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VOL. XII

LOS ANGELES
L. D. POWELL COMPANY
CHICAGO

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1911

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12 STANDARD PROC.

TABLE OF TITLES

INCEST	1
INCOMPETENTS	13
INDEMNITY	21
INDIANS	36
INDICTMENT AND INFORMATION	53
INDUCEMENT	718
INFANTS	727
INFORMATION AND BELIEF	888
INHERITANCE	912
INJUNCTIONS	991

INCEST

(J) THE ENDORSEMENT

I. GENERAL STATEMENT, 1

II. PROSECUTION OF OFFENSE ITSELF, 2

- A. *Similar to Partion*, 2
- B. *Similar to offense*, 3
 - 1. *Generally*, 3
 - 2. *Max Detestant Compel Election*, 3
- C. *The Indictment or Information*, 4
 - 1. *Following Statutory Language*, 4
 - 2. *Particular Accusations*, 5
 - a. *The Act*, 5
 - (I.) *Generally*, 5
 - (II.) *Whether Committed Felicitously*, 5
 - (III.) *Charging Commission by Both Parties*, 5
 - (IV.) *Time of Commission*, 5
 - (V.) *Whether by Adultery or Fornication*, 5
- D. *The Parties to the Act*, 7
 - (I.) *Charging Female To Be a Woman*, 7
 - (II.) *Negating Marriage Estoppel*, 8
 - (III.) *Relationship Between*, 8
 - (A.) *Generally*, 8
 - (B.) *Knowledge of Relationship*, 10
- E. *The Trial — Variance*, 11

III. PROSECUTION OF ATTEMPT TO COMMIT OFFENSE, 11

CROSS REFERENCES:

Adultery:	Prostitution;
Lewdness:	Rape;
Sodomy.	

For further references and crossreferences see the index to this work.

I. GENERAL STATEMENT.—While Incest was not a crime at common law,¹ in most of the states of the Union, it is made an indictable

1. Cal.—*People v. Steptoe*, 141 Cal. 111, 84 P. 2d 808, 71 Tr. 186. Fla.—*M. Cassin* 174 v. State, 55 Fla. 117, 119, 45 So. 846. Ill.—*Stokes v. People*, 184 Ill. 329, 54 N. E. 408. Ind.—*State v. Tucker*, 174 v. State, 55 Fla. 117, 119, 45 So. 846. Ind. 715, 21 N. E. 31. Ia.—*St. A.*

offense by statute.² Being, therefore, a statutory crime, its definition will be found to be as various as the statutes themselves.³ It is broadly defined as "sexual intercourse between parties so nearly related that marriage between them would be unlawful."⁴

II. PROSECUTION OF OFFENSE ITSELF.—A. **JOINDER OF PARTIES.**—It is not essential that the indictment be against both parties to the incestuous intercourse, but one may be indicted and tried alone,⁵ and especially is this true where the statute does not make the

(N. S.) 772. **Ia.**—*State v. Andrews*, 149 N. W. 245. **Mo.**—*State v. Slaughter*, 70 Mo. 484. **N. C.**—*State v. Laurence*, 95 N. C. 659; *State v. Keesler*, 78 N. C. 469. **Ore.**—*State v. Jarvis*, 20 Ore. 437, 26 Pac. 392, 20 Am. St. Rep. 141.

It was within the cognizance of, and punishable by the ecclesiastical courts. *McCaskill v. State*, 55 Fla. 117, 45 So. 843; *State v. Tucker*, 174 Ind. 715, 93 N. E. 3, 31 L. R. A. (N. S.) 772; 4 Bl. Com. 64.

History.—"It is related that in the time of the Commonwealth in England, when the ruling powers found it for their interest to put on the semblance of extraordinary strictness and purity of morals, incest and wilful adultery were made capital crimes, but at the Restoration, when men from the abhorrence of the hypocrisy of the late times fell into a contrary extreme of licentiousness, it was not thought proper to renew the law of such unfashionable rigor; and these offenses have been ever since left to the feeble coercion of the Spiritual Court according to the canon law." *State v. Keesler*, 78 N. C. 469.

2. See the statutes and the following cases: *State v. Andrews* (Iowa), 149 N. W. 245; *State v. Keesler*, 78 N. C. 469.

3. *People v. Stratton*, 141 Cal. 904, 66 S. 75 Pac. 106; *State v. Andrews* (Iowa), 149 N. W. 245. And see *State v. Hurd*, 101 Iowa 391, 396, 70 N. W. 613, wherein the court said: "We have seen no two statutes precisely alike in defining this crime, although there is quite a similarity."

4. *Standard Dict.*, Incest, quoted in the following cases: **Fla.**—*McCaskill v. State*, 55 Fla. 117, 45 So. 843. **Ga.**—*Taylor v. State*, 110 Ga. 150, 152, 35 S. E. 161. **Ind.**—*State v. Tucker*, 174 Ind. 715, 717, 93 N. E. 3.

Bishop defines incest as follows: "Incest, where statutes have not modified its meaning, is sexual commerce, either

habitual or in a single instance, and either under a form of marriage or without it, between persons too nearly related in consanguinity or affinity to be entitled to intermarry." Bishop, *St. Crimes* (3d ed.), §727, quoted in the following cases: *State v. Brown*, 47 Ohio St. 102, 108, 23 N. E. 747, 21 Am. St. Rep. 790; *State v. Nakashima*, 62 Wash. 686, 688, 114 Pac. 894.

For other definitions, see the statutes of the several states, and the following cases: **Ga.**—*Taylor v. State*, 110 Ga. 150, 35 S. E. 161. **Idaho.**—*People v. Barnes*, 2 Idaho 148, 162, 9 Pac. 532. **Ia.**—*State v. Andrews*, 149 N. W. 245. **La.**—*State v. Spurling*, 115 La. 789, 40 So. 167. **Mich.**—*Daniels v. People*, 6 Mich. 381, 386. **Minn.**—*State v. Herges*, 55 Minn. 464, 465, 57 N. W. 205. **Mont.**—*Territory v. Corbett*, 3 Mont. 50, 55. **Okla.**—*Fearnow v. Jones*, 34 Okla. 694, 126 Pac. 1015. **Pa.**—*Dinkey v. Com.*, 17 Pa. 126, 129, 55 Am. Dec. 542. **Tex.**—*Simon v. State*, 31 Tex. Crim. 186, 201, 20 S. W. 399, 37 Am. St. Rep. 802. **Wash.**—*State v. Glinde-mann*, 34 Wash. 221, 223, 75 Pac. 800, 101 Am. St. Rep. 1001; *State v. Nugent*, 20 Wash. 522, 56 Pac. 25, 72 Am. St. Rep. 133.

Distinguished From Other Sexual Crimes.—"The distinguishing fact of this crime, from that of rape, seduction, and adultery is the abhorrent one of the relationship of the parties, making the intercourse unnatural, sickening and deplorable in its consequences, because of which such marriages are prohibited and made a crime." *State v. Hurd*, 101 Iowa 391, 396, 70 N. W. 391. See also *State v. Learned*, 73 Kan. 328, 85 Pac. 293; *State v. Shear*, 51 Wis. 460, 462, 8 N. W. 287.

5. **Cal.**—*People v. Patterson*, 102 Cal. 239, 36 Pac. 436. **Neb.**—*Yeoman v. State*, 21 Neb. 171, 31 N. W. 669. **Ohio.**—*Lowther v. State*, 4 Ohio C. C. 522.

Under a statute in Indiana (2 G. & H. 452, §45), it was held that "whether

crime of incest a joint offense.⁶ It is not even necessary that they be both indicted separately.⁷

B. JOINDER OF OFFENSES. — 1. Generally. — Unless a statute prohibits the charging of two separate offenses in the same indictment,⁸ the crime of rape may be charged in one count of an indictment and the crime of incest in another,⁹ where both counts are based upon a single transaction.¹⁰

2. May Defendant Compel Election. — Where the indictment contains two counts, each charging the commission of distinct acts of incestuous intercourse, the defendant may compel the prosecutor to elect on which count he will proceed.¹¹ So too, while under an indictment so general in its terms as to cover different occasions, the state may prove as a part of its case every act of sexual intercourse between the parties within the period of the statute of limitations, it may be compelled to elect upon which act it will rely as constituting the offense

they be prosecuted in the same indictment or not, the crime must be charged as a joint crime. They may be tried separately, and one may be convicted and sentenced before the other is tried. If one be tried and acquitted, the other must be discharged; and, . . . if one be tried, convicted and sentenced, and the other tried and acquitted, this will, *ipso facto*, render the first conviction void." *Baumer v. State*, 49 Ind. 544, 19 Am. Rep. 691.

6. Powers v. State, 44 Ga. 209.

7. State v. Learned, 73 Kan. 328, 85 Pac. 293 (wherein an information against *particeps criminis* was dismissed); *Lowther v. State*, 4 Ohio C. C. 522.

8. State v. Price, 127 Iowa 301, 103 N. W. 195.

9. Ia.—*State v. Price*, 127 Iowa 301, 103 N. W. 195. **Tex.**—*Wiggins v. State*, 47 Tex. Crim. 538, 84 S. W. 821; *Owens v. State*, 35 Tex. Crim. 345, 33 S. W. 375. **Wis.**—*Porath v. State*, 90 Wis. 527, 536, 63 N. W. 1061, 48 Am. St. Rep. 954, holding a remark of the court in *State v. Shear*, 51 Wis. 460, 8 N. W. 287, to the contrary, *obiter*.

Iowa.—In *State v. Thomas*, 53 Iowa 214, 4 N. W. 998, it was held by a divided court that rape and incest could not be charged in the same indictment, upon the theory that mutual consent was necessary to the latter offense, and, therefore, the offenses were materially different. But in *State v. Hurd*, 101 Iowa 391, 70 N. W. 613, the soundness of the argument used in *State v. Thomas*, *supra*, was chal-

lenged, and it was expressly held that incest was included in the crime of rape, and mutual consent was not an element of the offense, under the statute.

10. Porath v. State, 90 Wis. 527, 536, 63 N. W. 1061, 48 Am. St. Rep. 954.

11. State v. Lawrence, 19 Neb. 307, 27 N. W. 126. In this case, the objection to the indictment was, that the date fixed by the first count was not included in the time stated in the second count, and the court said: "It cannot, therefore, be said that these two counts charge the same offense, but in different forms to meet the evidence, which is permissible in criminal practice." (1 Bish. Crim. Proc., §429), but the dates being different, and the first count not being included in the second, as to time, it may be said that each count charges separate and distinct felonies which should not be joined in the same indictment, and for that reason we cannot say the court erred in compelling the election. Especially is this true since it is a matter largely within the discretion of the trial court."

Compare *Porath v. State*, 90 Wis. 527, 536, 63 N. W. 1061, 48 Am. St. Rep. 954, wherein a count for rape and a count for incest, based upon the same transaction, were joined, merely to meet the different legal aspects which the evidence might give the case. The court upheld the lower court, which in the exercise of its discretion refused to require an election between the counts.

charged.¹² where, however, the indictment alleges but a single incestuous act, and evidence of other acts of sexual intercourse is given merely in corroboration of the evidence as to the principal offense charged, there can be no election.¹³

C. THE INDICTMENT OR INFORMATION. — 1. **Following Statutory Language.** — In accordance with the general rule governing indictments or informations for statutory offenses,¹⁴ an indictment charging the offense of incest in the language of the statute defining the offense,¹⁵ or substantially in the language of the statute,¹⁶ or language equivalent thereto is sufficient.¹⁷ Of course if a statutory form of indictment

12. **Ia.**—*State v. Price*, 127 Iowa 301, 103 N. W. 195; *State v. Hurd*, 101 Iowa 391, 400, 70 N. W. 613. **Ky.** *Smith v. Com.*, 109 Ky. 685, 60 S. W. 531. **Mich.**—*People v. Jenness*, 5 Mich. 305. **Mo.**—*State v. Pruitt*, 202 Mo. 49, 100 S. W. 431.

Waiver.—The defendant may waive his right to move for an election on the part of the state. *State v. Price*, 127 Iowa 301, 307, 103 N. W. 195.

The court must then instruct the jury that evidence of other commissions of the offense can be considered only for the purposes of corroborating the testimony as to the principal offense. *Smith v. Com.*, 109 Ky. 685, 60 S. W. 531.

Method of Making Election.—While it is held that the introduction of evidence tending directly to the proof of one act, and for the purpose of procuring a conviction upon it, constitutes an election of that act as the particular act charged (*People v. Jenness*, 5 Mich. 305, 327), the proper practice, where the defendant desires to have the court require the prosecution to elect of record which of several occurrences testified to by the prosecuting witness the state will rely upon, is to move that the court require an election. *David v. People*, 204 Ill. 479, 185, 68 N. E. 540. See *State v. Pruitt*, 202 Mo. 49, 100 S. W. 431, wherein the court said: "It is the duty of the court, at the close of the state's case, on motion of defendant for that purpose, to require the state to elect upon which act it will rely for conviction."¹²

"The court could not, by an instruction, make an election for the prosecuting officer." *David v. People*, 204 Ill. 479, 488, 68 N. E. 540.

13. *Yeoman v. State*, 21 Neb. 171, 31 N. W. 669.

14. See generally the title "**Indictment and Information.**"

15. **Ill.**—*Bolen v. People*, 184 Ill. 338, 56 N. E. 408. **Ohio.**—*Noble v. State*, 22 Ohio St. 541. See *Lowther v. State*, 4 Ohio C. C. 522. **W. Va.** *State v. Pennington*, 41 W. Va. 399, 23 S. E. 918.

Thus under a statute forbidding cohabitation without marriage, an indictment following the words of the statute, omitting only the words "without marriage" after the word "cohabit," is sufficient. The words "without marriage" used in the statute are not essential, since the word "cohabit" as used in defining the crime of incest, means any sexual intercourse between persons not married. *State v. Spurling*, 115 La. 789, 40 So. 167.

An indictment setting forth in the words of the statute all the elements of the crime of incest is sufficient, although the offense charged be not designated by that name. *State v. Spurling*, 115 La. 789, 40 So. 167.

16. **Cal.**—*People v. Koller*, 142 Cal. 621, 76 Pac. 500; *People v. Patterson*, 102 Cal. 239, 36 Pac. 436. **Ga.**—*Cook v. State*, 11 Ga. 53, 56 Am. Dec. 410. **Ia.**—*State v. Rennick*, 127 Iowa 294, 103 N. W. 159. **Ky.**—*Smith v. Com.*, 109 Ky. 685, 60 S. W. 531. **La.**—*State v. Spurling*, 115 La. 789, 40 So. 167.

17. **Fla.**—*Brown v. State*, 42 Fla. 184, 27 So. 869. **Kan.**—*State v. Learned*, 73 Kan. 328, 85 Pac. 293. **La.**—*State v. Guiton*, 51 La. Ann. 155, 24 So. 784. **Wis.**—*Hintz v. State*, 58 Wis. 493, 17 N. W. 639.

An indictment alleging that in a certain county and on a certain day I. B. and O. G., "being and knowing themselves to be persons forbidden to intermarry by reason that the said I. B. was the father of the said O. G., *and* B. did then and there unlawfully, feloniously, and incestuously have carnal knowledge each of the body of the other, contrary," etc., charges an

has been provided, an indictment conforming strictly to the statutory form is sufficient.¹⁸

2. Particular Averments.—*a. The Act.*—(I.) Generally.—Whether or not an indictment charging a single act of sexual intercourse is sufficient depends upon the statutory definition of the offense.¹⁹ It has also been said that a particular description of the specific act which constitutes the crime of incest, should be set forth.²⁰

(II.) Whether Committed Feloniously.—An allegation that the act was committed "feloniously" is not necessary, as the offense is a statutory one.²¹

(III.) Charging Commission by Both Parties.—In those jurisdictions where mutual consent is not an element of the offense it is not necessary that the indictment aver that the parties to the alleged crime had carnal knowledge of each other,²² it being sufficient to allege carnal knowledge upon the part of the accused only;²³ but under statutes making mutual assent of both parties essential to the commission of the offense, such assent must be alleged.²⁴

(IV.) Time of Commission.—Under statutes providing that where time is not of the essence of the offense its omission does not invalidate an indictment or information, neither the omission to state the time at which the incestuous act was committed,²⁵ nor an imperfect statement

offense under Florida Rev. Sts., §2601, though it does not pursue the exact language of the statute. *Brown v. State*, 42 Fla. 184, 27 So. 869, wherein the court said, "We think the allegation that the defendants 'did unlawfully, feloniously and incestuously have carnal knowledge, each of the body of the other,' fully equivalent to an allegation that they did have voluntary sexual intercourse with each other."

An information fully apprised the defendant of the charge which he was called upon to meet, where it averred that the defendant "did wilfully, unlawfully, and feloniously have sexual intercourse with N. E. S., a female child, she, the said N. E. S., being then and there the daughter of the said W. S. S.," etc. *People v. Stratton*, 141 Cal. 604, 75 Pac. 166.

18. *Baker v. State*, 30 Ala. 521.

19. Thus, where the statute prohibits "adultery or fornication" within the prohibited degrees, since a single act of unlawful sexual intercourse falls within the definition of "adultery" or "fornication," according as the party is married or not, an indictment is sufficient which alleges a single act of unlawful sexual intercourse. *State v. Brown*, 47 Ohio St. 102, 23 N. E. 747, 21 Am. St. Rep. 790.

20. *Martin v. State*, 58 Ark. 3, 22 S. W. 840.

21. *Bolen v. People*, 184 Ill. 338, 56 N. E. 408; *State v. Judd*, 132 Iowa 296, 109 N. W. 822. *Contra*, *Newman v. State*, 69 Miss. 393, 10 So. 580, for the reason that incest is a felony.

22. *State v. Kimble*, 104 Iowa 19, 73 N. W. 348; *State v. Hurd*, 101 Iowa 391, 70 N. W. 613; *State v. Ellis*, 11 Mo. App. 588, *affirmed*, 74 Mo. 385.

Nor does an allegation of carnal intercourse between the parties necessarily carry with it the idea that the indictment has charged the intercourse to have been with the consent of the prosecutrix. *Tate v. State* (Tex. Crim.), 77 S. W. 793.

"Sexual intercourse" and "carnal knowledge" are equivalents. *Noble v. State*, 22 Ohio St. 541.

23. *State v. Kimble*, 104 Iowa 19, 73 N. W. 348; *State v. Hurd*, 101 Iowa 391, 70 N. W. 613.

An allegation that the defendant "did commit fornication," is a sufficient averment of carnal knowledge. *State v. Dana*, 59 Vt. 614, 622, 10 Atl. 727.

24. *State v. Jarvis*, 20 Ore. 437, 26 Pac. 362, 23 Am. St. Rep. 141.

25. *Barnhouse v. State*, 31 Ohio St. 39.

thereof renders the indictment defective.²⁶ Nor need the indictment disclose whether the incestuous act was committed before or after the adoption of the statute in force, where there is no difference between the punishment of the offense under the statute in force at the time of bringing the indictment and that prescribed in the antecedent law.²⁷

Charging Offense With Continuando. — While an indictment for incest which charges the criminal act to have been committed continuously through a specified period of years, is to be regarded as charging several distinct offences, and is bad for duplicity,²⁸ if it charges the offense to have been committed on a day certain, and on divers days, before and after that time, it has been held to aver the time of committing the offense with sufficient certainty, since the *continuando* can be rejected as surplusage.²⁹

(V.) **Whether by Adultery or Fornication.** — The indictment in some states must charge incestuous adultery; if one or both were married,³⁰ or incestuous fornication if both were unmarried.³¹ Therefore, if incestuous adultery is charged it should allege the marriage of the defendant at the time of committing the offense,³² or if incest by fornication is charged, the indictment should allege that the defendant was an unmarried man at the time of committing the offense;³³ but a particular allegation is not necessary, where the words and language employed in

26. *Barnhouse v. State*, 31 Ohio St. 39; *State v. Pennington*, 41 W. Va. 599, 23 S. E. 918. See also *State v. Reynolds*, 48 S. C. 384, 26 S. E. 679.

27. *Baker v. State*, 30 Ala. 521.

28. *Barnhouse v. State*, 31 Ohio St. 39, since a single act of intercourse where the other conditions exist, is all that is required, under the statute, to complete the offense. See also *State v. Temple*, 38 Vt. 37.

29. *Cook v. State*, 11 Ga. 53, 56 Am. Dec. 410. But see *State v. Temple*, 38 Vt. 37, wherein one count of the indictment alleged that the accused committed the incestuous act "on the 20th day of September, A. D. 1860, and on divers other days and times between said 20th day of September and the 9th day of December, A. D. 1862," and it was held bad on motion in arrest of judgment, in that it alleged a series of offenses, and that too without specifying any particular day when each was committed except the first, and that the *continuando* could not be rejected as surplusage, as the substance of it was not wholly immaterial to the guilt or innocence of the accused.

30. *State v. Fritts*, 48 Ark. 66, 2 S. W. 256.

Charging a defendant with having committed adultery with a person named, by then and there having sexual

intercourse with her, is equivalent to charging that they did commit adultery and fornication together. *Lowther v. State*, 4 Ohio C. C. 522.

Charging O with "incestuous connection" with P, daughter of O and his wife, sufficiently charges that O was a married man and therefore sufficiently charges adultery as it must be assumed that A was living at the time, otherwise she would not then have been his wife. *Hintz v. State*, 58 Wis. 493, 17 N. W. 639.

31. *State v. Fritts*, 48 Ark. 66, 2 S. W. 256.

32. *Martin v. State*, 58 Ark. 3, 22 S. W. 840.

Reason.—If the defendant is guilty of the crime of incest by having committed adultery with his daughter, every allegation necessary to charge him with adultery should be made in the indictment, and the allegation that he was a married man at the time is a necessary allegation, as the allegation that he was an unmarried man would have been necessary had he been charged with the crime of incest by having committed fornication with his daughter. *Martin v. State*, 58 Ark. 3, 22 S. W. 840.

33. *State v. Fritts*, 48 Ark. 66, 2 S. W. 256. See *Martin v. State*, 58 Ark. 3, 22 S. W. 840.

the indictment leave no room for any reasonable doubt upon the subject.³⁴

In other states, however, upon the theory that the gist of the offense is the sexual intercourse,³⁵ and that an allegation as to whether the act charged is adultery or fornication or both is a conclusion of law,³⁶ an indictment or information charging sexual intercourse between parties within the prohibited degrees is sufficient, though not specifically alleging fornication or adultery.³⁷ Consequently an information will sustain a conviction though it avers that the act which constituted the crime was fornication, where one party was married.³⁸

b. *The Parties to the Act.*—(I.) **Charging Female To Be a Woman.** The indictment need not charge that the female was a woman.³⁹

34. *State v. Ratcliffe*, 61 Ark. 62, 31 S. W. 978.

An indictment for incest which alleges that defendant did "incestuously and adulterously have carnal knowledge of the body of" a person named, being a married man and the father of the person named, sufficiently alleges that he was a married man at the time the offense was committed. *State v. Ratcliffe*, 61 Ark. 62, 31 S. W. 978.

35. *People v. Cease*, 80 Mich. 576, 45 N. W. 585.

36. *McCaskill v. State*, 55 Fla. 117, 45 So. 843, wherein the charge was the commission of "adultery and fornication."

An allegation that the crime of adultery and fornication have been committed may be regarded as surplusage not affecting the sufficiency of the facts alleged to charge the single offense of incest denounced by the statute. *McCaskill v. State*, 55 Fla. 117, 45 So. 843.

37. Fla.—*McCaskill v. State*, 55 Fla. 117, 45 So. 843; *Brown v. State*, 42 Fla. 184, 27 So. 869. Kan.—*State v. Learned*, 73 Kan. 328, 85 Pac. 293. Mich.—*People v. Cease*, 80 Mich. 576, 45 N. W. 585.

In *People v. Cease*, 80 Mich. 576, 45 N. W. 585, the court said: "It was unnecessary to allege that the respondent committed adultery or fornication, inasmuch as the information distinctly charged him with the act which constituted the crime of incest."

A count of an information which charges that at a certain time and place, within the jurisdiction of the court, a man (naming him) and a woman (naming her), he being a married man and the grandfather of the woman, and she being an unmarried

woman, and being his granddaughter, "did then and there unlawfully, feloniously, and incestuously have sexual intercourse with each other," is sufficient, it not being requisite to allege that they committed adultery, or fornication with each other. *State v. Learned*, 73 Kan. 328, 85 Pac. 293.

An information, alleging that on the day named, O did have incestuous connection with P, daughter of said O and his wife, A, sufficiently alleges the marriage of the defendant, after verdict, at least. *Hintz v. State*, 58 Wis. 493, 17 N. W. 639.

38. *People v. Cease*, 80 Mich. 576, 45 N. W. 585. But see *State v. Fritts*, 48 Ark. 66, 2 S. W. 256, wherein it is said: "A party indicted for the crime of incest committed by fornication cannot be convicted unless it is both alleged and proved that he was unmarried at the time specified in the indictment."

Under an information charging incest by fornication with his niece, the fact that the proof shows that defendant was a married man is no bar to a conviction. *People v. Rouse*, 2 Mich. N. P. 209.

39. An indictment charging that D, a man, being the father of C. D., a girl, and within the degree of consanguinity prohibited, did have sexual intercourse with said C. D. was not subject to demurrer for failing to charge that C. D. was a woman; that is, a female at the age of puberty, charging, as it does, that she was a girl is sufficient. *Dixon v. State*, 147 Ala. 91, 41 So. 734, 119 Am. St. Rep. 57.

Under Alabama code, 1896, §4889, the offense may be committed, at least by the man, on a female within the pro-

(II.) **Negating Marriage Between.** — Under a statute applicable alike to parties who are intermarried within the prohibited degrees, as well as the unmarried, it is not necessary that the indictment negative the marriage of the parties,⁴⁰ and even if a legal marriage had been contracted in another state, and the parties had subsequently come into the state, this marriage would have to be set up as an affirmative defense and no allegation would have to be incorporated in the information to negative marriage⁴¹ though in one jurisdiction the contrary has been held on the ground that the court could not assume the impossibility of a legal marriage between the parties;⁴² nor would it seem to be necessary to allege that marriage was prohibited between the parties.⁴³

(III.) **Relationship Between.** — (A.) **GENERALLY.** — Averment of the exact relationship of the parties is an essential part of the indictment or information,⁴⁴ but all that is required is that the relationship of the parties be clearly stated,⁴⁵ without also averring that the parties were

hibited degree, without respect to her age. *Dixon v. State*, 147 Ala. 91, 41 So. 734, 119 Am. St. Rep. 57.

40. *State v. Brown*, 47 Ohio St. 102, 108, 23 N. E. 747, 21 Am. St. Rep. 790; *State v. Nakashima*, 62 Wash. 686, 114 Pac. 894.

An indictment was not fatally defective in alleging that the defendant did "unlawfully" intermarry with a person named, because it thereby failed to charge affirmatively that there was a marriage. It charged a "marriage" and that it was an "unlawful" one. *Simon v. State*, 31 Tex. Crim. 186, 203, 20 S. W. 399, 37 Am. St. Rep. 802.

41. *State v. Nakashima*, 62 Wash. 686, 114 Pac. 894.

42. *State v. Fritts*, 48 Ark. 66, 2 S. W. 256, under §§1578, 4592, Mansf. Dig.

The indictment should show with certainty that the woman was not the wife of the man. *State v. Fritts*, 48 Ark. 66, 2 S. W. 256, wherein the court said: "It will not do to assume that no legal marriage could have been celebrated between the parties. For if they were married in this state before the passage of the act, or were married since that date in any state or foreign country of which they were citizens, or subjects, and in which marriages between cousins german are not forbidden, then their union was not unlawful and it is not invalidated by the law. If an incestuous marriage has in fact been contracted, the indictment should charge that James Fritts incestuously did intermarry with, and take to be his wife, Mattie Phillips, the cousin of

said James Fritts, they being descended from the same grandfather," etc.

An averment that defendant was unmarried sufficiently shows by necessary implication that the female was not his wife. *State v. Brown*, 47 Ohio St. 102, 23 N. E. 747, 21 Am. St. Rep. 790.

43. "If the allegation that marriage is prohibited between the parties is necessary (which we do not decide) in addition to the allegation that the parties are related within the degrees of consanguinity specified in said sections, it is sufficient to allege that marriage is prohibited between them without adding the words *by the laws of the state of Vermont*. The conclusion, *contra formam statuti*, sufficiently shows that the offense charged in the indictment is an offense under a statute law of the state of Vermont." *State v. Dana*, 59 Vt. 614, 624, 10 Atl. 727.

44. *State v. Reedy*, 44 Kan. 190, 24 Pac. 66.

Kansas.—Preliminary Papers.—A specific, detailed and formal description of the offense is not required in the preliminary papers upon which an examination is had. All that is required is a general description of the offense. An averment of the relationship of the parties is not required in the complaint and warrant. *State v. Reedy*, 44 Kan. 190, 24 Pac. 66.

45. *Cal.*—*People v. Kaiser*, 119 Cal. 456, 51 Pac. 702. **III.**—*Bergen v. People*, 17 Ill. 426, 65 Am. Dec. 672. **La.**—*State v. Guilton*, 51 La. Ann. 155, 24

within the degrees of consanguinity within which marriages are prohibited, or declared by law to be incestuous and void,³⁸ and, where the statute makes no distinction between relationship by consanguinity or affinity, without alleging that they were related by blood or affinity.³⁷

It is not essential that the indictment allege the names of the parties through whom the relationship is traced,³⁸ or disclose that the female with whom the adultery was committed was a daughter of the defendant born in lawful wedlock,³⁹ or where incest with ones step-daughter

So. 784. Mich.—Hicks v. People, 10 Mich. 395. Ohio.—State v. Brown, 47 Ohio St. 102, 23 N. E. 747, 21 Am. St. Rep. 799.

Sufficient Averments of Relationship. An indictment for incest which charges that the acts were upon the person of A. B., the said A. B., then and there being the daughter of him, the said C. D., sufficiently avers the relationship between the parties. *Begon v. People*, 17 Ill. 426, 65 Am. Dec. 672; *Hicks v. People*, 10 Mich. 395. But conversely, an indictment which alleges that the defendant had carnal knowledge of one, F. W., and that defendant was the father of F. W., was held sufficient, though it was not alleged that F. W. was the daughter of defendant. *Waggoner v. State*, 35 Tex. Crim. 199, 32 S. W. 896.

Allegations in an indictment that defendant was the father of the woman involved, and therefore within the prohibited degrees; that he was a married man, and therefore capable of committing adultery; and that he incestuously and adulterously had carnal knowledge of his daughter, clearly meaning that he committed adultery with her,—all taken together make up a good indictment for the crime of incest. *State v. Ratcliffe*, 61 Ark. 62, 31 S. W. 978.

An allegation in an information that the defendant had sexual intercourse with his niece, knowing her to be of such relationship, sufficiently complies with a statute requiring that the information be direct and certain as regards the offense charged, and is not open to the objection that it does not allege the relationship of the parties. *State v. James*, 32 Utah 152, 157, 89 Pac. 460.

46. Hicks v. People, 10 Mich. 395.

Where a statute in general terms prohibited the sexual act between persons "nearer of kin . . . than cousins," the kinship being averred to be that

of uncle and niece, it was held unnecessary to aver in addition, that which was matter of law, that they were nearer of kin than cousins. *State v. Brown*, 47 Ohio St. 102, 23 N. E. 747, 21 Am. St. Rep. 799.

Where the statute fixes the limit in degrees which include the uncle and the niece, an indictment informs the defendant of the degrees of consanguinity within which marriage or concubinage is prohibited, by charging that he, the uncle, lived in concubinage with his niece. *State v. Guiton*, 51 La. Ann. 153, 24 So. 784.

47. *State v. Brown*, 47 Ohio St. 102, 23 N. E. 747, 21 Am. St. Rep. 799.

48. An indictment which alleges that the woman named as *particeps* was the daughter of the defendant's brother is sufficient, though the name of that brother is not specified. *State v. Pennington*, 41 W. Va. 599, 23 S. E. 918.

An indictment which clearly showed that the female with whom it was alleged the defendant committed the crime of incest was the defendant's niece, the daughter of his brother, and that the defendant and his brother were children of the same father and mother, was held to sufficiently show the relationship of the parties to the offense. It was not necessary for the indictment to allege that the defendant and his brother were lawful issue of their parents, nor that there was a lawful marriage of their parents. Neither was it necessary for the indictment to give the name of the mother of the defendant; nor to allege that the female was the lawful daughter of defendant's brother; nor was it necessary for the indictment to give the name of her mother, nor that she was born of a lawful marriage of her parents. *Bailey v. State*, 63 Tex. Crim. 584, 141 S. W. 224.

49. *Baker v. State*, 30 Ala. 521; *State v. Laurence*, 95 N. C. 659.

The crime is complete, under the

is averred to allege the marriage of the defendant to the mother or the subsistence of the marriage relation at the time of the commission of the act.⁵⁰

(B.) KNOWLEDGE OF RELATIONSHIP.—Where the statutory definition is entirely silent as to any *scienter*, the indictment need not charge the defendant with knowledge of the relationship of the parties to the act.⁵¹ But, conversely, where the statute makes a knowledge of the relationship an essential ingredient of the offense, an indictment is bad which fails to so allege.⁵²

statute, if she was his natural daughter." *Baker v. State*, 20 Ala. 521.

Though it was sought to quash the indictment upon the ground "that it does not aver that L. C. was the legitimate daughter, of the whole blood, of the defendant, by her mother, to whom he was legally married," it was held that the indictment was sufficient, since it charged the offense in the language of the statute, and so plainly and distinctly that the jury could clearly understand the nature of the offense. *Cook v. State*, 11 Ga. 53, 56 Am. Dec. 410.

50. *Noble v. State*, 22 Ohio St. 541.

51. Cal.—*People v. Koller*, 112 Cal. 621, 76 Pac. 500. Fla.—*McCaskill v. State*, 55 Fla. 417, 45 So. 843. Ia. *State v. Judd*, 122 Iowa 276, 109 N. W. 892; *State v. Rensch*, 127 Iowa 234, 109 N. W. 159. Mo.—*State v. Hallinger*, 54 Mo. 142. Tex.—*Simon v. State*, 31 Tex. Crim. 186, 203, 20 S. W. 399, 37 Am. St. Rep. 802. Vt.—*State v. Wyman*, 59 Vt. 517, 8 Atl. 900, 59 Am. Rep. 732; *State v. Dana*, 39 Vt. 614, 10 Atl. 727. Wash.—*State v. Glinde-man*, 24 Wash. 321, 75 Pac. 800, 101 Am. St. Rep. 1001, holding that a statement in *State v. McGilvray*, 20 Wash. 240, 55 Pac. 115, from which an inference to the contrary might be drawn was *obiter*. W. Va.—*State v. Pennington*, 41 W. Va. 339, 23 S. E. 918.

"It is only when the statutory definition contains the words 'knowing' or 'knowingly' that such an allegation is required. Where it does not, it is only necessary to follow the ordinary rules of criminal pleading prevailing in this state, and charge the offense in the language of the statute." *People v. Koller*, 112 Cal. 621, 76 Pac. 500; *State v. Hallinger*, 54 Mo. 142; *State v. Pennington*, 41 W. Va. 339, 23 S. E. 918, wherein the court said: "It is said the indictment is bad in not alleging that Pennington knew

that Arenia Pennington was his niece. The statute (section 22, chapter 149, Code 1891) does not make this an element in the definition of the offense, and the indictment follows the statute. It is contended that this is a case where a statute ought to be construed to contemplate, as an essential element of the offense, though not mentioned, a knowledge on the part of the man of the woman's relationship, as, if he be ignorant of it, he cannot be guilty; and, as it must be shown, it ought to be alleged as a material averment. This view seems to me strong, but it seems settled that generally, it is sufficient to use the language of the act defining a statutory offense, and such this is; and that, with particular relation to this offense, it is settled that unless the statute make such knowledge a part of the definition of the offense, . . . the indictment need not allege it. . . . In *State v. Dana*, 59 Vt. 614 (10 Atl. 727), it was again so held, and the court said it was not necessary to allege and prove affirmatively that respondent knew the relationship existing between him and the *particeps*."

Under a Texas statute defining incest to be the intermarrying or carnal knowledge of persons within the forbidden degrees, but not employing the word "knowingly," it was held that an indictment charging an unlawful marriage was not fatally defective, because it failed to charge that defendant "knowingly" entered into such marriage. *Simon v. State*, 31 Tex. Crim. 186, 20 S. W. 399, 37 Am. St. Rep. 802.

52. *Williams v. State*, 2 Ind. 439.

Using the word "unlawfully" is not equivalent to an allegation that the defendant had intercourse with his daughter, "knowing her to be such." *Williams v. State*, 2 Ind. 439.

The use of the word "feloniously"

Mutual Knowledge.— It is unnecessary to charge a mutual knowledge of the relationship, if the charge of knowing of the relationship is made against the party indicted,⁵⁴ unless by the statute the parties committing the offense must each have had knowledge of their relationship.⁵⁴

D. THE TELAL.—VARIANCE.— In accordance with the general rule the allegations in the indictment and the proof must substantially correspond, a material variance therein being fatal.⁵⁵

III.—PROSECUTION OF ATTEMPT TO COMMIT OFFENSE.— An information for attempt to commit incest should aver knowledge of the relationship and intent or facts from which intent is a necessary inference.⁵⁶ It need not negative the presumption that the attempt failed of commission through the volition of defendant.⁵⁷

is not equivalent to charging that the act was done knowingly, *i. e.*, with the knowledge on the part of the defendant of the relationship of the parties, even were it necessary to allege such knowledge. *State v. Judd*, 132 Iowa 296, 109 N. W. 892.

53. *Morgan v. State*, 11 Ala. 289.

In *Morgan v. State*, 11 Ala. 289, the court said: "1. It is argued that this indictment is defective, because it omits to charge the female with knowledge of the relation between herself and the other guilty party. It is true, the statute defines the offense to be the living in a state of adultery of persons within the degrees of consanguinity, or relationship, whose marriages are declared by law to be incestuous and void, *knowing of such consanguinity*, but this, in our judgment, warrants no inference that the knowledge is to be common to both the parties, before the guilt of either can attach. If there be an aggravation in a crime like this, it would exist in the concealment of that knowledge, which, if communicated, might have prevented its commission. The evident object and intention of this clause of the statute is, to relieve the party ignorant of the relation from the severe penalty imposed on persons living in adultery, when a relationship also exists within the prohibited degrees. We are entirely satisfied the indictment is good."

54. *Baumer v. State*, 49 Ind. 544, 19 Am. Rep. 691, under 2 G. & H. 452, §45.

55. Where the indictment charged the defendant with incestuous intercourse with the daughter of his sister, proof that the intercourse was with

the niece of defendant was not sufficient. *Blalack v. State* (Tex. Crim.), 162 S. W. 807.

Immaterial variance in name. *People v. Lake*, 116 N. Y. 61, 17 N. E. 146, 6 Am. St. Rep. 344, wherein the indictment gave the name of defendant's daughter as "Georgiana Taylor," and the proof showed that she was named "Georgiana Jeanette," but the question of her identity was put at rest by her presence in court. See also *State v. Petarosa*, 70 Me. 216.

56. *State v. McGilvery*, 20 Wash. 249, 248, 56 Pac. 115, wherein the court said: "We think that, while an intent to carnally know each other is not directly avowed in the present information, it is the necessary and irresistible inference to be derived from the language that is employed; and, if such be the fact, it meets the requirements of the law in regard to criminal pleading. It charges that they did, at a certain time and place, wilfully . . . attempt carnally to know each other, and that the acts then described and set forth in the information were for the purpose of carnally knowing each other." We think that a person of ordinary understanding would have no difficulty in discovering from the language of this information that it charged the actors with intending to carnally know each other."

Knowledge of Relationship. An information is sufficient if it alleges that the defendant had knowledge of the relationship of the parties. *State v. McGilvery*, 20 Wash. 249, 56 Pac. 115. See also, C. 2, 6, (111), (12).

57. *State v. McGilvery*, 20 Wash. 249, 249, 56 Pac. 115.

A subsequent abandonment cannot avail defendant, if the elements of an attempt existed on his part. The rule is well settled that when a party proceeds far enough in the perpetration of a crime as to clearly indicate his intention, coupled with an attempt to carry it into effect, and thereafter desists or fails to consummate the crime, he may be found guilty of the attempt. *State v. McGilvery*, 20 Wash. 240, 249, 55 Pac. 115.

INCOME TAX. — See Internal Revenue; Taxation.

Vol. XII

INCOMPETENTS

By the Editorial Staff.

I. APPOINTMENT OF GUARDIANS OR COMMITTEES, 14

- A. *Statutory Provisions*, 14
- B. *Jurisdiction and Venue*, 14
- C. *Parties to Proceedings*, 15
- D. *Notice of Proceedings*, 15
- E. *Pleading*, 16
- F. *Hearing and Determination*, 16
- G. *Notice of Appointment*, 17
- H. *Appeals*, 17
- I. *Costs*, 17

II. CLAIMS AND ACTIONS, 18

III. SETTLEMENTS, 19

IV. PROTECTION OF GUARDIAN, 19

V. REMOVAL OF GUARDIAN AND RESTORATION OF ESTATE, 19

CROSS-REFERENCES:

Default;	Insane Persons;
Guardian ad Litem;	Mental State;
Guardian and Ward;	Parties;
Husband and Wife;	Prisons and Prisoners;
Implied and Express Agreements;	Trusts and Trustees;
Infants;	Wills.

For further references and cross-references see the index to this work.

Scope of Article. — This article includes only the procedure relative to the person and estate of one who by excessive drinking, gaming, idleness, debauchery or the use of drugs so spends or wastes his estate as to be likely to expose himself or his family to want or suffering. The treatment of the guardianship of infants and insane persons and the incompetency of married women will be found under other titles.¹

1. See the titles "Guardian ad Litem;" "Guardian and Ward;" "Husband and Wife;" "Infants;" "Insane Persons;" "Judicial Sales."

I. APPOINTMENT OF GUARDIANS OR COMMITTEES. — A. STATUTORY PROVISIONS.—In a number of the states statutes have been enacted providing for the appointment of guardians for the property of spendthrifts² and drunkards or habitual users of morphine, opium, cocaine and similar drugs,³ both for the purpose of protecting the spendthrift and his family⁴ and also as a protection to the public,⁵ and the constitutionality of such statutes has been upheld;⁶ but since they are in derogation of the common law they are to be strictly construed,⁷ and beyond the requirements essential to the accomplishment and preservation of the legislative purpose and policy, they are not intended to encroach upon any rights of person or property, which the owner has by statutory or common law.⁸

B. JURISDICTION AND VENUE.—Jurisdiction over matters relative to the estates of spendthrifts and drunkards is conferred on different

2. Ala.—Code, 1907, §1611. **Conn.** Gen. St., 1902, §1833. **Ida.**—Rev. St., 1888, §3463. **Me.**—Rev. St., 1903, p. 618. **Mich.**—Comp. Laws, 1897, §8712. **Minn.**—Rev. Laws, 1905, §8306. **Neb.** Rev. St., 1913, §1644. **N. H.**—Pub. St., 1901, ch. 179, §4. **N. C.**—Revisal, 1905, §1200. **Ohio.**—Paige & Adams Code, §11,011. **R. I.**—Gen. Laws, 1909, §1170. **Vt.**—Pub. St., 1906, §3160.

In Illinois the procedure relative to the estates of spendthrifts and drunkards is similar to that concerning the estates of lunatics and idiots. Rev. St., 1913, ch. 86, §80 generally the title "Insane Persons."

But it has been held that the provision that the proceedings shall conform "as near as may be" to the provisions of the act relating to the commitment and detention of lunatics does not demand a strict compliance with the provisions of the last mentioned act. *Bishop v. Welch*, 149 Ill. App. 491.

In Oregon "all proceedings provided by statute relating to guardian and ward subsequent to the appointment of the guardian apply equally to the guardianship of a spendthrift." (*Lord's Laws*, 11322). *Samuel v. Samuel*, 31 Ore. 10, 98 Pac. 726, 141 Am. Ct. Rep. 724, 15 L. R. A. 683, 33 O. L.

3. Ala.—Code, 1907, §1611. **Ind.** Burns' Ann. St., 1917, §1215. **Ida.**—Rev. St., 1888, §3463. **Kan.**—Gen. St., 1909, §1170. **Me.**—Rev. St., 1903, p. 618. **Mo.** Rev. St., 1892, §3334; *Duffy v. Cabanne*, 1 Mo. App. 126. **N. J.**—Comp. St., 1910, p. 2797. **Pa.**—Purdon's Dig., vol. 2, p. 2287; *Imhoff v. Witmer's Admr.*, 21 Pa. 243; *Imhoff v. Luther*, 19 Pa. Co. Ct. 349. **R. I.**—Gen. Laws, 1909,

§1170. **Tex.**—Savile's Civ. St., §2735. **Wis.**—St., 1898, §3978.

4. Ala.—*Pinkston v. Semple*, 92 Ala. 564, 9 So. 329; *Jones v. Semple*, 91 Ala. 182, 8 So. 557. **Mass.**—*Norton v. Leonard*, 12 Pick. 152. **Pa.**—*Imhoff v. Witmer's Admr.*, 31 Pa. 243; *Ruffner v. Luther*, 19 Pa. Co. Ct. 349. **Vt.**—*Cushing v. Hale*, 8 Vt. 38.

5. **Mass.**—*Norton v. Leonard*, 12 Pick. 152, 161. **R. I.**—*Tillinghast v. Holbrook*, 7 R. I. 230. **Vt.**—*Cushing v. Hale*, 8 Vt. 38, 44.

6. *Devin v. Scott*, 34 Ind. 67; *Bond v. Bond*, 2 Pick. (Mass.) 382 (the court saying: "Here the people have deputed their power to the judge of probate, and the appointment of a guardian by him is not taking away the spendthrift's property, but preserving it to him for his own use. If the constitutionality of the provision is at all questionable, it must be on the ground that in the appointment of a guardian the spendthrift has not the benefit of a trial by jury; but that is not a process in which he is deprived of such benefit, for he may appeal to the Supreme Court, where a trial by jury may be ordered").

7. Ala.—*Jones v. Semple*, 91 Ala. 182, 8 So. 557. **Mich.**—*Partello v. Holton*, 79 Mich. 372, 44 N. W. 619. **Vt.** *Ellis v. Cramton & Chaffee*, 50 Vt. 608.

8. Ala.—*Jones v. Semple*, 91 Ala. 182, 8 So. 557. **Conn.**—*Strong v. Birchard*, 5 Conn. 357; *Chalker v. Chalker*, 1 Conn. 79, 6 Am. Dec. 206; *Knapp v. Lockwood*, 3 Dav 131; *Johnson v. Stanley*, 1 Root 245. **R. I.**—*Hamlin v. Court of Probate*, 9 R. I. 204.

courts in different states," such as probate¹⁰ or orphans' courts,¹¹ or the municipal officers of the town wherein the incompetent resides.¹²

C. PARTIES TO PROCEEDINGS.—The relatives¹³ or a friend of the incompetent,¹⁴ or under some statutes the residents¹⁵ or officers of the municipality¹⁶ or "any person"¹⁷ may petition for the appointment of a guardian, and the incompetent in some states, should be made a party to the proceedings.¹⁸

D. NOTICE OF PROCEEDINGS.—Notice of the petition to appoint a guardian should be given to the alleged incompetent.¹⁹

9. **Chancery.**—Ala. Code, 1907, §§4611, 4616; Miss. Code, 1906, §2433.

In Illinois, the county or probate court. Rev. St., 1913, ch. 86, §1; Ure v. Ure, 223 Ill. 154, 79 N. E. 153, 114 Am. St. Rep. 336.

In Iowa, the district court. Rev. St., 1888, §3463.

In Nebraska, the county court. Rev. St., 1913, §1644.

In New York, see Code Civ. Proc., §2320; and *Scribner v. Qualtrough*, 44 Barb. 431.

In Oregon, the county court. Lord's Laws, §1322.

In Pennsylvania, the court of common pleas. Purdon's Dig., p. 2387.

10. **Me.**—See *Raymond v. Wyman*, 18 Me. 385. **Minn.**—Rev. St., 1905, §3826. **Mo.**—Rev. St., 1909, §534. **N. H.**—Pub. St., 1901, ch. 179, §1. **Ohio.**—Paige & Adams Code, §11,011.

11. **N. J.** Comp. St., p. 2797; *Dickerson v. Dickerson*, 31 N. J. Eq. 672.

12. **Conn.**—Gen. St., 1902, §1833; *Mix v. Peck*, 13 Conn. 244. **Mass.**—*Stacey v. Benson*, 18 Pick. 496. **Vt.**—*Cushing v. Hale*, 8 Vt. 38.

13. **Ala.**—Code, 1907, §4611. **Mass.**—Rev. Laws, 1902, p. 1308. **Minn.**—Rev. Laws, 1905, §3826. **Miss.**—Code, 1906, §2433. **N. H.**—Pub. St., 1901, ch. 179, §1. **R. I.**—*McKenna v. McKenna*, 29 R. I. 224, 69 Atl. 844.

The father may file the petition as "next of kin" though the alleged incompetent may have brothers or sisters. *Pinkston v. Semple*, 92 Ala. 564, 9 So. 329.

14. **Mass.**—Rev. Laws, 1902, p. 1308. **Minn.**—Rev. Laws, 1905, §3826. **Miss.**—Code, 1906, §2433. **R. I.**—*McKenna v. McKenna*, 29 R. I. 224, 69 Atl. 844.

15. **Ill.** Rev. St., 1913, ch. 86, §1; *Baker v. Searle*, 2 R. I. 115.

16. See *Morton v. Leonard*, 12 Pick. (Mass.) 152. But see Rev. Laws, 1902, ch. 145, §7.

In Michigan by the superintendent

of the poor, or director of the poor or justice of the peace. Comp. Laws, 1897, §8712.

In Minnesota by the county board. Rev. Laws, 1905, §3826.

In Nebraska by any officer in charge of the poor, or a justice of the peace. Rev. St., 1913, §1643.

In New Hampshire by the selectmen of the town. Pub. St., 1901, ch. 179, §4.

In Rhode Island the petition is by a relative or friend or overseer of the poor only. *McKenna v. McKenna*, 29 R. I. 224, 69 Atl. 844.

17. *Matter of James*, 30 How. Pr. (N. Y.) 446; *N. C. Rev.*, 1905, §1890.

18. **Ala.** Code, 1907, §4612.

19. **Conn.**—Gen. St., 1902, §1833.

Ind.—*Burn's Ann. St.*, §6175. **Kan.**

Gen. St., 1909, §1820. **Me.**—Rev. St., 1903, p. 618; *Raymond v. Wyman*, 18

Me. 385. **Mass.**—Rev. Laws, 1902, vol.

II, p. 1309. **Mich.**—Comp. Laws, 1897,

§8713. **Minn.**—Rev. Laws, 1905, §3827.

Miss.—Code 1906, §2433. **Neb.**—Rev.

St., 1913, §1645. **N. Y.**—*Matter of*

James, 30 How. Pr. 446; *Matter of*

Coffin, 41 Misc. 131, 82 N. Y. Supp. 941;

In re Bennett, 5 N. Y. Supp. 373. **N. C.**

Rev., 1905, §1890. **Ore.**—Lord's Laws,

§1323. **R. I.**—*Hamilton v. Probate*

Court, 29 R. I. 204. **Vt.**—*Ellis v. Cran-*

ton & Chaffee, 50 Vt. 108.

But in *Hamilton v. Probate Court* 2

R. I. 204, the court said: "We do not

mean to say, however, that in such a

case it may not be advisable to notify

the family of the proposed ward. The

power of putting a person of full age

under guardianship is a great power,

and to be exercised with great cau-

tion; and no ground should be afforded

for even a suspicion, that it was in-

tended to keep the proceedings secret

from any member of his family or to

prevent their being heard before the

court."

Service on the alleged spendthrift in

jail held to be a sufficient compliance

E. PLEADING.—The bill or petition for the appointment of a guardian should specify the cause for which relief is prayed,²⁰ the estate proposed to be secured²¹ and that the defendant is a resident of the county.²²

Under the Pennsylvania procedure any person aggrieved by the inquisition may traverse the same and if a replication be not filed the court may order the prothonotary to file one on behalf of the opposite party.²³

F. HEARING AND DETERMINATION.—PROCEEDINGS SHOULD NOT BE *EX PARTE*.—An inebriate cannot be confined in an asylum on *ex parte* affidavits without any provision for an examination.²⁴

Commission or Jury.—In some jurisdictions a jury is impaneled to try the question of the alleged incompetency,²⁵ while in others the inquiry is conducted by a commission.²⁶

Adjudication.—If the allegations of the bill are admitted either expressly or by failure to answer, or it is established by proof that the allegations are true the chancellor or other proper officer hearing the matter deprives the incompetent of all further control over his estate and provides for its safe keeping by the appointment of a trustee or overseer,²⁷ or he may couple the guardianship of the property with the

with a statute requiring notice to be left at his usual place of abode. *Dunn's Appeal*, 35 Conn. 82.

Notice is unnecessary where the incompetent files the petition. *Pratt v. Court of Probate*, 22 R. I. 596, 48 Atl. 943.

The notice need not recite the application or its substance. *Angell v. Probate Court*, 11 R. I. 187.

Service of notice by the petitioner held improper under a statute requiring service by a disinterested person. *Baker v. Searle*, 2 R. I. 115.

20. Ala.—Code, 1907, §4612. **Conn.** *Johnson v. Stanley*, 1 Root 245. **Ia.** *Rev. St.*, 1888, §3464. **Mich.**—Comp. Laws, 1897, §8712. See *In re Brown*, 45 Mich. 326, 7 N. W. 899. **Minn.**—Rev. Laws, 1905, §3826. **Neb.**—Rev. St., 1913, §1644. **Ore.**—Lord's Laws, §1322.

The cause of defendant's want of discretion need not be alleged. *Angell v. Probate Court*, 11 R. I. 187.

Waiver of Defects.—By appearing generally to the merits the defendant will be deemed to have "waived any jurisdictional defect arising out of the alleged insufficiency in the allegations of the application." *Bishop v. Welch*, 149 Ill. App. 491.

A petition by the husband to have a guardian appointed for the person and estate of his wife need not allege that

he was unable to support her. *Tillinghast v. Holbrook*, 7 R. I. 230.

21. Ala. Code, 1907, §4612; *Jones v. Semple*, 91 Ala. 182, 8 So. 557.

22. Baker v. Baker, 150 Iowa 511, 129 N. W. 494, 35 L. R. A. (N. S.) 292, 1912 D Ann. Cas. 680, 129 N. W. 494, holding that the petition need not state that the defendant is an inhabitant.

23. In re Sampson, 5 Pa. Dist. 717.

24. Matter of Janes, 30 How. Pr. (N. Y.) 446.

25. Ill.—Rev. St., 1913, ch. 86, §2. **Ind.**—Burn's Ann. St., §6175, trial is had as in other civil causes. **Ia.**—Rev. St., 1888, §3464. **Kan.**—Gen. St., 1909, §4821. **N. Y.**—Matter of Janes, 30 How. Pr. 446.

26. See McGinnis v. Com., 74 Pa. 245.

Limit of Inquiry.—The inquiry should be confined to the defendant's present habits and not those of the past. *In re Haviland*, 1 W. N. C. (Pa.) 345.

27. Ala.—Code, 1907, §4612. **Ind.** *Burn's Ann. St.*, §6176. **Me.**—Rev. St., 1903, p. 618. See *Young v. Young*, 87 Me. 44, 32 Atl. 782. **Ohio.**—Paige & Adams Code, §11,011.

The power of the court is restricted to the estate proposed to be secured and specified in the bill. *Jones v. Semple*, 91 Ala. 182, 8 So. 557.

Findings.—The commission need not

guardianship of the person,²⁸ or the court may appoint a guardian of his person regardless of whether he has an estate.²⁹ This appointment, however, must be for a reasonable time, expressly limited; otherwise it is void.³⁰

G. NOTICE OF APPOINTMENT.—Under some statutes the guardian is required to give public notice of his appointment and these provisions must be strictly complied with to enable the guardian to avoid contracts made by his ward with persons ignorant of his disability.³¹ Other statutes have required the filing of a certificate of the officers as to their doings and an inventory of the property taken.³²

H. APPEALS.—An appeal is not allowed to the petitioner after a dismissal of his petition for the appointment of a guardian,³³ but the alleged incompetent may appeal from a decision depriving him of his liberty.³⁴

I. COSTS.—While the estate of the incompetent will be taxed with the costs of the proceedings in which his incompetency is adjudicated, the court should endeavor to keep such costs as low as possible.³⁵ It

return a finding to the effect that the party is incapable of managing his estate. It is sufficient to find that he is an habitual drunkard. *McGinnis v. Com.*, 74 Pa. 245; *Ludwick v. Com.*, 18 Pa. 172.

Under a statute which authorizes a probate court to appoint a guardian of the person and estate of a person who "from want of discretion in managing his estate, shall be likely to bring himself or family to want, or to render himself or family chargeable," a decree which finds simply that the petitioner "is lacking in discretion" and does not find that he is likely to bring himself to want or to render himself chargeable is insufficient to warrant the appointment of a guardian. *Pratt v. Court of Probate*, 22 R. I. 596, 48 Atl. 943; *Hopkins v. Howard*, 20 R. I. 394, 39 Atl. 519.

Affidavits necessary. *Com. v. Lambert*, 4 Pa. Co. Ct. 439.

The presumption is in favor of the validity of the decree. *Young v. Young*, 87 Me. 44, 32 Atl. 782.

28. **Mass.**—Rev. Laws, 1902, ch. 145, §7. **Mich.**—Comp. Laws, 1897, §8713. **Miss.**—Code, 1906, §2433. **N. Y.**—Matter of Lynch, 5 Paige 120. **Ohio.**—Paige & Adams Code, §11,011. **Ore.**—Lord's Laws, §1323. **R. I.**—Tillinghast v. Holbrook, 7 R. I. 230, wherein the question arose as to the propriety of appointing a guardian of the person of a married woman. The court said: "The custody of her person would not be taken from him (the husband) unless for her

protection. In the case before us all idea of an invasion of the husband's right is excluded by the fact that this proceeding was had upon his application."

29. *Ia. Rev. St.*, 1888, §3463.

30. *Chalker v. Chalker*, 1 Conn. 79, 6 Am. Dec. 206; *Waters v. Waterman*, 2 Root 214. See also *Washband v. Washband*, 24 Conn. 500.

31. **Kan.**—Gen. St., 1909, §4825. **Neb.** *Rev. St.*, 1913, §1646. **N. H.**—*Pub. St.*, 1901, ch. 179, §7. **Ore.**—Lord's Laws, §1324. **Vt.**—*Ellis v. Cramton & Chaffee*, 50 Vt. 608.

32. Inventory required. *Kan. Gen. St.*, 1909, §4826; *Me. Rev. St.*, 1903, p. 619.

When the selectmen take the property of a spendthrift and neglect to set up a certificate of their doings and fail to file in the town clerk's office an inventory of the property taken, the owner, after demand and refusal, may recover the property in trover. *Knapp v. Lockwood*, 3 Day (Conn.) 131.

33. *McKenna v. McKenna*, 29 R. I. 224, 69 Atl. 844.

34. *Matter of Janes*, 30 How. Pr. (N. Y.) 446.

The taking of an appeal from an order of appointment does not affect the operation of the appointment. *Mix v. Peek*, 13 Conn. 244.

35. *In re Buecker*, 18 W. N. C. (Pa.) 70. See also *Matter of Van Cott*, 1 Paige (N. Y.) 489.

The court is not authorized to allow to the solicitor of the petitioner any-

has been held that where the relatives of the alleged incompetent prosecute a commission against him in good faith, they will not be charged with costs although the prosecution should be unsuccessful.³⁶

II. CLAIMS AND ACTIONS.—The guardian of an incompetent being invested with powers similar to those of the guardian of a minor should appear and prosecute or defend all suits by or against his ward,³⁷ but an action should not be brought against the guardian personally for the liabilities of his ward,³⁸ nor his accounts investigated in a suit against the ward,³⁹ for recourse may be had against the guardianship bond,⁴⁰ or by proceeding against the property of the ward by petition or as in other civil cases.⁴¹

thing beyond the ordinary taxable costs and taxable disbursements. *Matter of Root*, 8 Paige (N. Y.) 625.

36. *Matter of Arnhout*, 1 Paige (N. Y.) 497.

37. *Ind.*—*Makepeace v. Bronnenberg*, 146 Ind. 243, 45 N. E. 336. *Me.*—*Rev. St.*, 1903, p. 619. *Mass.*—*Mason v. Mason*, 19 Pick. 506; *Bond v. Bond*, 2 Pick. 382; *Brown v. Chase*, 4 Mass. 436. *N. Y.*—See *New v. New*, 6 Paige 237.

Effect of Incompetent's Death.—The estate, powers and duties of the trustee of an inebriate's estate, under the Alabama Code, §§2502-2506, like the committee of a lunatic in England, terminate with the death of the inebriate though he still remains liable to account; and having filed a bill in equity to set aside a conveyance of land executed by the inebriate after his appointment, the suit abates by the death and cannot be continued or revived in the name of the heirs of the inebriate jointly with the trustee. *Ex parte Williams*, 87 Ala. 547, 6 So. 314.

38. *N. H.*—*Pendexter v. Cole*, 66 N. H. 556, 22 Atl. 560. *N. Y.*—*Hall & Hall v. Taylor*, 8 How. Pr. 428. *Ore.*—*Sturgis v. Sturgis*, 51 Ore. 10, 93 Pac. 696, 131 Am. St. Rep. 724, 15 L. R. A. (N. S.) 1034.

A suit will not lie against the statutory guardian of a common drunkard, on a note made by such drunkard prior to the appointment of such guardian. The suit must be against the drunkard himself. *Coombs v. Janvier*, 31 N. J. L. 240.

The trustee of an habitual drunkard cannot be sued upon a contract entered into before inquisition found although he may have effects in his hands sufficient to pay. *Steel v. Young*, 4 Watts (Pa.) 459.

39. "Whether the ward's property

has been judiciously and legally managed and invested by the guardian is a proper subject of investigation and inquiry upon the adjustment of the guardian's accounts in the probate court but it is not open to inquiry in a suit against the ward for the recovery of a debt." *Pendexter v. Cole*, 66 N. H. 556, 22 Atl. 560.

40. *Hicks v. Chapman*, 10 Allen (Mass.) 463; *Pendexter v. Cole*, 66 N. H. 556, 22 Atl. 560.

41. *Simmons v. Almy*, 100 Mass. 239; *Hicks v. Chapman*, 10 Allen (Mass.) 463. See *Sturgis v. Sturgis*, 51 Ore. 10, 93 Pac. 696, 131 Am. St. Rep. 724, 15 L. R. A. (N. S.) 1034.

Petition to the chancery court for payment. *L'Amoureux v. Crosby*, 2 Paige (N. Y.) 422, 22 Am. Dec. 655. See also *Matter of Heller*, 3 Paige (N. Y.) 199; *Hall & Hall v. Taylor*, 8 How. Pr. (N. Y.) 428.

Where it is necessary for the creditor of an habitual drunkard to file a bill against the committee, to establish a debt and to obtain satisfaction thereof out of the estate of the drunkard, such incompetent may also be made a party defendant in the suit; so as to make the proceedings binding on him in case he should be restored to the possession and control of his estate before the termination of the suit. *Beach v. Bradley & Lay*, 8 Paige (N. Y.) 146.

Action at Law.—In *Sternbergh v. Schoolcraft*, 2 Barb. (N. Y.) 153, it was held that a judgment recovered in a court of law against a person who has been found an habitual drunkard and whose person and property have been placed in the custody of a committee will not, for that reason, be declared void, though the court of chancery which appointed the committee might have interfered by injunction to re-

Actions Between Guardian and Ward.—Civil actions between the ward and his guardian are postponed until the relation subsisting between them can be dissolved.⁴²

III. SETTLEMENTS.—The trustee must at stated intervals make partial settlement of his accounts and may be required to do so at any time, and on the termination of the trust must make final settlement thereof, such settlements being governed largely by the rules regulating the settlements of general guardians.⁴³

IV. PROTECTION OF GUARDIAN.—It is the duty of the court to aid and protect the guardian in the proper exercise of his right to the care and control of an habitual drunkard and to give him directions on the subject when necessary.⁴⁴

V. REMOVAL OF GUARDIAN AND RESTORATION OF ESTATE.—REMOVAL.—The guardian may be removed by the appointing tribunal or officer for neglect of duty or mismanagement of his trust, and another appointed in his place.⁴⁵

strain such suit and might have punished as for contempt any interference by suit when the person interfering acted with full knowledge of the commission.

Sufficiency of Complaint.—Where the complaint against a committee omitted to allege or show by what court or authority the debtor was declared an habitual drunkard and the custody of his person and estate awarded to the defendant, it was held bad on demurrer. *Hall & Hall v. Taylor*, 8 How. Pr. (N. Y.) 428.

Where the chancellor has settled the amount due and ordered it paid out of the estate, with costs, his further order that the creditor may sue in the event of non-payment, is erroneous, the proper remedy to compel payment being a summary proceeding against the committee. *Beach v. Bradley & Lay*, 8 Paige (N. Y.) 146.

42. *Mason v. Mason*, 19 Pick. (Mass.) 506.

The committee of an habitual drunkard who holds a mortgage against the estate, cannot, without the sanction of the court, enforce it by proceedings of foreclosure under the statute. *Matter of Carter*, 3 Paige (N. Y.) 146.

43. Ala. Code, 1907, §4617. See generally the title "Guardian and Ward."

Reference to Master.—See *Matter of Carter*, 3 Paige (N. Y.) 146.

Effect of Neglect of Duty.—If the committee neglects to file an inventory or to render his accounts regularly under oath, in the settlement of his ac-

counts every presumption will be taken most strongly against him. *Matter of Carter*, 3 Paige (N. Y.) 145. And in *Stephens v. Marshall*, 23 Hun (N. Y.) 641, it was held that under such circumstances he would be charged with one-half of the expenses of the accounting.

44. Where a third person, without the consent and against the wishes of the committee, has the custody of, or harbors the habitual drunkard, the committee should apply to the court *ex parte* for an order that such person deliver the drunkard up to the committee, or cease from harboring him; and if such order is disobeyed, the party will be punished for a contempt of court. *Matter of Ann Lynch*, 5 Paige ch. (N. Y.) 120.

In the case of an habitual drunkard if the committee finds that any person is furnishing him with the means of intoxication, even gratuitously, he should apply to the court for an order restraining all persons from furnishing the drunkard with ardent spirits or with the means of obtaining liquor on pain of contempt. *Matter of Heller*, 3 Paige (N. Y.) 199.

45. Conn. Gen. St., 1902, §1833; *Dickerson v. Dickerson*, 31 N. J. Eq. 652.

Costs of Removal Proceedings. Where the committee has been guilty of gross negligence, he will be decreed to pay the costs of the proceedings against him to obtain his removal. *Matter of Carter*, 3 Paige (N. Y.) 146.

Restoration of Estate.—On petition of the person whose estate has been committed to the control of a trustee or guardian and on notice to such trustee, or guardian and on satisfactory proof of the reformation of the incompetent person and of his fitness to have charge of his estate, the chancellor or court must order that it be restored to him.⁴⁵

46. **U. S.**—*Cockrill v. Cockrill*, 92 Fed. 811, 34 C. C. A. 254. **Ala.**—Code, 1907, §4615. **Conn.**—Gen. St., 1902, §1834. **Ind.**—Burns' Ann. St., §6177. **Mass.**—Rev. Laws, 1902, ch. 145, §11. **Miss.**—Rev. St., 1906, §2434. **N. C.**—Rev. 1905, §1893. **Ohio.**—Paige & Adams' Code, §11,013.

The incompetent on whose application the discharge of the guardianship has been ordered cannot attack such order on the ground that the guardian was not properly notified. *Cockrill v. Cockrill*, 92 Fed. 811, 34 C. C. A. 254.

Discretion of Court.—The power given the courts to release spendthrifts from guardianship is such that the appellate court will not revise their ex-

ercise of such power, unless a very strong case of abuse is shown. *Williston v. White*, 11 Vt. 40.

Ex Parte Hearing.—A commission under which a person has been found an habitual drunkard "ought not to be superseded upon an ex parte hearing without notice, and upon the evidence of affidavits merely, even with the assent of the guardian." *Matter of Weis*, 16 N. J. Eq. 318.

Reference to Master.—In *Matter of Weis*, 16 N. J. Eq. 318, it was suggested that the "most convenient, safe, and expeditious course" in cases of habitual drunkardness would be to adopt the practice in cases of lunacy and refer the matter to a master.

INCONSISTENCY.—See Answers; Choice and Election of Remedies; Departure; Duplicity; Joinder of Actions; Repugnancy.

INCUMBRANCES.—See Covenant, Action of; Lands and Land Transfers; Title; Vendor and Purchaser.

INDEBITATUS.—See Assumpsit.

INDECENCY.—See Obscenity; Post-Office.

INDECENT ASSAULT.—See Assault and Battery; Rape.

INDECENT EXPOSURE.—See Obscenity.

INDEMNITY

By the Editorial Staff.

I. DEFINED AND DISTINGUISHED, 22

- A. *Definitions*, 22
- B. *Implied Indemnity*, 22
- C. *Distinguished From Contribution*, 23
- D. *Distinguished From Agreement To Pay or Perform*, 23
- E. *Distinguished From Contracts of Insurance*, 24
- F. *Distinguished From Suretyship*, 24
- G. *From Guaranty*, 24
- H. *From Promise To Assume*, 25
- I. *From Agreement To Repurchase*, 25

II. PREREQUISITES TO BRINGING OF ACTION, 26

- A. *Demand on Indemnitor or Notice of Liability*, 26
- B. *Seeking Remedy Against Others*, 26
- C. *Necessity of Defending Prior Suit*, 26
- D. *Notice to Indemnitors To Defend Prior Suit*, 26
 - 1. *Under Express Contract of Indemnity*, 26
 - 2. *On Implied Indemnity*, 27
 - 3. *Sufficiency of Notice*, 27

III. ACCRUAL OF RIGHT OF ACTION, 28

IV. DETERMINING LIABILITY OVER BEFORE JUDGMENT IN PRIOR SUIT, 28

V. ACTIONS TO ENFORCE, 29

- A. *Form of Action*, 29
- B. *Parties*, 29
 - 1. *Application of the Rule of Privity*, 29
 - 2. *Contracts Running to Joint Indemnitees*, 30
- C. *Pleading*, 31
 - 1. *Plaintiff's Pleading in Action on Contract*, 31
 - 2. *Plea or Answer in Action on Contract*, 31
 - 3. *Pleadings in Action on Implied Indemnity*, 32
- D. *Conclusiveness of Judgment in Prior Suit*, 32
 - 1. *Where Opportunity To Defend Was Given*, 32
 - 2. *Where No Notice or Opportunity To Defend*, 35

the good faith execution of the agency;⁷ and there is implied in every contract of agency a contract to indemnify the principal if he sustains any loss through the neglect of the agent.⁸

Generally whenever the wrongful act of one person results in liability being imposed on another, the latter may have indemnity from the person actually guilty of the wrong.⁹

C. **DISTINGUISHED FROM CONTRIBUTION.**¹⁰ — Indemnity springs from contract, express or implied, while contribution is an equity founded on acknowledged principles of natural justice.¹¹ In contribution only a proportionate amount is recovered, while in indemnity the recovery is of the whole amount of the damage to the indemnitee.¹²

D. **DISTINGUISHED FROM AGREEMENT TO PAY OR PERFORM.** — Under agreement to pay or perform some act a recovery may be had as soon as there is a breach of the contract, and the measure of damages is the full amount agreed to be paid. In contracts to indemnify, the obligee must have been actually damnified and can only recover to the extent of the injury sustained up to the time of the institution of the suit.¹³

Aetna Indemnity Co., 155 N. C. 219, 71 S. E. 214; *Gregg v. City of Wilmington*, 155 N. C. 18, 70 S. E. 1070. **N. D.**—*City of Grand Forks v. Paulsen*, 19 N. D. 293, 123 N. W. 878, 40 L. R. A. (N. S.) 1158. **Ohio.**—*Wilhelm v. City of Defiance*, 58 Ohio St. 56, 50 N. E. 18, 65 Am. St. Rep. 745, 40 L. R. A. 294. **Tex.**—*City of Corsicana v. Tobin*, 23 Tex. Civ. App. 492, 57 S. W. 319. **Utah.**—*Culmer v. Wilson*, 13 Utah 129, 44 Pac. 833, 57 Am. St. Rep. 713.

7. *Henderson v. Eekers*, 115 Minn. 410, 132 N. W. 715, 1912 D Ann. Cas. 989, *citing* *Guirney v. St. Paul, M. & M. R. Co.*, 43 Minn. 496, 46 N. W. 78, 19 Am. St. Rep. 256; *Leshner v. Getman* 30 Minn. 321, 15 N. W. 309.

So in *Humphreys v. Pratt*, 5 Bli. (N. S.) 154, 5 Eng. Reprint 269, all that an execution plaintiff had done was to point out cattle to the sheriff as belonging to the debtor and so subject to levy. An implied promise to indemnify the sheriff against a claimant resulted. See also *Smith v. Keal*, (1882), 9 Q. B. D. 340.

8. *Northern Assur. Co. v. Borgelt*, 67 Neb. 282, 93 N. W. 226.

9. **Md.**—*Baltimore & O. R. Co. v. Howard County*, 113 Md. 404, 77 Atl. 930; *Baltimore & O. R. Co. v. Howard County*, 111 Md. 176, 73 Atl. 656, 40 L. R. A. (N. S.) 1172. **N. Y.**—*Village of Port Jervis v. First Nat. Bank*, 96 N. Y. 550. **Tex.**—*Galveston, H. & S. A. R. Co. v. Pigott*, 54 Tex. Civ. App.

367, 116 S. W. 841; *City of Corsicana v. Tobin*, 23 Tex. Civ. App. 492, 57 S. W. 319.

10. See also the title "**Contribution.**"

11. *Vandiver v. Pollak*, 107 Ala. 547, 19 So. 180, 54 Am. St. Rep. 118.

12. *Gulf, etc. R. Co. v. Galveston, etc. R. Co.*, 83 Tex. 509, 18 S. W. 956.

13. **U. S.**—*Wicker v. Hoppock*, 6 Wall. 94, 18 L. ed. 752. See also *Coe v. Rankin*, 5 McLean 354, 5 Fed. Cas. No. 2,943. **Ark.**—*Badgett v. Martin*, 12 Ark. 730. **Conn.**—*Redfield v. Haight*, 27 Conn. 31; *Lathrop v. Atwood*, 21 Conn. 117. **Ga.**—*Williams & Co. v. U. S. Fidelity, etc. Co.*, 11 Ga. App. 635, 75 S. E. 1067, *quoting* with approval, *Tucker v. Murphey*, 114 Ga. 662, 40 S. E. 836, and *citing* many Georgia cases. **Ind.**—*Lloyd v. Marvin*, 7 Blackf. 464. **La.**—*Bain v. Arthur*, 129 La. 143, 55 So. 743. **Mass.**—*Hall v. Thayer*, 12 Met. 130. **Neb.**—*Northern Assur. Co. v. Borgelt*, 67 Neb. 282, 93 N. W. 226. **N. Y.**—*Chace v. Himman*, 8 Wend. 452, 24 Am. Dec. 39. **N. C.**—*Mullen v. Whitmore*, 74 N. C. 477. **Ohio.**—*Henderson-Achert Lith. Co. v. John Schillito Co.*, 64 Ohio St. 236, 60 N. E. 295, 83 Am. St. Rep. 745. **Pa.**—*Ardesco Oil Co. v. North America Oil & Min. Co.*, 66 Pa. 375; *McSorley v. Coxie*, 40 Pa. Super. 560. **S. D.**—*Campher v. Bldg. & Loan Assn.*, 6 S. D. 341, 61 N. W. 35. **Tex.**—*Browne v. French*, 3 Tex. Civ. App. 445, 22 S. W. 531. **W. Va.**

From Promissory Notes. — A contract of indemnity is easily distinguished from a promissory note in that the one is a contingent liability while the other is an absolute promise.¹⁴

E. DISTINGUISHED FROM CONTRACTS OF INSURANCE. — Strictly speaking, contracts of insurance are contracts of indemnity since they appertain to the person or party to the contract, and not to the thing which is subject to the risk against which its owner is protected;¹⁵ but it must be remembered that a contract of insurance may be one against liability as distinguished from a contract against loss by reason of liability.¹⁶

F. DISTINGUISHED FROM SURETYSHIP. — A contract of indemnity is not one to pay as in case of suretyship, but one to make good a future loss or damage.¹⁷

G. FROM GUARANTY. — Though the words "guaranty" and "indemnity" are sometimes used interchangeably,¹⁸ and in one sense it may be said that all guarantees are contracts of indemnity,¹⁹ there is, in principle, an obvious and important difference between a contract of guaranty and a contract of indemnity.²⁰

State v. Hays, 30 W. Va. 107, 3 S. E. 177. *Wis.*—*Taylor v. Coon*, 79 Wis. 76, 48 N. W. 123.

14. See *Jenckes v. Rice*, 119 Iowa 451, 93 N. W. 381, where an instrument was in form a promissory note but contained a sentence reciting that the note was given to secure the payee against a specified loss. Reading the whole together the court says "it was intended and understood as a contract of indemnity only." And see also *Steere v. Trebilcock*, 108 Mich. 464, 66 N. W. 342, where a note was made payable on demand, but after the signature appeared these words: "This note is to be paid when Coffin & Stanton make first payment on bonds." This was a contract of indemnity.

But compare *Price v. Rodman*, 2 Ky. L. Rep. 213, where indorsers and maker of promissory notes entered into a contract of indemnity as to their respective liability. See also the title "**Bills and Notes.**"

15. *Cummings v. Cheshire, etc. Ins. Co.*, 55 N. H. 457. See also *Woodbury v. Post*, 158 Mass. 140, 33 N. E. 86, where the court says, in effect, that certain contracts of indemnity are like contracts of insurance. And see *Omaha Gas Co. v. City of South Omaha*, 71 Neb. 115, 98 N. W. 437.

16. *Poe v. Philadelphia Casualty Co.*, 118 Md. 347, 84 Atl. 476, quoting with approval *Frye v. Bath Gas & E. Co.*, 97 Me. 241, 54 Atl. 395, 94 Am. St.

Rep. 500, 59 L. R. A. 444. See also *Cushman v. Carbondale Fuel Co.*, 122 Iowa 656, 98 N. W. 509, and the title "**Insurance.**"

17. *Bain v. Arthur*, 129 La. 143, 55 So. 743. See also the title "**Principal and Surety.**"

18. *Kenigsberg v. Reininger*, 159 Iowa 548, 141 N. W. 407; *Dole v. Young*, 24 Pick. (Mass.) 250. See *Frash v. Polk*, 67 Ind. 55, where a contract was held to be an independent contract of indemnity though it recited "we hereby guarantee." See also *Dent v. Arthur*, 156 Mo. App. 472, 137 S. W. 285, where the promisor told the promisee to take an appeal and he "would guarantee that he would not lose any." This was an original promise of indemnity.

The words "indemnity" and "compensation" construed. See *Bayley v. Employer, etc. Co.*, 125 Cal. 345, 58 Pac. 7.

So where a bond read "should said Brown indemnify the said (plaintiffs) and save them perfectly free and harmless from the operation of said judgments by virtue of the liens thereof," the bond was not a mere bond of indemnity, but damage from the judgments must be shown. *Loyd v. Marvin*, 7 Blackf. (Ind.) 464.

19. *Harburg India, etc. Co. v. Martin* (1902), 1 K. B. 778.

20. *Anderson v. Spence*, 72 Ind. 315, 37 Am. Rep. 162.

The use of the word "guaranty" in a contract primarily means that the one making the contract promises to make good the default of another.²¹

A contract of guaranty always presupposes some other contract or transaction to which it is collateral,²² while a contract of indemnity is essentially an original contract, the promisor and promisee being in direct privity.²³

Some English cases have drawn the distinction that a guaranty is a promise to a creditor to secure a debt due him while an indemnity is a promise to a debtor to secure the repayment of a debt payable by him.²⁴

In many cases it has been held that one who promises to indemnify another for becoming a guarantor for a third party is himself an indemnitor and his contract is an original contract of indemnity,²⁵ and a similar rule obtains where one indemnifies another for becoming a surety on a bail bond²⁶ or on an official bond.²⁷

H. FROM PROMISE TO ASSUME.—An ordinary clause in a deed whereby the grantee assumes and agrees to pay an incumbrance therein described, is not a contract of indemnity, notwithstanding the use of the words "save me harmless from the same;"²⁸ but under the circumstances surrounding them such contracts may be contracts of indemnity.²⁹

I. FROM AGREEMENT TO REPURCHASE.—Where one having no interest in stock save that of agent or broker in conducting a sale, at the seller's request agrees with purchasers that he will buy back

21. *Dole v. Young*, 24 Pick. (Mass.) 250.

22. See the title "Guaranty."

23. *Ind.*—Anderson v. Spence, 72 Ind. 315, 37 Am. Rep. 162; Spencer v. McLean, 20 Ind. App. 626, 50 N. E. 769. *La.*—Bain v. Arthur, 129 La. Ann. 143, 55 So. 743. *Mass.*—*Dole v. Young*, 24 Pick. 250. *N. H.*—Batchelder v. Wendell, 36 N. H. 204. *Ore.*—Manary v. Runyon, 43 Ore. 495, 73 Pac. 1028. *S. D.*—Western Surety Co. v. Kelley, 27 S. D. 465, 131 N. W. 808.

So in *Halleck v. Moss*, 22 Cal. 266, it being claimed defendant was a guarantor or surety and not an indemnitor, the court says: "We might inquire whose ability or liability to pay does he guarantee, or for whom is he surety? The contract is solely his own."

24. *Guild & Co. v. Conrad* (1894), 2 Q. B. 885, 63 L. J. Q. B. 721, 71 L. T. N. S. 140, 9 Rep. 746, 42 W. R. 642, following *Wildes v. Dudlow*, L. R. 19 Eq. 198, 44 L. J. Ch. 341, 23 W. R. 435, and *Thomas v. Cooke*, 8 B. & C. 728, 7 L. J. K. B. (O. S.) 49, 3 M. & R. 444, 14 E. C. L. 358, 108 Eng. Reprint 1213. See also *Hargreaves v.*

Parsons, 14 L. J. Exch. 250, 13 M. & W. 561; *Harburgh India, etc. Co. v. Martin* (1902), 1 K. B. 778.

25. *N. J.*—*Hartley v. Sandford*, 66 N. J. L. 40, 48 Atl. 1009. *N. Y.*—*Jones v. Bacon*, 145 N. Y. 446, 40 N. E. 216; *Sanders v. Gillespie*, 59 N. Y. 250; *Chapin v. Merrill*, 4 Wend. 657. *Ore.*—*Rose v. Wollenberg*, 31 Ore. 269, 44 Pac. 382, 65 Am. St. Rep. 826, 39 L. R. A. 378. *Pa.*—*Carman v. Noble*, 9 Pa. 366. *Tenn.*—*Macey v. Childress*, 2 Tenn. Ch. 438. *Can.*—*Tumblay v. Meyers*, 16 U. C. Q. B. 143.

26. *McCormick v. Boylan*, 83 Conn. 686, 78 Atl. 335, 1912 A. Ann. Cas. 882; *Western Surety Co. v. Kelley*, 27 S. D. 465, 131 N. W. 808.

27. *Doran v. Davis*, 43 Iowa 86.

28. *Foster v. Atwater*, 42 Conn. 244; *Perry v. Ward*, 82 Vt. 1, 71 Atl. 721.

29. See *Israel v. Reynolds*, 11 Ill. 218, which speaks of such a contract as one "in the nature of an indemnity against the debt."

So in *Young v. Schlosser*, 65 Ind. 225, of a bond assuming the payment of taxes, liens, and incumbrances of every nature against lands purchased,

the stock at par if so desired, his contract with the seller is one of indemnity and not an implied or express contract to repurchase necessitating a tender of the stock.³⁰ So a broker's contract to save purchasers harmless is one of indemnity not calling for a tender,³¹ and a contract of sale of bonds reserving a right to repurchase in consideration of a guaranty as to the interest and principal so long as the bonds remained in the hands of the purchaser is a contract of indemnity, and the purchaser must show damage before he can recover thereon.³²

II. PREREQUISITES TO BRINGING OF ACTION.—A. DEMAND ON INDEMNITOR OR NOTICE OF LIABILITY.—No demand on or notice to the indemnitor in a contract of indemnity is necessary prior to the commencement of suit.³³

B. SEEKING REMEDY AGAINST OTHERS.—The indemnified need not seek relief from a person against whose conduct the indemnity is given.³⁴

C. NECESSITY OF DEFENDING PRIOR SUIT.—Where one has been indemnified for going on another's official bond he may sue the indemnitor though it does not appear that he defended the suit on the bond unless it is affirmatively shown that he could have successfully defended.³⁵

D. NOTICE TO INDEMNITORS TO DEFEND PRIOR SUIT.³⁶—1. Under **Express Contract of Indemnity.**—The general rule is that in the absence of some special agreement the indemnitor is not entitled to any notice to defend suit against the person indemnified, as a condition precedent to a suit by the latter.³⁷

the court says "it may have been good as an indemnity to the estate" from which the land was purchased. See also the title "**Mortgages.**"

30. *Rawle v. Moore*, 142 App. Div. 429, 127 N. Y. Supp. 6.

31. *Bullock v. Lewis*, 22 Colo. App. 449, 125 Pac. 849. See also *Norris v. Reynolds*, 131 App. Div. 818, 116 N. Y. Supp. 106, where the sale was by a promoter.

32. *Robinson v. Connell*, 240 Pa. 96, 87 Atl. 300.

33. *Halleck v. Moss*, 22 Cal. 266.

Notice of the prisoner's default need not be given by the bail before suing his indemnitor. *McCormick v. Boylan*, 83 Conn. 686, 78 Atl. 335, 1912 A. Ann. Cas. 882.

34. One who has been indemnified for going on a bail bond need not after the prisoner's default of appearance, demand payment of the amount of the bond from the prisoner. *McCormick v. Boylan*, 83 Conn. 686, 78 Atl. 335, 1912 A. Ann. Cas. 882.

One who has by contract indemnified a municipality for permitting a society

to occupy a sidewalk may be sued on the contract of indemnity, although the city has made no effort to recover from the society. *Springfield v. Boyle*, 164 Mass. 591, 42 N. E. 333.

One who has indemnified another for becoming an indorser on a third party's note may be sued on his contract of indemnity as soon as the indorser has been compelled to pay the note, and the indorser is not obliged to first exhaust his remedy against the maker. *Kempton v. Coffin*, 12 Pick. (Mass.) 129.

35. *Doran v. Davis*, 43 Iowa 86.

A plea in an action on an indemnity bond given to induce the obligees to become sureties on an execution bond, that the executors had not defended a suit on the latter bond, is defective if it does not aver that there was a legal defense which might have been set up. *Brown & Cawwood v. Murdock & Brauner*, 16 Md. 521.

36. As affecting conclusiveness of judgment, see *infra*, V, E.

37. So in *Halleck v. Moss*, 22 Cal. 266, one who had indemnified the

One may covenant absolutely to be bound by the result of a suit, in which case he is not entitled to any notice. Or his covenant may be one of general indemnity only, in which case, while notice does not go to the cause of action, the want of notice makes the judgment only *prima facie* evidence of liability.³⁸ Also it has been held that there must either be a notice and an opportunity to defend, or it must appear that the plaintiff in the former action had a good cause of action on the face of the contract,³⁹ and a person indemnified cannot charge the indemnitor with the costs of defending a suit on a debt clearly due unless authorized by him to defend.⁴⁰ On the other hand if the indemnitor has notice of the suit and refuses to defend he is chargeable with the costs.⁴¹

2. On Implied Indemnity.—The omission to give notice does not go to the right of action but simply changes the burden of proof and imposes upon the party against whom the judgment was recovered the necessity of again litigating and establishing all of the actionable facts.⁴²

3. Sufficiency of Notice.—Express notice is not necessary, but it is sufficient if one was present and aided in the defense.⁴² The notice

executors of an estate against loss from paying an assessment on stock, a provision in the contract of indemnity, "if the said stock in the course of the administration of said estate shall be sold at auction upon reasonable notice the proceeds of said sale shall amount to as much as the assessment to be paid by the executors as aforesaid," has reference to the notice of sale, which having been given in the form prescribed by law is conclusively "reasonable." The indemnitor was not entitled to any special notice, and having notice of the sale is presumed to have notice of the deficiency. See also *Batchelder v. Wendell*, 36 N. H. 204; *Lamb v. Harrison's Admr.*, 2 Leigh (Va.) 525.

One who has been indemnified for going on a probate bond need not give notice of suit brought thereon as prerequisite to maintaining his action against the indemnitor. *French v. Parish*, 14 N. H. 496.

38. *Binsse v. Wood*, 37 N. Y. 526; *Bridgeport Ins. Co. v. Wilson*, 34 N. Y. 275; *Aberdeen v. Blackmar*, 6 Hill (N. Y.) 324; *Lee v. Clark*, 1 Hill (N. Y.) 56; *Browne v. French*, 3 Tex. Civ. App. 445, 22 S. W. 581.

39. It appeared that the contract of indemnity was given to induce one who held the stakes of a horse race to pay them to one party to the wager. The face of the contract shows as a matter

of law that the other party had a cause of action against the stakeholder for the money deposited by him. Hence it was not necessary to declare any notice to defend. *Fender v. Stiles*, 31 Ill. 460.

40. *French v. Parish*, 14 N. H. 496.

41. *French v. Parish*, 14 N. H. 496.

42. *Village of Port Jervis v. First Nat. Bank*, 96 N. Y. 550.

One who has been joined as a party defendant in the original suit and against whom the action has been discontinued on demurrer by the other defendant for misjoinder of parties defendant and who thereupon withdrew and was not notified or requested to continue in the defense, cannot be held liable over on the judgment. *Boston v. Brooks*, 187 Mass. 286, 73 N. E. 206.

43. So in *City of Chicago v. Robbins*, 2 Black (U. S.) 418, 17 L. ed. 298, one was held liable over where he knew the case was in court, was told of the day of trial, was applied to to assist in procuring testimony and wrote to a witness.

One who employed and paid counsel, was present at the trial and paid expenses of plaintiff and his witnesses, is liable though no express notice was given. *Davis v. Smith*, 79 Me. 351, 10 Atl. 55.

So it was held sufficient where one of the indemnitors appeared as coun-

must be a reasonable notice affording an opportunity to interpose such defense as the indemnitor may desire.⁴⁴

III. ACCRUAL OF RIGHT OF ACTION.⁴⁵ — A cause of action on the indemnity does not accrue until the occurrence of the facts, conditions or liability stipulated against.⁴⁶

On an implied indemnity the right of action does not accrue until the damages have been ascertained and fixed in some mode and the plaintiff held liable therefor.⁴⁷

IV. DETERMINING LIABILITY OVER BEFORE JUDGMENT IN PRIOR SUIT. — No provision of law exists by which one noticed to come in may petition to have the question of his liability over

set for defendant in the prior suit. *Holbrook v. Holbrook*, 15 Me. 9.

So in *Village of Port Jervis v. First Nat. Bank*, 96 N. Y. 550, a bank was held liable over where its president was also a trustee of the village seeking to hold the bank liable over and he consulted with the village attorney, was informed of the bank's probable liability, was a witness at the trial and directed an appeal.

Where a partnership made the engagement to indemnify and one partner was sued in a separate action on the same bond as principal obligor, and a second employed counsel to defend, the third partner had implied notice, and all were concluded by the judgment. *Carman v. Noble*, 9 Pa. 366.

44. *Carroll v. Nodine*, 41 Ore. 412, 69 Pac. 51, 93 Am. St. Rep. 743.

Notice held reasonable which gave information of the institution of the suit, the names of the parties thereto, the amount claimed, nature of injury alleged and place where accident was alleged to have occurred, with a statement that the person sought to be held liable over would be expected to make a proper defense. *City of Astoria v. Astoria, etc. R. Co.*, 67 Ore. 538, 136 Pac. 645.

One sought to be held liable over cannot object that sufficient time was not given him to prepare his defense where he was present, by counsel at the trial, made no attempt to get a continuance and the case seems to have been fully and fairly tried. *Veazie v. Penobscot R. Co.*, 49 Me. 119.

Personal notice served on the contractor and notice by mail to the sureties on his bond seems sufficient to make the judgment conclusive against them. *City of Omaha v. Yancey*, 91 Neb. 261, 135 N. W. 1044.

Where a contract of indemnity stipulated for "due notice," it was held that a shorter period of time than that allowed for default judgments ought not to be held conclusive as a matter of law when the parties offer to show as a matter of fact that it was not sufficient time to prepare a defense. *Spokane v. Costello*, 33 Wash. 98, 74 Pac. 58.

45. As affecting the statute of limitations, see the title "**Limitation of Actions.**"

46. Where a committee was indemnified for borrowing money, no cause of action arose until an action was instituted and a judgment rendered therein against the committee, and no substantial cause of action would arise until the notes were actually paid. *Hall v. Thayer*, 12 Met. (Mass.) 130.

Where a bond of indemnity is against claims the indemnitee need not wait until an action is brought against her before commencing suit, since the condition is broken when the claim is made. *Carman v. Noble*, 9 Pa. 366; *Leber v. Kauffelt*, 5 Watts & S. (Pa.) 440.

Under an agent's contract of indemnity against loss from his neglect of duty, the right of action arises when the principal is damaged and not when the actual disobedience of orders takes place. *Northern Assur. Co. v. Borgelt*, 67 Neb. 282, 93 N. W. 226.

47. *Veazie v. Penobscot R. Co.*, 49 Me. 119.

The right of action for the indemnity does not arise until judgment has been recovered against the person seeking to be indemnified and he has paid the judgment. *City of Georgetown v. Groff*, 136 Ky. 662, 124 S. W. 888; *Clinton v. Boehm*, 139 App. Div. 73, 124 N. Y. Supp. 789.

determined in advance of the original suit to avoid making a defense.⁴⁸

V. ACTIONS TO ENFORCE.—A. **FORM OF ACTION.**—It has been said a contract of indemnity may be enforced in equity by a suit for specific performance.⁴⁹

Ex Contractu or Ex Delicto.—The action on a bond of indemnity is one arising *ex contractu* and not one sounding in damages for an offense or quasi offense, although the act constituting the breach of the bond may be an offense or a quasi offense.⁵⁰

Where the contract is an express one assumpsit may be maintained thereon.⁵¹ But in an action on an implied promise to indemnify, the proper form of action at common law is case and not assumpsit.⁵²

B. PARTIES.—1. **Application of the Rule of Privity.**—A contract of indemnity may be assigned and suit maintained thereon by the assignee as in other cases.⁵³ But in general an action can only be maintained by a party to the contract or one for whose benefit it was made.⁵⁴

48. *Charleston, etc. R. Co. v. Union Warehouse, etc. Co.*, 139 Ga. 20, 76 S. E. 360.

49. *Batchelder v. Wendell*, 36 N. H. 204.

50. *Gordon v. Stanley*, 108 La. 182, 32 So. 531.

51. Where plaintiff's claim is founded on a promise of indemnity and not on a contract of record, the basis of his claim is assumpsit and not debt. *Davis v. Smith*, 79 Me. 351, 10 Atl. 55.

Where there is an express contract of indemnity by its terms containing nothing more than the law would imply, it is optional with the plaintiff to declare in general *indebitatus assumpsit* for money paid, or upon the special contract. *Me.*—*Davis v. Smith*, 79 Me. 351, 10 Atl. 55. *Mass.*—*Gibbs v. Bryant*, 1 Pick. 118. *N. H.*—*Sanborn v. Emerson*, 12 N. H. 57.

52. *Pennsylvania Steel Co. v. Washington & B. Bridge Co.*, 194 Fed. 1011, since the original and fundamental basis of the recovery is not contract but tort to indemnify for which no promise, express or implied, arises warranting resort to the action of assumpsit. But see *Moore v. Appleton*, 26 Ala. 633.

53. See generally the titles "Assignments;" "Parties."

It was contended that a mortgage being merely given to indemnify the mortgagee, the liability under it being only contingent, and to a certain extent being indefinite could not be assigned so as to vest a right of action

in the assignee. *Carper v. Munger*, 62 Ind. 481.

54. See generally the title "Parties."

One having been indemnified for turning over moneys in his hands claimed by an administrator, the administrator cannot bring suit on the contract of indemnity in the absence of some averment showing a state of facts entitling him to subrogation, or showing an assignment of the contract to him. *Derry v. Morrison*, 8 Ind. App. 50, 34 N. E. 107.

Making the indemnitee a party, and calling upon him to answer to his interest, does not change the rule. *Derry v. Morrison*, 8 Ind. App. 50, 34 N. E. 107.

A contract given to save an estate harmless from liens cannot be enforced by the lienor in the absence of some stipulation beneficial to him which has been broken. *Young v. Schlosser*, 65 Ind. 225.

Where a county treasurer has taken out in his own name a contract of indemnity to secure himself against his personal liability as custodian of the county funds he is himself the real party in interest entitled to sue thereon and not the county, at least so long as there is no liability over by reason of the embezzlement by or insolvency of the treasurer. *Moulton v. McLean*, 5 Colo. App. 454, 39 Pac. 78.

Notes having been consolidated, a contract of indemnity between the maker and the indorsers of the original notes whereby they provide for their respective obligations as between them-

In an action upon a cause of action against which indemnity has been given, the indemnitor as such, cannot be joined as a defendant.⁵⁵ Nor can a defendant, sued upon a liability against which he has been indemnified, bring in as a party, the indemnitor.⁵⁶ But these rules do not prevent the rendering of judgment against the one of two wrongdoers who is primarily liable where plaintiff has joined both.⁵⁷

Nor does the fact that an indemnifying bond has been given by one joint tortfeasor to the other prevent their joinder in an action on the tort;⁵⁸ but this rule does not extend to an indemnitor who has contracted against damages resulting from negligence in the doing of acts not wrongful in themselves;⁵⁹ and those statutes which in general terms provide that one who indemnifies another against an act to be done by the latter is liable jointly with the person indemnified, are merely declaratory of the common law rule.⁶⁰

Where the liability of the contracting parties in an indemnity contract is several, the action on the contract may be against one party alone.⁶¹

2. Contracts Running to Joint Indemnitees.—Where an indemnity bond runs to joint obligees one cannot sue thereon without joining the others as plaintiffs in the absence of an allegation that he alone was injured by the breach;⁶² but where only one of joint indemnitees has in fact suffered any damage he may sue alone,⁶³ though it is proper

selves, cannot be enforced by an outside party who became a surety on the consolidated note. *Price v. Rodman*, 2 Ky. L. Rep. 213.

Where contractors have indemnified one for whom they are about to build against damages done to adjoining property, the owner of the adjoining property cannot sue on the contract of indemnity because not in privity thereto. *French v. Vix*, 143 N. Y. 90, 37 N. E. 612.

55. One whose land has been injured by a drainage ditch cannot in his suit against the county join persons who have contracted to indemnify the county for damages arising from the construction of the ditch. *Peterson v. Roberts County*, 31 S. D. 439, 141 N. W. 368.

56. A railroad sued for damages by abutting owners cannot bring in by cross-bill and make defendants in the suit, persons who have indemnified the railroad. *Frey v. Ft. Worth, etc. R. Co.*, 56 Tex. 465, 25 S. W. 609; *Texas Midland R. Co. v. Miers* (Tex. Civ. App.), 37 S. W. 640.

57. *City of Fort Worth v. Allen*, 10 Tex. Civ. App. 488, 31 S. W. 235. See also *Pope v. Hays*, 19 Tex. 375.

58. *Northam v. Casualty Co.*, 177 Fed. 981.

The sheriff and plaintiff in attachment may be sued as joint tortfeasors where the plaintiff gave the sheriff an indemnifying bond. **U. S.**—*Northam v. Casualty Co.*, 177 Fed. 981. **Cal.**—*Lewis v. Johns*, 34 Cal. 629. **N. Y.**—*Herring v. Hoppock*, 15 N. Y. 409.

59. Thus one cannot join the bonding company who has given an indemnity bond to protect a corporation from the result of negligence in operating. *Northam v. Casualty Co.*, 177 Fed. 981.

60. *Northam v. Casualty Co.*, 177 Fed. 981 (*construing* Mont. Rev. Civ. Code, §5653, and *distinguishing* *Moore v. Los Angeles Iron & Steel Co.*, 89 Fed. 73, which apparently construes otherwise); *Cal. Civ. Code*, §2777.

61. *Hall v. Thayer*, 12 Met. (Mass.) 130.

62. *Percival v. McCoy*, 13 Fed. 379.

In other words, when the plaintiff sues as beneficial obligee on a bond of indemnity he must allege that he had an interest in the performance of the duty and that the duty was imposed either for his sole benefit, or jointly for the benefit of himself and others. *Clark v. Nickell* (W. Va.), 79 S. E. 1020.

63. The indemnity ran to four co-sureties on a bond. One had died and the other two were insolvent. Plain-

in such a case to sue jointly, but to the use of the one damaged.⁶⁴

C. PLEADING. — 1. **Plaintiff's Pleading in Action on Contract.** Plaintiff's pleading in an action on a contract of indemnity must state the facts constituting his cause of action, in accordance with the rules elsewhere discussed.⁶⁵ It need not be alleged that the defendant received any benefit from the act which he requested the plaintiff to perform.⁶⁶

One suing on an indemnity given for going bail need not allege the authority to take the bail bond.⁶⁷

On a written contract of indemnity a consideration need not be pleaded in those jurisdictions where a written instrument imports a consideration.⁶⁸ The general rule is that the plaintiff must directly allege his damage.⁶⁹

2. **Plea or Answer in Action on Contract.** — Under the common law system of pleading *non damnificatus* is a good plea on a bond of indemnity.⁷⁰ The plea of "conditions performed" answers the same

tiff alone was damaged. *Cross v. Williams*, 72 Mo. 577.

64. Perhaps the suit could only be maintained as a joint suit. But however that may be there is no impropriety in stating the facts showing the damage as to one only and declaring the same use which the law would necessarily imply from those facts. *Mehaffy v. Lytle*, 1 Watts (Pa.) 314.

Where an indemnity to save harmless for becoming bail ran to two persons, one of whom refused to recognize, but the other became bail and suffered damage through the prisoner's absconding, action may be brought jointly by the indemnitees for the benefit of that one who was damaged. *Bird v. Washburn*, 10 Pick. (Mass.) 223.

65. See the titles "Assumpsit;" "Bonds;" "Declaration and Complaint;" "Implied and Express Agreements."

As against a general demurrer a petition by a surety suing one who has indemnified him for going on an official bond is sufficient which alleges the execution and delivery of the contract, the breach of the bond, the consequent damage to the surety and the fact that it has not been made whole by either the principal or the indemnitors. *American Bonding & T. Co. v. Burton*, 30 Ky. L. Rep. 703, 99 S. W. 654.

A complaint seeking reimbursement on a contract of indemnity for becoming guarantor on a bond conditioned against acts of dishonesty by defendant sufficiently sets out a cause of action by setting up the facts showing

a shortage was caused by defendant's fraud or dishonesty without any express and direct allegation that it was so caused. *Fidelity & Casualty Co. v. Fickhoff*, 63 Minn. 170, 65 N. W. 531, 56 Am. St. Rep. 464, 30 L. R. A. 586.

A contract indemnifying another against damage or expense from injuries occasioned by the use of machinery, is like a contract of insurance and the doctrines applied in actions for negligence have no further application than in determining whether a liability of the plaintiff to the persons injured is well pleaded. *Woodbury v. Post*, 158 Mass. 140, 33 N. E. 86.

So the right to recover upon a bond may by its terms depend not upon the presence or absence of negligence but upon whether the indemnitee has suffered a recovery. *Omaha Gas Co. v. City of South Omaha*, 71 Neb. 115, 98 N. W. 437.

66. *McCormick v. Boylan*, 83 Conn. 686, 78 Atl. 335, 1912 A. Ann. Cas. 882; *Carman v. Noble*, 9 Pa. 366.

67. *McCormick v. Boylan*, 83 Conn. 686, 78 Atl. 335, 1912 A. Ann. Cas. 882.

68. *Kenigsberg v. Reininger*, 159 Iowa 548, 141 N. W. 407.

69. *Taylor v. Com.*, 79 Wis. 76, 48 N. W. 123.

In assumpsit with a special count declaring on a promise to indemnify, plaintiff must directly allege that he has been damaged. *Farnsworth v. Nason*, *Brayt*. (Vt.) 192.

70. This distinction drawn by many cases must, however, be borne in mind.

purpose as the plea "*non damnificatus*."⁷¹

3. Pleadings in Action on Implied Indemnity.—In an action on an implied obligation to indemnify, plaintiff must allege facts showing there was no defense to the action or claim for which he is seeking indemnity.⁷²

In an action for indemnity brought by one who has paid damages for injuries which he claims were the result of defendant's negligence he must allege facts showing absolutely no negligence in himself.⁷³

The declaration must so state the former cause of action that the court can clearly see that the cause there stated is identical with the cause stated in the present declaration.⁷⁴

D. CONCLUSIVENESS OF JUDGMENT IN PRIOR SUIT.—**1. Where Opportunity To Defend Was Given.**—A judgment in a prior suit establishing the liability of the plaintiff in the suit on the indemnity is conclusive on the indemnitor where he had full opportunity to defend or participate in the defense, whether or not he appeared.⁷⁵

The plea of *non damnificatus* cannot be pleaded where the condition is to discharge or acquit the plaintiff from such a bond or other particular thing; for there the defendant must set forth affirmatively the special matter of performance. But it is otherwise where the condition is to discharge and acquit the plaintiff from any damage by reason of such bond or particular thing for that is in truth the same thing with a condition to indemnify and save harmless. *Cutler v. Southern*, 1 Saund. 116, note 1, 85 Eng. Reprint 125. See also: **N. Y.**—*Thomas v. Allen*, 1 Hill 145; *Port v. Jackson*, 17 Johns. 239, 479; *Douglas v. Clark*, 14 Johns. 177. **Pa.** *Bauer v. Roth*, 4 Rawle 83. **Vt.**—*Perry v. Ward*, 82 Vt. 1, 71 Atl. 721. **Va.** *Board of Supervisors v. Dunn*, 27 Gratt. 608; *Archer v. Archer's Adm.*, 8 Gratt. 539. **W. Va.**—*Polong v. Maddox*, 41 W. Va. 779, 24 S. E. 999; *State v. Hays*, 30 W. Va. 113, 3 S. E. 177.

But the plea of *non damnificatus* is no answer to a declaration which specifies the breaches in such a manner as to show damage. *Dime Savings Inst. v. American Surety Co.*, 68 N. J. L. 440, 53 Atl. 217.

71. *Board of Supervisors v. Dunn*, 27 Gratt. (Va.) 608; *Archer v. Archer's Adm.*, 8 Gratt. (Va.) 539; *Poling v. Maddox*, 41 W. Va. 779, 24 S. E. 999.

Nil debit is not a good plea. *Bauer v. Roth*, 4 Rawle (Pa.) 83. *Compare* 6 STANDARD PROC. 460 *et seq.*; 7 STANDARD PROC. 63.

72. Thus a town, suing one who had left an obstruction in the street un-

guarded whereby another was injured, should set out that it had notice, express or implied, of the existence of the nuisance. The town had compromised and paid the claim without notice to defendant. *Fabey v. Town of Harvard*, 62 Ill. 28.

And it must be alleged that the person injured was free from negligence contributing to his injury. *Catterlin v. City of Frankfort*, 79 Ind. 547, 41 Am. Rep. 627.

73. Since he may have been a joint tortfeasor and so not entitled to indemnity, to allege that the accident "was occasioned wholly by the negligence of the defendant" is not sufficient. *Cincinnati, etc. R. Co. v. Louisville, etc. R. Co.*, 97 Ky. 128, 30 S. W. 408.

74. *Littleton v. Richardson*, 34 N. H. 179, 66 Am. Dec. 759.

Defendant is entitled to judgment on the pleadings, where it is not alleged on what ground a general verdict in the prior case was based and from the pleadings and evidence in the prior case it appears that there was at least one ground on which the verdict might have been based, but on which defendant would not have been liable over. *City of Omaha v. Armour & Co.*, 196 Fed. 885, 116 C. C. A. 447.

75. U. S.—*Washington Gas Co. v. District of Columbia*, 161 U. S. 316, 16 Sup. Ct. 564, 40 L. ed. 712; *Burley v. Compagnie De Navigation Francaise*, 194 Fed. 335, 115 C. C. A. 194, *affirming* 183 Fed. 166; *Chicago City v. Robbins*, 2 Black (U. S.) 418, 17 L. ed. 298. Ind.

In such case all that the plaintiff is bound to show is that defendant is liable as being the cause of the liability,⁷³ provided plaintiff has exercised good faith in defending the prior suit.⁷⁷

The one claiming the indemnity cannot go back of the judgment against him to show that it was based upon a different state of facts from those found.⁷⁸

Issues Concluded. — The judgment in the prior suit is conclusive as against one notified to come in and defend, as to the right of plaintiff in that suit to recover, and as to all defenses which could have been set up or were set up and passed upon.⁷⁹ In other words, it is conclusive as to all matters in issue,⁸⁰ but is not conclusive as to matters not adjudicated.⁸¹

Catterlin v. City of Frankfort, 79 Ind. 547, 41 Am. Rep. 627. **Me.**—*Davis v. Smith*, 79 Me. 351, 10 Atl. 55; *Veazie v. Penobscot R. Co.*, 49 Me. 119. **Md.**—*Baltimore & Ohio R. Co. v. Howard County*, 111 Md. 176, 73 Atl. 656, 40 L. R. A. (N. S.) 1172. **Mich.**—*Grant v. Maslen*, 151 Mich. 466, 115 N. W. 472, 16 L. R. A. (N. S.) 910. **Minn.**—*Henderson v. Eckern*, 115 Minn. 410, 132 N. W. 715, 1912 D Ann. Cas. 989. **N. H.**—*Littleton v. Richardson*, 34 N. H. 179, 66 Am. Dec. 759. **N. Y.**—*Heiser v. Hatch*, 86 N. Y. 614; *Beers v. Pinney & Green*, 12 Wend. 309. See *Fulton County G. & E. Co. v. Hudson Riv. T. Co.*, 200 N. Y. 287, 93 N. E. 1052. **N. D.**—*City of Grand Forks v. Paulsness*, 19 N. D. 293, 123 N. W. 878, 40 L. R. A. (N. S.) 1158. **Ore.**—*City of Astoria v. Astoria, etc. R. Co.*, 67 Ore. 538, 136 Pac. 645. **Pa.**—*Fowler v. Jersey Shore Borough*, 17 Pa. Super. 366. **Vt.**—*Spencer v. Dearth*, 43 Vt. 98. **Wash.**—*Seattle v. Regan & Co.*, 52 Wash. 262, 100 Pac. 731, 132 Am. St. Rep. 963.

It follows that one who is notified of the previous action and is present at the trial thereof is concluded by the judgment thereon; *City of Harrodsburg v. Vanarsdall*, 148 Ky. 507, 147 S. W. 1.

One who has been called upon to come in and defend is bound by the judgment and cannot again litigate the question involved. *McDonald v. Village of Lockport*, 28 Ill. App. 157; *Village of Port Jervis v. First Nat. Bank*, 96 N. Y. 550.

One who indemnified the executors of an estate against loss of assets of the estate through paying an assessment on certain stock cannot when sued on his contract attack the validity of the sale of the stock in the

course of probate proceedings. *Halleck v. Noss*, 22 Cal. 266.

76. *McDonald v. Village of Lockport*, 28 Ill. App. 157.

77. *Seattle v. Regan & Co.*, 52 Wash. 262, 100 Pac. 731, 132 Am. St. Rep. 963.

78. That is to say, having been charged in an action of tort he cannot show his liability was based on some other theory and so escape the operation of the rule that a joint tortfeasor is not liable over. *Central of Georgia R. Co. v. Macon R., etc. Co.*, 9 Ga. App. 628, 71 S. E. 1076.

79. **Ga.**—*Byne v. City of Americus*, 6 Ga. App. 48, 64 S. E. 285; *McArthur v. Ogletree*, 4 Ga. App. 429, 61 S. E. 859. **N. H.**—*Boston & M. R. R. v. Sargent*, 72 N. H. 455, 57 Atl. 688; *Boston & M. R. R. v. Brackett*, 71 N. H. 494, 53 Atl. 304. **N. D.**—*City of Grand Forks v. Paulsness*, 19 N. D. 293, 123 N. W. 878, 40 L. R. A. (N. S.) 1158. **Pa.**—*Mehaffy v. Lytle*, 1 Watts. 314.

80. *City of Astoria v. Astoria, etc. R. Co.*, 67 Ore. 538, 136 Pac. 645. See also *Washington Gas Co. v. District of Columbia*, 161 U. S. 316, 16 Sup. Ct. 564, 40 L. ed. 712.

Where an indemnitor was notified of an action to foreclose a lien, took charge by attorney and conducted the action to its close, the judgment therein is final and conclusive as to the validity of the lien. *Great Northern R. Co. v. Akeley*, 88 Minn. 237, 92 N. W. 979.

81. **N. H.**—*Gregg v. Page B. Co.*, 60 N. H. 247, 46 Atl. 26. **N. Y.**—*Fulton County G. & E. Co. v. Hudson River T. Co.*, 200 N. Y. 287, 93 N. E. 1052. See also *Reynolds v. Alderman*, 114 N. Y. Supp. 463, affirming 103 N. Y. Supp. 863. **Pa.**—*Fowler v. Jersey Shore Borough*, 17 Pa. Super. 366.

If the liability over is not as broad as the original liability the plaintiff in the suit to recover over if he relies on the adjudication made in the former case, must show that the very ground of liability against the indemnitor was found to exist and was necessarily adjudicated in the original suit,⁸² and defendant may show that as a matter of fact he was not responsible for the condition which caused the original liability, where that question was not litigated.⁸³

One claimed to be responsible over may set up any defense which he could not have set up in the former action.⁸⁴

These rules do not, however, permit one to stay out of a case and at the same time dictate to his principal what defense shall be interposed.⁸⁵

Defendant is concluded as to facts found by the jury in the former suit.⁸⁶ The judgment in the prior suit is conclusive as to the cause of the injury and extent of the damage;⁸⁷ and is conclusive so far as the

Owners of a vessel against whom judgment for damages from collision was rendered sought to make the owners of a tug which had towed them to the place of collision liable over. Defendants were entitled in the latter suit to bring out whether their instructions were disobeyed by the crew of the vessel, whether the anchor dragged, etc. *Burley v. Compagnie De Navigation Francaise*, 194 Fed. 335, 115 C. C. A. 199, *affirming* 183 Fed. 166.

82. *B. Roth Tool Co. v. New Amsterdam Casualty Co.*, 161 Fed. 709, 88 C. C. A. 569.

After general verdict which might have been based on either one of several grounds, defendant is not bound by the judgment unless he would have been liable on every ground. *City of Omaha v. Armour & Co.*, 196 Fed. 885, 116 C. C. A. 447.

83. *N. H.*—*Boston & M. R. R. v. Sargent*, 72 N. H. 455, 57 Atl. 688. *N. Y.* *Fulton County G. & E. Co. v. Hudson River I. Co.*, 200 N. Y. 287, 93 N. E. 1052; *City of New York v. Lloyd*, 148 App. Div. 146, 133 N. Y. Supp. 118. *Tex.*—*Gulf, etc. R. Co. v. Galveston, etc. R. Co.*, 83 Tex. 509, 18 S. W. 956. *Wash.*—*Seattle v. Regan & Co.*, 52 Wash. 262, 100 Pac. 731, 132 Am. St. Rep. 963.

So one sued by a municipality to recover over on a judgment against it for injuries from an obstruction in the street may show he was under no obligation to keep the street in a safe condition and that it was not through his fault the accident happened. *City of Chicago v. Robbins*, 2 Black (U. S.)

418, 17 L. ed. 298. *Mich.*—See also: *City of Lansing v. Detroit, etc. R. Co.*, 129 Mich. 403, 89 N. W. 54. *N. D.*—*City of Grand Forks v. Paulsness*, 19 N. D. 293, 123 N. W. 878, 40 L. R. A. (N. S.) 1158. *Pa.*—*Fowler v. Jersey Shore Borough*, 17 Pa. Super. 366.

Compare *Washington Gas Co. v. District of Columbia*, 161 U. S. 316, 16 Sup. Ct. 564, 40 L. ed. 712.

84. *Grant v. Maslen*, 151 Mich. 466, 115 N. W. 472, 16 L. R. A. (N. S.) 910; *Fowler v. Jersey Shore Borough*, 17 Pa. Super. 366.

85. *Seattle v. Northern Pac. R. Co.*, 63 Wash. 129, 114 Pac. 1038; *Seattle v. Regan & Co.*, 52 Wash. 262, 100 Pac. 731, 132 Am. St. Rep. 963.

86. *Defective Condition of Highway.*—*Me.*—*City of Portland v. Richardson*, 54 Me. 46, 89 Am. Dec. 720. *N. Y.*—*Mayor, etc. v. Brady*, 151 N. Y. 611, 45 N. E. 1122. *Pa.*—*Fowler v. Jersey Shore Borough*, 17 Pa. Super. 366. *Wash.*—*Seattle v. Regan & Co.*, 52 Wash. 262, 100 Pac. 731, 132 Am. St. Rep. 963; *Seattle v. Saulez*, 47 Wash. 365, 92 Pac. 140.

Absence of Contributory Negligence. *Me.*—*City of Portland v. Richardson*, 54 Me. 46, 89 Am. Dec. 720. *N. Y.*—*Mayor, etc. v. Brady*, 151 N. Y. 611, 45 N. E. 1122. *Wash.*—*Seattle v. Regan & Co.*, 52 Wash. 262, 100 Pac. 731, 132 Am. St. Rep. 963; *Seattle v. Saulez*, 47 Wash. 365, 92 Pac. 140.

87. *Me.*—*Veazie v. Penobscot R. Co.*, 49 Me. 119. *Mich.*—*Grant v. Maslen*, 151 Mich. 466, 115 N. W. 472, 16 L. R. A. (N. S.) 910. *N. Y.*—*Fulton County G. & E. Co. v. Hudson River T. Co.*, 200

correctness of the judgment is concerned, but is not conclusive as to whether there was such a relationship between the parties as to create a right to indemnity,⁸⁸ unless the jury has found such facts as establish the primary liability.⁸⁹

Defendant may show that the contract of indemnity was forbidden by law as that it was to indemnify the doing of an act known to be criminal or contrary to good morals.⁹⁰

2. Where No Notice or Opportunity To Defend.—In actions against one claimed to be liable over, if he was not notified or had no opportunity to defend the prior suit, the judgment therein is not conclusive of the liability, but is at most only *prima facie* evidence thereof,⁹¹ and this rule has been enacted into the statutes in some jurisdictions.⁹²

Upon a covenant to indemnify against claims and suits the indemnitor without notice is made *prima facie* liable by judgment against the principal.⁹³

N. Y. 287, 93 N. E. 1052; *Mayor, etc. v. Brady*, 151 N. Y. 611, 45 N. E. 1122; *City of New York v. Lloyd*, 148 App. Div. 146, 133 N. Y. Supp. 118; *Mayor, etc. v. Troy, etc. R. Co.*, 49 N. Y. 657, *affirming* 3 Lans. 270. Pa.—*Fowler v. Jersey Shore Borough*, 17 Pa. Super. 366. Wash.—*Seattle v. Regan & Co.*, 52 Wash. 262, 100 Pac. 731, 132 Am. St. Rep. 963; *Seattle v. Saulez*, 47 Wash. 365, 92 Pac. 140.

In *Carman v. Noble*, 9 Pa. 366, it was urged that the judgment was not conclusive as to the amount of the damage until it had been paid. But the court says this is not so, for the indemnitee stands in jeopardy and can be compelled to pay the judgment and costs.

88. *Charleston, etc. R. Co. v. Union Warehouse & C. Co.*, 139 Ga. 20, 76 S. E. 360; *Central of Georgia R. Co. v. Macon R. & L. Co.*, 9 Ga. App. 628, 71 S. E. 1076; *McArthur v. Ogletree*, 4 Ga. App. 429, 61 S. E. 859.

The defendant may show that the case is one in which the law does not recognize any action over as that he and the plaintiff were joint tort feors. *McArthur v. Ogletree*, 4 Ga. App. 429, 61 S. E. 859.

89. *Commissioners, etc. v. Aetna Indemnity Co.*, 155 N. C. 219, 71 S. E. 214. See also *Gregg v. City of Wilmington*, 155 N. C. 18, 70 S. E. 1070.

Where an affirmative answer was given to a question which clearly establishes the existence of a fact on which the liability of defendant in the second

suit is based that matter cannot be again litigated. *Boston & M. R. R. v. Brackett*, 71 N. H. 494, 53 Atl. 394; *City of New York v. Corn*, 117 N. Y. Supp. 514.

90. *McArthur v. Ogletree*, 4 Ga. App. 429, 61 S. E. 859.

91. Idaho.—*City of Lewiston v. Isaman*, 19 Idaho 653, 115 Pac. 494. Ind.—*Catterlin v. City of Frankfort*, 79 Ind. 547, 41 Am. Rep. 627. Mass.—*Train v. Gold*, 5 Pick. 380. Mo.—*Stewart v. Thomas*, 45 Mo. 42. Pa.—*Lothrop v. Blake*, 3 Pa. 483. Vt.—*Lincoln v. Blanchard*, 17 Vt. 464. Wash.—*Seattle v. Saulez*, 47 Wash. 365, 92 Pac. 140.

See also *Fahey v. Town of Harvard*, 62 Ill. 28.

Where he endeavored to defend but had been refused permission to do so, he is not bound. *City of Lewiston v. Isaman*, 19 Idaho 653, 115 Pac. 494.

92. If the indemnitor has been requested to defend and neglects to do so the judgment is conclusive. If he has not been notified or is not allowed to control the defense the judgment is only presumptive evidence against him. See *City of Butte v. Cook*, 29 Mont. 88, 74 Pac. 67, *construing* Civ. Code, §1586. See also *Western Surety Co. v. Kelley*, 27 S. D. 465, 131 N. W. 808, *construing* Comp. Laws, §§1959, 1965, and holding they are applicable as well where one has indemnified bail in criminal proceedings as in civil or commercial transactions.

93. *Lucy v. Price*, 39 Iowa 26.

INDIANS

By the Editorial Staff.

I. JURISDICTION, 37

- A. *Of Federal Courts, 37*
 - 1. *Civil, 37*
 - a. *Over Tribes, 37*
 - b. *Over Individual Members, 37*
 - 2. *Criminal, 37*
- B. *Of Court of Claims, 39*
- C. *Of State Courts, 39*
 - 1. *Civil, 39*
 - a. *Over Tribes, 39*
 - b. *Over Individuals, 39*
 - 2. *Criminal, 39*
 - 3. *Probate, 41*
- D. *Of Territorial Courts, 41*
- E. *Of Tribal Courts, 41*

II. ACTIONS BY AND AGAINST TRIBES, 42

- A. *Generally, 42*
- B. *Actions For and on Behalf of the Tribe, 44*

III. ACTIONS BY AND AGAINST INDIVIDUAL INDIANS, 44

- A. *In Federal Courts, 44*
- B. *In State Courts, 45*
- C. *Actions For and on Behalf of Individual Indians, 46*
- D. *Allottees, 46*
- E. *Laches, 47*

IV. PARTIES, 47

V. PLEADINGS, 48

VI. JUDGMENT, 49

- A. *Generally, 49*

B. *Judicial Sales*, 49

C. *Exemptions*, 50

VII. NEW TRIAL, 50

VIII. SELLING OR FURNISHING LIQUOR, 50

I. JURISDICTION.—A. OF FEDERAL COURTS.—1. **Civil.**—a. *Over Tribes.*—The federal courts have no jurisdiction of actions by or against an Indian tribe, except it be given by specific congressional act.¹ In the Indian Territory, they formerly had jurisdiction of all actions affecting the rights of Indians, except those over which the tribal courts exercised exclusive jurisdiction.²

b. *Over Individual Members.*—Federal courts have jurisdiction of all cases where an Indian brings suit to enforce his claim to have land allotted to him;³ in all actions in which the ownership, use or possession of land allotted to an Indian is in issue;⁴ in any action for the recovery of personal property issued to an Indian by the United States;⁵ and in any action by an Indian involving his right of exemption from the provisions of a state statute.⁶ But they have only such jurisdiction as has been conferred by statute,⁷ and that is not given merely because an Indian, who is a ward of the government is a party, or his personal rights are involved.⁸

2. **Criminal.**—The federal courts have jurisdiction over all crimes committed by Indians within a reservation, where jurisdiction has not been reserved to the tribal courts, or vested in territorial or state courts.⁹ Jurisdiction has been conferred on them to try tribal Indians for the crimes of murder, manslaughter, rape, assault with intent to

1. *Elk v. Wilkins*, 112 U. S. 94, 103, 5 Sup. Ct. 41, 28 L. ed. 643; *Holden v. Joy*, 17 Wall. (U. S.) 211, 21 L. ed. 523; *Mackey v. Cox*, 18 How. (U. S.) 100, 15 L. ed. 299; *Worcester v. Georgia*, 6 Pet. (U. S.) 515, 8 L. ed. 483; *Cherokee Nation v. Georgia*, 5 Pet. (U. S.) 1, 8 L. ed. 25; *Adams v. Murphy*, 165 Fed. 304, 91 C. C. A. 272; *Brought v. Cherokee Nation*, 129 Fed. 192, 63 C. C. A. 350; *Hargrove v. Cherokee Nation*, 129 Fed. 186, 63 C. C. A. 276; *In re Celestine*, 114 Fed. 551; *Thebo v. Choctaw Tribe*, 66 Fed. 372, 13 C. C. A. 519; *Price v. Cherokee Nation*, 5 Ind. Ter. 518, 82 S. W. 893. See 31 St. at L. 760; 30 St. at L. 495; 28 St. at L. 305.

2. 26 St. at L. 93; *Davenport v. Buffington*, 97 Fed. 234, 38 C. C. A. 453; *Gulf, etc. R. Co. v. Washington*, 49 Fed. 347, 1 C. C. A. 286; *McCurtain v. Grady*, 1 Ind. Ter. 107, 38 S. W. 65.

As to jurisdiction of tribal courts, see *infra*, I, E.

3. *Reynolds v. United States*, 174 Fed. 212, 98 C. C. A. 220; *Smith v. United States*, 142 Fed. 225; *Parr v. United States*, 132 Fed. 1004; *Patawa v. United States*, 132 Fed. 893.

4. *McKay v. Kalyton*, 204 U. S. 458, 27 Sup. Ct. 346, 51 L. ed. 566; *Hy-Yu-Tse-Mil-Kin v. Smith*, 194 U. S. 401, 24 Sup. Ct. 676, 48 L. ed. 1039; *Parr v. United States*, 132 Fed. 1004; *Patawa v. United States*, 132 Fed. 893; *Sloan v. United States*, 95 Fed. 193.

5. *McKnight v. United States*, 130 Fed. 659, 65 C. C. A. 37.

6. *Y-Ta-Tah-Wah v. Rebock*, 105 Fed. 257.

7. *In re Celestine*, 114 Fed. 551.

8. *In re Celestine*, 114 Fed. 551.

9. U. S.—Rev. St. 1878, §§2145, 2146; 23 St. at L. 385; *Apapas v. United States*, 233 U. S. 587, 34 Sup. Ct. 704,

kill, arson, burglary and larceny,¹⁰ except when committed in a territory of the United States, wherein territorial courts have been established,¹¹ or within a state and outside of the limits of any Indian reservation.¹² Such courts have exclusive jurisdiction over all crimes committed on reservations, where the United States reserved jurisdiction under treaty with the tribe or by act of congress,¹³ and of all violations of treaty stipulations and federal statutes affecting the police regulations of Indian reservations.¹⁴ They also have exclusive jurisdiction over all crimes punishable by the laws of the United States, when committed on an Indian reservation in a territory by persons other than Indians.¹⁵

58 L. ed. 1104; *Nofire v. United States*, 164 U. S. 657, 17 Sup. Ct. 212, 41 L. ed. 588; *Lucas v. United States*, 163 U. S. 612, 16 Sup. Ct. 1168, 41 L. ed. 282; *Alberty v. United States*, 162 U. S. 499, 16 Sup. Ct. 864, 40 L. ed. 1051; *United States v. Thomas*, 151 U. S. 577, 14 Sup. Ct. 426, 38 L. ed. 276; *Smith v. United States*, 151 U. S. 50, 14 Sup. Ct. 234, 38 L. ed. 67; *In re Mayfield*, 141 U. S. 107, 11 Sup. Ct. 939, 35 L. ed. 635; *United States v. Kagama*, 118 U. S. 375, 6 Sup. Ct. 1109, 30 L. ed. 228; *Ex parte Crow Dog*, 109 U. S. 556, 3 Sup. Ct. 396, 27 L. ed. 1030; *United States v. McBratney*, 104 U. S. 621, 26 L. ed. 869; *United States v. Rogers*, 4 How. 567, 11 L. ed. 1105; *In re Lincoln*, 129 Fed. 247; *Peters v. Malin*, 111 Fed. 244; *In re Blackbird*, 109 Fed. 139; *United States v. Logan*, 105 Fed. 240; *United States v. King*, 81 Fed. 625; *United States v. Berry*, 4 Fed. 779. **Minn.**—*State v. Campbell*, 53 Minn. 354, 55 N. W. 553, 21 L. R. A. 169. **Neb.**—*Ex parte Cross*, 20 Neb. 417, 30 N. W. 428.

But see *State v. Foreman*, 8 Yerg. (Tenn.) 256; *State v. Harris*, 47 Wis. 298, 2 N. W. 543; *State v. Duxtater*, 47 Wis. 278, 2 N. W. 439.

As to jurisdiction of state courts, see *infra*, I, C, 2; of territorial courts, see *infra*, I, D; of tribal courts, see *infra*, I, E.

10. 23 St. at L. 385; *United States v. Logan*, 105 Fed. 240; *In re Wolf*, 27 Fed. 606.

11. **U. S.**—23 St. at L. 385; *United States v. Thomas*, 151 U. S. 577, 14 Sup. Ct. 426, 38 L. ed. 276; *United States v. Kagama*, 118 U. S. 375, 6 Sup. Ct. 1109, 30 L. ed. 228; *In re Lincoln*, 129 Fed. 247; *Peters v. Malin*, 111 Fed. 244; *In re Blackbird*, 109 Fed. 139; *United States v. Logan*, 105 Fed. 240;

United States v. King, 81 Fed. 625. **Minn.**—*State v. Campbell*, 53 Minn. 354, 55 N. W. 553, 21 L. R. A. 169. **Neb.**—*Ex parte Cross*, 20 Neb. 417, 30 N. W. 428.

12. **U. S.**—*United States v. Kiya*, 126 Fed. 879. **Colo.**—*Pablo v. People*, 23 Colo. 134, 46 Pac. 636, 37 L. R. A. 636. **Mont.**—*State v. Little Whirlwind*, 22 Mont. 425, 56 Pac. 820; *State v. Spotted Hawk*, 22 Mont. 33, 55 Pac. 1026. **N. C.**—*State v. Ta-Cha-Na-Tah*, 64 N. C. 614. **Wash.**—*State v. Williams*, 13 Wash. 335, 43 Pac. 15.

13. **U. S.**—*United States v. Logan*, 105 Fed. 240; *United States v. Partello*, 48 Fed. 670; *United States v. Bridleman*, 7 Fed. 894, 7 Sawy. 243. **Ind. Ter.**—*Bise v. United States*, 5 Ind. Ter. 602, 82 S. W. 921; *Oats v. United States*, 1 Ind. Ter. 152, 38 S. W. 673. **Okla.**—*In re Ingram*, 12 Okla. 54, 69 Pac. 868. **Ore.**—*State v. Columbia George*, 39 Ore. 127, 65 Pac. 604.

[a] The provision contained in an enabling act for the admission of a state into the union that all Indian lands within such state "shall remain under the absolute jurisdiction and control of the congress of the United States" does not amount to a reservation by the United States of jurisdiction over crimes committed on such lands by or against persons not Indians. *Draper v. United States*, 164 U. S. 240, 17 Sup. Ct. 107, 41 L. ed. 419.

14. *Wright v. United States*, 158 U. S. 232, 15 Sup. Ct. 819, 39 L. ed. 963; *Brought v. Cherokee Nation*, 129 Fed. 192, 63 C. C. A. 350; *Hargrove v. Cherokee Nation*, 129 Fed. 186, 63 C. C. A. 276.

15. **U. S.**—Rev. St., 1878, §2145; *Pickett v. United States*, 216 U. S. 456, 30 Sup. Ct. 265, 54 L. ed. 566; *Ex parte*

B. OF COURT OF CLAIMS.—The United States court of claims has jurisdiction of all claims against Indian tribes and the federal government arising out of Indian depredations upon property, taken or destroyed.¹⁵

C. OF STATE COURTS.—**1. Civil.**—**a. Over Tribes.**—The state courts have no jurisdiction over Indians in their tribal relations.¹⁷

b. Over Individuals.—State courts have civil jurisdiction generally of actions on contracts made with Indians,¹⁸ and of any action concerning Indian lands not subject to tribal government or federal restrictions, between an Indian and a white citizen,¹⁹ and between Indians.²⁰ They have the same jurisdiction of all actions by and against an Indian allottee under the general allotment act, prior to May 8, 1906, that they would have of actions by or against a white citizen,²¹ except actions affecting the ownership of lands held in trust by the United States for such Indian.²² They have jurisdiction of lands not under Indian government, but held by individual Indians as tenants in common;²³ and of all actions sounding in tort to which an Indian may be a party.²⁴

A state court has jurisdiction of property situated on an Indian reservation where such property belongs to a white man who lives on the reservation by tribal consent.²⁵

2. Criminal.—A state court has jurisdiction of crimes committed

Wilson, 140 U. S. 575, 11 Sup. Ct. 870, 35 L. ed. 513. **Dak.**—McCall v. United States, 1 Dak. 320, 46 N. W. 608. **Okl.** Welty v. United States, 14 Okla. 7, 76 Pac. 121; Herd v. United States, 13 Okla. 512, 75 Pac. 291; *In re Ingram*, 12 Okla. 54, 69 Pac. 868; Ellis v. United States, 11 Okla. 653, 69 Pac. 787; Barelay v. United States, 11 Okla. 503, 69 Pac. 798; Goodson v. United States, 7 Okla. 117, 54 Pac. 423.

16. Act of March 3, 1891, ch. 538; Swope v. United States, 33 Ct. Cl. 223; Tanner v. United States, 32 Ct. Cl. 192.

17. United States v. Kagama, 118 U. S. 375, 6 Sup. Ct. 1109, 30 L. ed. 228; New York Indians, 5 Wall. (U. S.) 761, 18 L. ed. 708; The Kansas Indians, 5 Wall. (U. S.) 737, 18 L. ed. 667; United States *ex rel* Davis v. Shanks, 15 Minn. 369.

18. Kan.—Ingraham v. Ward, 56 Kan. 550, 44 Pac. 14; Rubideaux v. Vallie, 12 Kan. 28; Swartzell v. Rogers, 3 Kan. 369; Jones v. Eisler, 3 Kan. 128. **Me.**—Murch v. Tomer, 21 Me. 535. **Wash.**—Gho v. Julles, 1 Wash. Ter. 325. **Wis.**—Stacy v. La Belle, 99 Wis. 520, 75 N. W. 60, 67 Am. St. Rep. 879, 41 L. R. A. 419.

19. Wright v. Marsh, 2 Greene (Iowa) 94; Telford v. Barney, 1 Greene

(Iowa) 575; Bem-Way-Bin-Ness v. Eshelby, 87 Minn. 108, 91 N. W. 291.

20. Kan.—Swartzell v. Rogers, 3 Kan. 369. **Nev.**—Lobdell v. Hall, 3 Nev. 507. **Wash.**—Bird v. Winyer, 24 Wash. 269, 64 Pac. 178.

[a] **Contempt.**—It has been held that a state court has jurisdiction in a contempt matter over an Indian who is a party to an action before such court, notwithstanding the fact that the court is without jurisdiction to try the action improperly before it, and a federal court is without jurisdiction to issue a writ of habeas corpus in behalf of the Indian thus imprisoned for contempt. *Ex parte Forbes*, 1 Dill. 363, 9 Fed. Cas. No. 4,921.

21. *In re Heff*, 197 U. S. 488, 25 Sup. Ct. 506, 49 L. ed. 848; *Wa-La-Note-Tke-Tynin v. Carter*, 6 Idaho 85, 53 Pac. 106.

22. McKay v. Kalyton, 204 U. S. 458, 27 Sup. Ct. 346, 51 L. ed. 566.

23. Telford v. Barney, 1 Greene (Iowa) 575.

24. Wiley v. Keokuk, 6 Kan. 94; Bates v. Printup, 31 Misc. 17, 64 N. Y. Supp. 561.

25. Stiff v. McLaughlin, 19 Mont. 300, 48 Pac. 232, and execution may be levied against it, notwithstanding a

by Indians within the state and outside of an Indian reservation,²⁶ as well as of crimes committed on an Indian reservation within the state by persons who are not Indians,²⁷ and of crimes committed by Indians,²⁸ where jurisdiction over such reservation, or of such crime, is not expressly reserved by the United States.²⁹ It also has jurisdiction of a crime committed by an Indian either within or outside of a reservation, where he has severed his tribal relations.³⁰

provision in the enabling act that all Indian lands in the state shall remain under the absolute control of the congress of the United States.

[a] The enabling act, §4, subd. 2, and the compact with the United States embraced in Const., 203, subd. 2, vest in the state (N. D.) all jurisdiction not expressly reserved in Congress over the territory embraced in the Ft. Berthold Indian reservation. *State ex rel. Baker v. Mountrail County*, 28 N. D. 389, 149 N. W. 120.

26. **U. S.**—*In re Wolf*, 27 Fed. 606; *United States v. Sa-Coo-da-Cot*, 1 Abb. 377, 1 Dill. 271, 27 Fed. Cas. No. 16, 212. **Cal.**—*People v. Turner*, 85 Cal. 432, 24 Pac. 857; *People v. Ketchum*, 73 Cal. 635, 15 Pac. 353. **Colo.**—*Pablo v. People*, 23 Colo. 134, 46 Pac. 636, 37 L. R. A. 636. **Kan.**—*Hunt v. State*, 4 Kan. 60. **Me.**—*State v. Newell*, 84 Me. 465, 24 Atl. 943. **Mont.**—*State v. Little Whirlwind*, 22 Mont. 425, 56 Pac. 820; *State v. Spotted Hawk*, 22 Mont. 33, 55 Pac. 1026. **N. C.**—*State v. Tach-Na-Tah*, 64 N. C. 614. **Wash.** *State v. Williams*, 13 Wash. 335, 43 Pac. 15.

But see *In re Captain Jack*, 130 U. S. 353, 9 Sup. Ct. 546, 32 L. ed. 976.

[a] The burden is on an Indian, accused of an offense against another Indian, to show that the offense was committed on a reservation, so as to give the federal courts exclusive jurisdiction, under the express terms of Act (Nev.), 1885 (Comp. Laws, §4655) and Act Cong. March 3, 1885, ch. 341 (23 St. at L. 385, §9), excepting cases where judicial notice will be taken of the existence of a lawfully established and defined Indian reservation.³ *State v. Buckaroo Jack*, 30 Nev. 325, 96 Pac. 497.

27. **U. S.**—*Draper v. United States*, 164 U. S. 240, 17 Sup. Ct. 107, 41 L. ed. 419; *United States v. McBratney*, 104 U. S. 621, 26 L. ed. 869; *United States v. Hadley*, 99 Fed. 437; *United*

States v. Ward, McCahon 199, 28 Fed. Cas. No. 16,639. **Ala.**—*Caldwell v. State*, 1 Stew. & P. 327. **Ga.**—*State v. Tassels*, Dud. 229. **Kan.**—*State v. O'Laughlin*, 29 Kan. 20; *McCracken v. Todd*, 1 Kan. 148. **Minn.**—*State v. Campbell*, 53 Minn. 354, 55 N. W. 553, 21 L. R. A. 169. **Neb.**—*Marion v. State*, 16 Neb. 349, 20 N. W. 289, 20 Neb. 233, 29 N. W. 911, 57 Am. Rep. 825; *Painter v. Ives*, 4 Neb. 122. **N. Y.**—*In re Peters*, 2 Johns. Cas. 344.

28. *Ex parte Sloan*, 4 Sawy. 330, 22 Fed. Cas. No. 12,944; *Painter v. Ives*, 4 Neb. 122.

29. *State ex rel. Baker v. Mountrail County*, 28 N. D. 389, 149 N. W. 120.

[a] **Rape.**—State courts alone have jurisdiction of rape committed by an Indian residing on allotted land within an Indian reservation. *United States v. Kiya*, 126 Fed. 879. See 29 St. at L. 487.

[b] **Stolen Property.**—It has been held that in the case of a theft committed in the Indian country and the stolen property carried into an adjoining state, the courts of such state will have jurisdiction of the person and the crime. *Clark v. State*, 27 Tex. App. 405, 11 S. W. 374.

30. **Cal.**—*People v. Turner*, 85 Cal. 432, 24 Pac. 857; *People v. Ketchum*, 73 Cal. 635, 15 Pac. 353. **N. Y.**—*Jackson v. Goodell*, 20 Johns. 188; *In re Peters*, 2 Johns. Cas. 344. **Wash.**—*State v. Smokalem*, 37 Wash. 91, 79 Pac. 603; *State v. Howard*, 33 Wash. 250, 74 Pac. 382; *State v. Williams*, 13 Wash. 335, 43 Pac. 15.

[a] Where lands have been allotted to Indians in severalty, as authorized by act of Congress, Feb. 8, 1887, ch. 119, 24 St. at L. 388, the Indians cease to be wards of the government, and become citizens of the United States and of the state in which they reside, and are therefore amenable to the criminal laws of the state and triable in the state, and not in the federal

3. Probate.—A state court has no jurisdiction to appoint an administrator for the estate of a tribal Indian, who was residing on a reservation at the time of his death.³¹ It may, however, appoint a legal guardian for minor Indian heirs owning lands in the state.³²

D. OF TERRITORIAL COURTS.—Territorial courts, being vested with the same jurisdiction as the United States district courts in all cases arising under the constitution and laws of the United States,³³ and possessing chancery as well as common law jurisdiction,³⁴ and such jurisdiction as the territorial legislatures may prescribe over all matters and causes, except those in which the United States is a party,³⁵ they usually have jurisdiction of all actions affecting Indians and their property which may be triable in either a federal or state court,³⁶ and of all criminal offenses of which such courts have jurisdiction.³⁷

E. OF TRIBAL COURTS.—Tribal courts were sometimes vested with exclusive jurisdiction of all civil actions between members of the tribe,³⁸ and of all prosecutions for crimes committed by one Indian against the person or property of another Indian in the Indian country.³⁹ Such jurisdiction extended to persons who had become

courts, unless the offense charged was committed within territory over which the United States has reserved the exclusive jurisdiction to its courts. *Ex parte Savage*, 158 Fed. 205.

31. *Y-Ta-Tah-Wah v. Rebock*, 105 Fed. 257; *United States ex rel. Davis v. Shanks*, 15 Minn. 369.

32. *Brashear v. Williams*, 10 Ala. 630; *Farrington v. Wilson*, 29 Wis. 383.

33. Rev. St. §1910; *The City of Panama*, 101 U. S. 453, 25 L. ed. 1061; *Reynolds v. United States*, 98 U. S. 154, 25 L. ed. 244; *Clinton v. Englebrecht*, 13 Wall. (U. S.) 434, 20 L. ed. 659; *Johnson v. United States*, 6 Utah 403, 24 Pac. 256, 677.

As to United States courts generally, see the title "**United States Courts.**"

34. U. S.—Rev. St., §1868. *Ariz. Carroll v. Byers*, 4 Ariz. 158, 36 Pac. 499. *Utah*.—*Brereton v. Miller*, 7 Utah 426, 27 Pac. 81.

35. U. S.—§1874, Rev. St. *Dak. Murphy v. Murphy*, 4 Dak. 107, 25 N. W. 806. *N. M.*—*Lincoln-Lucky & Lee Min. Co. v. District Court*, 7 N. M. 486, 38 Pac. 580. *Okla.*—*Robinson v. Peru Plow & W. Co.*, 1 Okla. 140, 31 Pac. 988.

36. *In re Gon-Shay-ee*, 130 U. S. 343, 9 Sup. Ct. 542, 32 L. ed. 973; *Ex parte Crow Dog*, 109 U. S. 556, 3 Sup. Ct. 396, 27 L. ed. 1030; *Young v. United States*, 176 Fed. 612.

37. 23 St. at L. 385; *In re Wilson*, 140 U. S. 575, 11 Sup. Ct. 870, 35 L. ed. 513; *In re Captain Jack*, 130 U. S. 353, 9 Sup. Ct. 546, 32 L. ed. 976; *In re Gon-shay-ee*, 130 U. S. 343, 9 Sup. Ct. 542, 32 L. ed. 973; *Brown v. United States*, 146 Fed. 975, 77 C. C. A. 173. *affirming Herd v. United States*, 13 Okla. 512, 75 Pac. 291; *In re Ingram*, 12 Okla. 54, 69 Pac. 868; *Goodson v. United States*, 7 Okla. 117, 54 Pac. 423.

38. *Raymond v. Raymond*, 83 Fed. 721, 28 C. C. A. 38; *Crowell v. Young*, 4 Ind. Ter. 148, 69 S. W. 829; *Boudinot v. Boudinot*, 2 Ind. Ter. 107, 48 S. W. 1019.

39. 26 St. at L. 96; 25 St. at L. 784; *Nofire v. United States*, 164 U. S. 657, 17 Sup. Ct. 212, 41 L. ed. 588; *Talton v. Mayes*, 163 U. S. 376, 16 Sup. Ct. 986, 41 L. ed. 196; *Alberty v. United States*, 162 U. S. 499, 16 Sup. Ct. 864, 40 L. ed. 1051; *Smith v. United States*, 151 U. S. 50, 14 Sup. Ct. 234, 38 L. ed. 67; *In re Mayfield*, 141 U. S. 107, 11 Sup. Ct. 939, 35 L. ed. 635; *United States v. Barnaby*, 51 Fed. 20; *Ex parte Tiger*, 2 Ind. Ter. 41, 47 S. W. 304.

[a] Prior to the act of Congress of March 3, 1885, courts of the Indian tribes had exclusive jurisdiction over crimes committed by Indians against Indians on an Indian reservation within a state. *United States v. Kagama*,

members of the tribe by adoption, whether of Indian blood or otherwise.⁴⁰ When acquired, it could not be defeated by the subsequent naturalization of the Indian as a citizen of the United States.⁴¹ Such courts had sole jurisdiction of the construction of the tribal laws,⁴² and in the Indian Territory had exclusive jurisdiction of all probate matters.⁴³

Controversies arising between members of one of the five civilized tribes were triable in the tribal court of such tribe,⁴⁴ unless the issues of the case involved the question of ownership of an allotment of land.⁴⁵

Tribal courts are regarded as of similar nature to territorial courts, and their judgments are on the same footing and entitled to the same faith and credit as judgments of territorial courts of the United States,⁴⁶ and cannot be impeached collaterally, except as in the case of a judgment coming from another state or foreign country, the want of jurisdiction may be shown against it.⁴⁷

II. ACTIONS BY AND AGAINST TRIBES. — A. GENERALLY.
An Indian tribe⁴⁸ cannot sue or be sued in a federal or state court,

118 U. S. 375, 6 Sup. Ct. 1109, 30 L. ed. 228; *Ex parte Crow Dog*, 109 U. S. 556, 3 Sup. Ct. 396, 27 L. ed. 1030.

40. *Nofire v. United States*, 164 U. S. 657, 17 Sup. Ct. 212, 41 L. ed. 588; *Alberty v. United States*, 162 U. S. 499, 16 Sup. Ct. 864, 40 L. ed. 1051; *Raymond v. Raymond*, 83 Fed. 721, 28 C. C. A. 38.

41. *Ex parte Kyle*, 67 Fed. 306.

[a] The jurisdiction of a tribal court likewise extended to a citizen of the United States where he entered a general appearance to an action pending in a tribal court, and filed a plea to the merits, and there was a trial upon the plea, as he thereby waived his exemption and submitted to the jurisdiction of the court. *Mehlin v. Lee*, 56 Fed. 12, 5 C. C. A. 403.

42. *Talton v. Mayes*, 163 U. S. 376, 16 Sup. Ct. 986, 41 L. ed. 196.

43. *Hayes v. Barringer*, 7 Ind. Ter. 697, 104 S. W. 937.

[a] The five civilized tribes (Cherokee, Creek, Choctaw, Chickasaw and Seminole), of the Indian Territory, had their own judicial tribunals, which had exclusive jurisdiction in all civil and criminal cases arising in the country in which members of the tribe, by nativity or by adoption, were the only parties; and in all such cases the adjudication was according to the laws of the tribe to which the tribunal belonged. These tribal courts were

abolished October 1, 1898, by act of Congress. 30 St. at L. 504.

44. 25 St. at L. 784; *Davenport v. Buffington*, 97 Fed. 234, 38 C. C. A. 453.

45. 28 St. at L. 305.

46. *Standley v. Roberts*, 59 Fed. 836, 8 C. C. A. 305; *Mehlin v. Lee*, 56 Fed. 12, 5 C. C. A. 403.

[a] A judgment of a tribal court, wherein the question of ownership of land between two members of the tribe has been determined, is *res judicata* as to such litigants, their alienees, assignees and agents. *Holford v. James*, 4 Ind. Ter. 632, 76 S. W. 261, *affirmed*, 136 Fed. 553, 69 C. C. A. 263.

47. *Raymond v. Raymond*, 1 Ind. Ter. 334, 37 S. W. 202.

[a] Some tribes have no judicial organization. Some have had the jurisdiction of their courts limited by state statute, notably the tribes living in New York, whose courts have no criminal jurisdiction; and the peacemakers court of the Senecas is limited to one hundred dollars. *N. Y. Laws* (1847), ch. 365, §8; *Jackson v. Goodell*, 20 Johns. (N. Y.) 188; *Jimeson v. Pierce*, 102 App. Div. 618, 92 N. Y. Supp. 331.

48. The term "Indians" as employed herein implies the original inhabitants of the continent of North America and their descendants.

[a] The word "tribe" as used in this article includes the terms *nation*,

except by authority of statute conferring such right.⁴⁹ And where such grant of authority is extended, its exercise is limited to the causes either enumerated in the statutory grant or clearly contemplated in the scope of its provisions.⁵⁰

Some tribes have been authorized by act of congress to sue for the recovery of the possession of land wrongfully held by one claiming to be a member of the tribe⁵¹ and recover damages for such wrongful detention,⁵² and to maintain any action necessary for the preservation of the tribal property.⁵³

A portion of a tribe cannot maintain an action at law in the name of the tribe,⁵⁴ nor can individual members bring such action in the name of the tribe,⁵⁵ in the absence of express provision of statute

tribe and *band*, where such *band* has received governmental recognition as maintaining separate community existence and interests from those of the tribe from which such band has separated.

[b] **Nation, Tribe and Band Defined.**—*Nation*.—A large tribe or group of affiliated tribes possessing a common government, language or racial origin, and acting for the time being, in concert.

Tribe.—A body of Indians of the same or similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory.

Band.—A company of Indians not necessarily, though usually of the same race or tribe, but united under the same leadership in a common design. While a "band" does not imply the separate racial origin characteristic of a tribe, of which it is usually an offshoot, it does imply a leadership and a concert of action. *Montoya v. United States*, 180 U. S. 261, 21 Sup. Ct. 358, 45 L. ed. 521.

49. **U. S.**—*Thebo v. Choctaw*, 66 Fed. 372, 13 C. C. A. 519. **Ind. Ter.** *Engleman v. Cable*, 4 Ind. Ter. 336, 69 S. W. 894. **N. Y.**—*Seneca Nation v. Christie*, 126 N. Y. 122, 27 N. E. 275; *Seneca Nation v. Tyler*, 14 How. Pr. 109; *Strong v. Waterman*, 11 Paige 607; *Seneca Nation v. Hammond*, 3 Thomp. & C. 347; *Jackson v. Reynolds*, 14 Johns. 335; *Montauk v. Long Island R. Co.*, 28 App. Div. 470, 51 N. Y. Supp. 142; *Jemmison v. Kennedy*, 55 Hun 47, 7 N. Y. Supp. 296; *Crouse v. New York, etc. R. Co.*, 49 Hun 576, 2 N. Y. Supp. 453; *Onondaga Nation v. Thacher*, 29 Misc. 428, 61 N. Y. Supp. 1027 (*af-*

firmed, 53 App. Div. 561, 65 N. Y. Supp. 1014, *affirmed*, 169 N. Y. 584, 62 N. E. 1098); *Seneca Nation v. John*, 16 N. Y. Supp. 40. **R. I.**—*In re Narragansett Indians*, 20 R. I. 715, 40 Atl. 347.

50. *Adams v. Murphy*, 165 Fed. 304, 91 C. C. A. 272; *The St. Regis Indians v. Drum*, 19 Johns. (N. Y.) 127; *Seneca Nation v. John*, 16 N. Y. Supp. 40.

51. 30 St. at L. 495; *Hargrove v. Cherokee Nation*, 129 Fed. 186, 63 C. C. A. 276.

52. *Brought v. Cherokee Nation*, 129 Fed. 192, 63 C. C. A. 350; *Hargrove v. Cherokee Nation*, 129 Fed. 186, 63 C. C. A. 276.

53. 30 St. at L. 495; *Price v. Cherokee Nation*, 5 Ind. Ter. 518, 82 S. W. 893.

54. *Cayuga Indians v. State*, 99 N. Y. 235, 1 N. E. 770; *People v. Land Office Comrs.*, 99 N. Y. 648, 1 N. E. 764.

55. *Cherokee Trust Funds*, 117 U. S. 288, 6 Sup. Ct. 718, 29 L. ed. 880; *Elk v. Wilkins*, 112 U. S. 94, 5 Sup. Ct. 41, 28 L. ed. 643; *Johnson v. Long Island R. Co.*, 162 N. Y. 462, 56 N. E. 992; *Seneca Nation v. Christie*, 126 N. Y. 122, 27 N. E. 275; *Onondaga Nation v. Thacher*, 29 Misc. 428, 61 N. Y. Supp. 1027, *affirmed*, 53 App. Div. 561, 65 N. Y. Supp. 1014, *affirmed*, 169 N. Y. 584, 62 N. E. 1098.

[a] In the absence of express statutory authority, no action will lie in the name of any tribe of Indians, or in the name of any member of such tribe, in behalf of himself and all others similarly situated. *Pharaoh v. Benson*, 146 App. Div. 51, 149 N. Y. Supp. 438.

[b] But individual Indians who

therefor.⁵⁶ But it has been held that under certain circumstances a member of the tribe may sue in equity on behalf of the tribe.⁵⁷

A tribe which has been authorized by state statute to sue and be sued in a state court, may maintain a suit for injunction to restrain the usurpation of official authority over the tribal offices.⁵⁸ Some tribes have been authorized to sue and be sued in a state court only by and through their attorneys, commissioned for that purpose.⁵⁹

B. ACTIONS FOR AND ON BEHALF OF THE TRIBE. — The government of the United States may, as guardian, maintain an action in behalf of any tribe of Indians residing within its boundaries.⁶⁰ A member of any one of the five civilized tribes was authorized to bring an action in the federal court in behalf of the tribe for the preservation of the tribal property, in case the chief of the tribe failed or refused to do so.⁶¹

III. ACTIONS BY AND AGAINST INDIVIDUAL INDIANS.

A. IN FEDERAL COURTS. — A tribal Indian, not being a citizen of the United States or of the state in which he resides, nor a citizen or subject of a foreign nation, has no right to maintain an action in a federal court,⁶² unless authorized by statute to do so.⁶³

were authorized by the tribe to act as custodians of a tribal fund may sue on behalf of the tribe for the conversion of such fund. *Ain-Dus O-Kee Shig v. Beaulieu*, 98 Minn. 98, 107 N. W. 820.

56. 30 St. at L. 495; *Price v. Cherokee Nation*, 5 Ind. Ter. 518, 82 S. W. 893.

57. **Bill in Equity.**—Where a tribe has no right to sustain an action at law, in the name of the tribe, a bill may be filed in a court of chancery by one or more members of such tribe, in behalf of themselves and the other members interested, to protect their rights and to obtain compensation for the damages sustained by the numerous persons composing the tribe by reason of trespass upon their tribal lands. *Strong v. Waterman*, 11 Paige (N. Y.) 607.

58. *Seneca Nation v. John*, 16 N. Y. Supp. 40.

[a] The Seneca Nation of Indians, in New York, are authorized by act of the legislature to maintain actions in the state courts for the enforcement and protection of their tribal rights. *Seneca Nation v. Tyler*, 14 How. Pr. (N. Y.) 109.

59. *Jackson v. Reynolds*, 14 Johns. (N. Y.) 335.

[a] While a tribe of Indians may not sue or be sued in the absence of

express statutory authority, conferring such right, such tribe is not without remedy, as application to the legislature would secure authority to maintain any action necessary, upon a proper showing as to its necessity. *Johnson v. Long Island R. Co.*, 162 N. Y. 462, 56 N. E. 992.

60. *United States v. Winans*, 73 Fed. 72; *United States v. Boyd*, 68 Fed. 577.

[a] The United States may enjoin the collection of taxes imposed by local authorities on the lands of allottees in violation of the trust agreement. *United States v. Chehalis County*, 217 Fed. 281.

[b] The federal government may also maintain a suit in equity to cancel conveyances constituting a cloud on the title of purchasers of lots in a town site on Indian lands. *United States v. Dowden*, 194 Fed. 475.

61. 30 St. at L. 495; *Gowen v. Harley*, 56 Fed. 973, 6 C. C. A. 190; *Price v. Cherokee Nation*, 5 Ind. Ter. 518, 82 S. W. 893; *Forsythe v. United States*, 3 Ind. Ter. 599, 64 S. W. 548.

62. *Felix v. Patriek*, 145 U. S. 317, 12 Sup. Ct. 862, 36 L. ed. 719; *Paul v. Chilsoquie*, 70 Fed. 401; *Karrahoo v. Adams*, 1 Dill. 344, 14 Fed. Cas. No. 7,614.

63. *Southern Kansas R. Co. v. Briscoe*, 144 U. S. 133, 12 Sup. Ct. 538, 56

By act of congress an Indian may sue and be sued in a federal court in any matter affecting his ownership, use or possession of any land allotted to him,⁶⁴ and he may bring an action in the district court of the United States to enforce his right to have land allotted to him, where such right has been denied.⁶⁵ He has been authorized to bring an action in ejectment in the federal courts under certain circumstances,⁶⁶ and he may recover possession of land held by a non-citizen of the tribe by an action in unlawful detainer.⁶⁷ He may also sue in the federal courts for the recovery of damages for arrest on a charge of violating a state statute.⁶⁸ But he cannot maintain an action to compel the public representative or agent of the Indian tribe to pay a debt which he claims against his tribe.⁶⁹

B. IN STATE COURTS.—A tribal Indian may sue and be sued in a state court in any cause of action⁷⁰ which does not involve a question of ownership, use or possession of any land held in trust by the United States for any party to such action,⁷¹ except for the redress of any wrong committed against his person or property while actually on a reserve excluded from the jurisdiction of the state.⁷² He may sue in a state court for the diversion of water which he has been using on the public domain,⁷³ and may assign his right of action to a white citizen.⁷⁴

An Indian may maintain an action of trespass in such court,⁷⁵ and an action in ejectment,⁷⁶ and he may sue and be sued on any contract not prohibited by federal statute.⁷⁷ An Indian may maintain an

L. ed. 377, *affirming* 40 Fed. 273; *Brought v. Cherokee Nation*, 129 Fed. 192, 63 C. C. A. 350; *Hargrove v. Cherokee Nation*, 129 Fed. 186, 63 C. C. A. 276; *Gowen v. Harley*, 56 Fed. 973, 6 C. C. A. 190.

64. 31 St. at L. 760; 28 St. at L. 305; *McKay v. Kalyton*, 204 U. S. 458, 27 Sup. Ct. 346, 51 L. ed. 566; *Hy-Yu-Tse-Mil-Kin v. Smith*, 194 U. S. 401, 24 Sup. Ct. 676, 48 L. ed. 1039; *Parr v. United States*, 132 Fed. 1004; *Patawa v. United States*, 132 Fed. 893; *Sloan v. United States*, 95 Fed. 193.

65. 36 St. at L. 1091, and amendatory act, ch. 5, vol. 37, pt. 1, Pub. Laws; *Hy-Yu-Tse-Mil-Kin v. Smith*, 119 Fed. 114, 55 C. C. A. 216, *affirmed*, 194 U. S. 401, 24 Sup. Ct. 676, 48 L. ed. 1039.

66. *Gooding v. Watkins*, 5 Ind. Ter. 578, 82 S. W. 913; *Price v. Cherokee Nation*, 5 Ind. Ter. 518, 82 S. W. 893.

67. *Fraer v. Washington*, 4 Ind. Ter. 165, 69 S. W. 835.

68. *Y-Ta-Tah-Wah v. Rebock*, 105 Fed. 257.

69. *Parks v. Ross*, 11 How. (U. S.) 362, 13 L. ed. 730.

70. U. S.—*Felix v. Patrick*, 36 Fed. 457. Kan.—*Ingraham v. Ward*, 56 Kan. 550, 44 Pac. 14; *Wiley v. Keokuk*, 6 Kan. 94; *Jones v. Eisler*, 3 Kan. 128. Me.—*Murch v. Tomer*, 21 Me. 535. Mo.—*Whirlwind v. Von der Ahe*, 67 Mo. App. 628.

71. *Langford v. Monteith*, 102 U. S. 145, 26 L. ed. 53; *Harkness v. Hyde*, 98 U. S. 476, 25 L. ed. 237; *Bates v. Clark*, 95 U. S. 204, 24 L. ed. 471.

72. U. S.—*Y-Ta-Tah-Wah v. Rebock*, 105 Fed. 257; *Felix v. Patrick*, 36 Fed. 457. Kan.—*Rubideaux v. Vallie*, 12

Kan. 28. Minn.—*Bem-Way-Bin-Ness v. Eshelby*, 87 Minn. 108, 91 N. W. 291.

73. *Loddell v. Hall*, 3 Nev. 507.

74. *Missouri Pac. R. Co. v. Cullers*, 81 Tex. 382, 17 S. W. 19, 13 L. R. A. 542.

75. *Smith v. Mosgrove*, 51 Ore. 495, 94 Pac. 970.

76. *Gooding v. Watkins*, 5 Ind. Ter. 578, 82 S. W. 913; *Price v. Cherokee Nation*, 5 Ind. Ter. 518, 82 S. W. 893; *Coleman v. Doe*, 4 Smed. & M. (Miss.) 40.

77. Ind.—*Daugherty v. Bogy*, 3 Ind. Ter. 197, 53 S. W. 542. Me.—*Murch*

action in a state court for damages for false imprisonment.⁷⁸

It has been held that an Indian may maintain a suit for the enforcement of a decree of a tribal court.⁷⁹ An Indian cannot maintain an action to enforce the operation of a treaty made with his tribe.⁸⁰ In some instances authority to sue in a state court has been expressly conferred by legislative act.⁸¹

C. ACTIONS FOR AND ON BEHALF OF INDIVIDUAL INDIANS. — The United States may, as guardian, bring an action in a federal court in behalf of an Indian for the recovery of personal property which has been issued to him by federal authority,⁸² and may maintain an action in ejectment against a third person who has ousted Indian allottees from the possession of land allotted to them under tribal agreement and congressional act.⁸³

The United States may also maintain an action to set aside a conveyance of Indian land made in violation of the restrictions imposed on the same by congress,⁸⁴ or to cancel a lease of land made for a longer period than that authorized by congress,⁸⁵ and may maintain a suit to enjoin the collection of taxes imposed by local authorities on the lands of Indian allottees in violation of the trust agreement.⁸⁶

D. ALLOTTEES. — An Indian to whom land was allotted in severalty by the government of the United States prior to May 8, 1906,⁸⁷ under the general allotment act of February 8, 1887,⁸⁸ became by virtue thereof a citizen of the United States, and "entitled to all the rights, privileges and immunities of such,"⁸⁹ and a citizen of the state or territory in which he resided, and could sue and be sued in all respects as a white citizen,⁹⁰ except as to matters affecting his owner-

v. Tomer, 21 Me. 535. **N. Y.**—*Hastings v. Farmer*, 4 N. Y. 293; *Jackson v. King*, 18 Johns. 506; *Dana v. Dana*, 14 Johns. 181; *Singer Mfg. Co. v. Hill*, 60 Hun 347, 15 N. Y. Supp. 27. **R. I.** *Stokes v. Rodman*, 5 R. I. 405. **Can.** *Bryce v. Salt*, 11 Ont. Pr. 112; *McKinnon v. Van Every*, 5 Ont. Pr. 284.

78. *Wiley v. Keokuk*, 6 Kan. 94.

79. *Jameson v. Pierce*, 102 App. Div. 618, 92 N. Y. Supp. 331.

80. *Cayuga Indians v. State*, 99 N. Y. 235, 1 N. E. 770.

81. *Laws of N. Y.* (1847), §14, ch. 365; *Jemison v. Kennedy*, 55 Hun 47, 7 N. Y. Supp. 296.

[a] **In New York, Indians are held to be wards of the state, and, generally speaking, are possessed of only such rights to appear and litigate in courts of justice as are conferred upon them by statute.** *Terrence v. Gray*, 151 N. Y. Supp. 136.

82. *McKnight v. United States*, 130 Fed. 659, 65 C. C. A. 37.

83. *United States v. Moore*, 161 Fed. 513, 88 C. C. A. 455.

84. *United States v. Aaron*, 183 Fed. 347; *United States v. Bellm*, 182 Fed. 161.

85. *United States v. Abrams*, 181 Fed. 847, *affirmed*, *United States v. Noble*, 197 Fed. 292, 116 C. C. A. 654.

86. *United States v. Chehalis County*, 217 Fed. 281.

87. Act of Congress, May 8, 1906, amended the General Allotment Act of February 8, 1887, so as to withhold citizenship from the allottee until issuance of the fee simple patent, and hold him "subject to the conclusive jurisdiction of the United States" during the interim. 34 St. at L., ch. 2348, pt. 1.

88. 24 St. at L. 388.

89. 24 St. at L. 388; *In re Heff*, 197 U. S. 488, 25 Sup. Ct. 506, 49 L. ed. 848; *Boyd v. Nebraska*, 143 U. S. 135, 162, 12 Sup. Ct. 375, 36 L. ed. 103.

90. **U. S.**—*In re Heff*, 197 U. S. 488, 25 Sup. Ct. 506, 49 L. ed. 848; *Farrell v. United States*, 110 Fed. 942, 49 C. C. A. 183; *United States v. Rickert*,

ship, use or possession of any allotment of land held in trust for him by the United States.⁹¹

Remedy for Denial of Right — When any person of Indian blood has been unlawfully excluded from, or denied the right of, an allotment of land, he may bring suit therefor in the federal district court,⁹² and the favorable judgment of such court is conclusive as to the allowance of the allotment.⁹³

E. LACHES. — A tribal Indian may be charged with laches,⁹⁴ but due consideration must be given to the degree of education and knowledge of business affairs possessed by him in determining the question of laches.⁹⁵

Laches will not run against the United States in an action instituted for the protection of Indian wards.⁹⁶

IV. PARTIES. — An Indian tribe is a necessary party to an action against the United States where any members of such tribe are charged with the commission of a depredation,⁹⁷ but in case the tribe is not known, the action may be prosecuted against the United States alone,⁹⁸ unless it appears that the Indians committing the depredations are not members of any organized tribe or band of Indians, in which event there is no liability.⁹⁹

106 Fed. 1; *In re Celestine*, 114 Fed. 551. **Idaho.**—*Wa-La-Note-Tke-Tynin v. Carter*, 6 Idaho 85, 53 Pac. 106. **Kan.** *In re Now-ge-Zhuck*, 69 Kan. 410, 76 Pac. 877. **Neb.**—*State ex rel. Crawford v. Norris*, 37 Neb. 299, 55 N. W. 1086. **N. D.**—*State v. Denoyer*, 6 N. D. 586, 72 N. W. 1014.

91. *In re Heff*, 197 U. S. 488, 25 Sup. Ct. 506, 49 L. ed. 848; *Langford v. Monteith*, 102 U. S. 145, 26 L. ed. 153; *Harkness v. Hyde*, 98 U. S. 476, 25 L. ed. 237; *Bates v. Clark*, 95 U. S. 204, 24 L. ed. 471; *United States v. Rickert*, 106 Fed. 1.

92. 28 St. at L. 305; *Hy-Yu-Tse-Mil-Kin v. Smith*, 119 Fed. 114, 55 C. C. A. 216, *affirmed*, 194 U. S. 401, 24 Sup. Ct. 676, 48 L. ed. 1039.

93. *Smith v. Hy-Yu-Tse-Mil-Kin*, 110 Fed. 60; *Sloan v. United States*, 95 Fed. 193.

94. **Kan.**—*Pope v. Falk*, 66 Kan. 793, 72 Pac. 246. **Miss.**—*New Orleans, J. & G. R. Co. v. Moye*, 39 Miss. 374. **N. Y.**—*Seneca Nation v. Christie*, 126 N. Y. 122, 27 N. E. 275.

95. **U. S.**—*Felix v. Patrick*, 145 U. S. 317, 12 Sup. Ct. 862, 36 L. ed. 719, *disapproving* *Laughton v. Nadeau*, 75 Fed. 789. **Kan.**—*Dunbar v. Green*, 66 Kan. 557, 72 Pac. 243. **N. D.**—*State ex rel. Baker v. Mountrail*, 28 N. D. 389, 149 N. W. 120.

[a] Where civilized Indians are en-

titled to participate in a per capita distribution of a tribal fund, of which they had constructive notice, and ample time afforded them to ascertain whether their names are on the pay-roll, and they neglect to have their names placed on such pay-roll, or claim their portion of such fund, until it has been paid out to those whose names appear on such pay-roll, they are without remedy in the courts to require a second payment of the portion which had been due them. *Pam-To-Pee v. United States*, 36 Ct. Cl. 427, *affirmed*, 187 U. S. 371, 23 Sup. Ct. 142, 47 L. ed. 221.

96. *United States v. Chehalis County*, 217 Fed. 281.

97. 26 St. at L. 851; *United States v. Martinez*, 195 U. S. 469, 25 Sup. Ct. 80, 49 L. ed. 282; *Pino v. United States*, 38 Ct. Cl. 64; *Lowe v. United States*, 37 Ct. Cl. 413; *Dobbs v. United States*, 33 Ct. Cl. 308; *Woolverton v. United States*, 29 Ct. Cl. 107.

[a] **Service of the petition upon the attorney general of the United States** is sufficient to bring the defendant Indians into court. *Jaeger v. United States*, 27 Ct. Cl. 278.

98. *Gorham v. United States*, 29 Ct. Cl. 97, *affirmed*. 165 U. S. 316, 17 Sup. Ct. 382, 41 L. ed. 729.

99. *Bell v. United States*, 39 Ct. Cl. 350.

The United States is a necessary party to an action brought by an Indian to have land allotted to him.¹ An Indian allottee is not a necessary party to a suit by the United States to cancel a lease of such Indian's allotment for a longer term than that authorized by congress.²

In the Indian Territory it was necessary to make the tribe a party to any action in a federal court wherein the tribal property was in any way affected by the issues of the case.³

V. PLEADINGS.—In Indian cases the pleadings follow the general rules, except in cases where specific rules have been provided.⁴

1. 31 St. at L. 760; *Hy-Yu-Tse-Mil-Kin v. Smith*, 119 Fed. 114, 55 C. C. A. 216, *affirmed*, 194 U. S. 401, 24 Sup. Ct. 676, 48 L. ed. 1039; *Parr v. United States*, 132 Fed. 1004.

[a] A court is not bound to take judicial notice of the quantity of Indian blood possessed by a party before it. *Ball v. Dancer (Okla.)*, 143 Pac. 820.

2. *Bowling v. United States*, 191 Fed. 19, 111 C. C. A. 561, *affirming* *United States v. Rundell*, 181 Fed. 887; *United States v. Allen*, 179 Fed. 13, 103 C. C. A. 1.

3. 30 St. at L. 495; *Brought v. Cherokee Nation*, 129 Fed. 192, 63 C. C. A. 350; *Hargrove v. Cherokee Nation*, 129 Fed. 186, 63 C. C. A. 276; *Sanders v. Thornton*, 97 Fed. 863, 38 C. C. A. 508; *Thompson v. Morgan*, 4 Ind. Ter. 412, 69 S. W. 920; *Muskogee Nat. Tel. Co. v. Hall*, 4 Ind. Ter. 18, 64 S. W. 600; *Casteel v. McNeely*, 4 Ind. Ter. 1, 64 S. W. 594.

[a] In an action brought by a telegraph company to restrain persons from erecting telephones in a town on tribal lands in the Indian Territory, it was necessary to make the tribe owning such lands a party to the suit. *Muskogee Nat. Tel. Co. v. Hall*, 4 Ind. Ter. 18, 64 S. W. 600.

4. If the defendant tribe is not named in the claimant's petition, it cannot be brought in by amendment after the time for filing new petitions has expired; and a petition which names the wrong tribe, or fails to name any tribe when the tribe is known, will be dismissed. *United States v. Martinez*, 195 U. S. 469, 25 Sup. Ct. 80, 49 L. ed. 282; *United States v. Gorham*, 165 U. S. 316, 17 Sup. Ct. 382, 41 L. ed. 729, *affirming* 29 Ct. Cl. 97; *Garrison v. United States*,

30 Ct. Cl. 272; *Woolverton v. United States*, 29 Ct. Cl. 107.

[a] In an action by a member of an Indian Territory tribe on behalf of such tribe, it was necessary that the complaint should allege that the chief of the tribe had failed or refused to bring the suit. 30 St. at L. 497; *Brought v. Cherokee Nation*, 4 Ind. Ter. 462, 69 S. W. 937; *Daniels v. Miller*, 4 Ind. Ter. 426; 69 S. W. 925; *Hargrove v. Cherokee Nation*, 3 Ind. Ter. 478, 58 S. W. 667.

[b] **General Denial.**—In an action for rent under Rev. Laws, 1910, §3802, the question whether the Indian lessor was competent to make a lease without approval of the county court, and the questions as to his age, his quantum of Indian blood, and the alienability of his surplus and homestead allotment, constituted defensive matters not available under a general denial. *Mullen v. Howard*, 43 Okla. 531, 143 Pac. 659.

[c] **Time To Plead.**—The time prescribed by statute within which the attorney general shall plead for an Indian tribe and the federal government in an Indian depredation suit is sixty days, but the court may grant such extension of time as it shall deem proper. *Labadie v. United States*, 31 Ct. Cl. 436.

[d] **Authority To Sue.**—A complaint, filed in the name of the United States by the Department of Justice, to recover damages for the unlawful occupation of lands within the Ft. Hall Indian reservation by an irrigation company under authority of the secretary of the interior, was subject to demurrer on the ground that no authority to bring such action had been conferred by congress. *United States v. Portneuf-Marsh Val. Irr. Co.*, 213 Fed. 601, 130 C. C. A. 181.

Jurisdictional Facts. — In a depredation claim, the petition must allege the citizenship of the claimant, and the amity of the defendant tribe of Indians, as necessary jurisdictional facts,⁵ and these jurisdictional facts must be tried and determined before either party will be allowed a severance of issues.⁶

VI. JUDGMENT. — A. **GENERALLY.** — The final judgment of the federal courts in favor of an Indian's right to have land allotted to him has the same effect as the allowance of such allotment by the secretary of the interior.⁷

Where the government sets up a counterclaim against the claimant in an Indian depredation claim the court cannot deduct the amount of the counterclaim from the judgment against the Indians.⁸ Where the judgment on such a claim fails to show which independent tribe of the Indian nation committed the depredation, additional findings of fact may be made for the guidance of the departments of the government.⁹

B. **JUDICIAL SALES.** — Congress having placed such restrictions on the sale of Indian lands, both tribal and allotments in severalty, as to render void any attempt to sell or make subject to lien of debt any such land,¹⁰ a sale under execution levied against either the tribal lands or any allotment of same to a member of the tribe, is void, unless expressly authorized by statute,¹¹ except improvements made by persons or corporations operating coal or other mines, railroads, or other industries under tribal lease.¹² But personal property owned by Indians by blood can be reached by creditors' suit, and put in the hands of a receiver.¹³

Indian lands upon which the restrictions have expired by limitation, and lands acquired by Indians otherwise than by tribal allotment or United States trust patent, are subject to levy of execution and sale

5. *Gamel v. United States*, 31 Ct. Cl. 321.

6. *Gamel v. United States*, 31 Ct. Cl. 321.

7. *Smith v. Hy-Yu-Tse-Mil-Kin*, 110 Fed. 60; *Sloan v. United States*, 95 Fed. 193.

8. "When the time of payment comes the statutes give the accounting officers of the treasury abundant authority to set off an indebtedness due from a claimant to the United States against a judgment in his favor." *Labadie v. United States*, 33 Ct. Cl. 476.

9. *Valencia v. United States*, 31 Ct. Cl. 388; *Graham v. United States*, 30 Ct. Cl. 318.

10. 24 St. at L. 389; 18 St. at L. 420; *United States v. Rickert*, 188 U. S. 432, 23 Sup. Ct. 478, 47 L. ed. 532; *Jones v. Meehan*, 175 U. S. 1, 20 Sup. Ct. 1, 44 L. ed. 49; *United States v.*

Flournoy Live-Stock, etc. Co., 69 Fed. 886; *Beck v. Flournoy Live-Stock, etc. Co.*, 65 Fed. 30, 12 C. C. A. 497.

11. *Crowell v. Young*, 4 Ind. Ter. 36, 64 S. W. 607; *Daugherty v. Bogy*, 3 Ind. Ter. 197, 53 S. W. 542; *Hastings v. Whitmer*, 2 Ind. Ter. 335, 51 S. W. 967; *Pound v. Pullen's Lessee*, 3 Yerg. (Tenn.) 338.

[a] **In the Indian Territory.** — See 26 St. at L. 96; *Hampton v. Mays*, 4 Ind. Ter. 503, 69 S. W. 1115; *Crowell v. Young*, 4 Ind. Ter. 148, 69 S. W. 829; *Mays v. Frieberg*, 3 Ind. Ter. 774, 49 S. W. 52; *Arnold v. Campbell*, 3 Ind. Ter. 550, 64 S. W. 532; *Springston v. Wheeler*, 3 Ind. Ter. 388, 58 S. W. 658.

12. 26 St. at L. 95.

13. 26 St. at L. 81 (Act of Congress, May 2, 1890, ch. 182); *Daugherty v. Bogy*, 3 Ind. Ter. 197, 53 S. W. 542.

as in case of lands belonging to any other person authorized to own land.¹⁴ A minor Indian's interest in an allotment of land acquired by inheritance may be sold by order of a court.¹⁵

C. EXEMPTIONS. — Allotments of land to Indians in severalty under restrictions as to alienation are "exempt from levy, taxation, sale or forfeiture," and cannot be sold for non-payment of taxes,¹⁶ nor made subject to execution under a judgment for the debts of such allottee,¹⁷ or for improvements placed on such land by another.¹⁸ But the exemption ends with the expiration of the period of in-alienation,¹⁹ or upon the passing of title from the Indian patentee to a citizen or other person capable of taking it.²⁰

VII. NEW TRIAL. — In depredation claims new trial is governed by act of congress.²¹

VIII. SELLING OR FURNISHING LIQUOR. — By act of congress, and by legislative act in some of the states and territories, selling or in anywise furnishing intoxicating liquors to Indians is a criminal offense,²² and an indian who sells or furnishes intoxicating liquors to

14. 26 St. at L. 95; *In re Grayson*, 3 Ind. Ter. 497, 61 S. W. 984; *Daugherty v. Bogy*, 3 Ind. Ter. 197, 53 S. W. 542; *Hastings v. Whitmer*, 2 Ind. Ter. 335, 51 S. W. 967.

15. *Wilson v. Morton*, 29 Okla. 745, 119 Pac. 213.

16. U. S.—United States *v. Rickett*, 188 U. S. 432, 23 Sup. Ct. 478, 47 L. ed. 532; *Fellows v. Denniston*, 5 Wall. 761, 18 L. ed. 708; *The Kansas Indians*, 5 Wall. 737, 18 L. ed. 667. Kan.—*Parker v. Winsor*, 5 Kan. 362; *Blue-Jacket v. Comrs. of Johnson County*, 3 Kan. 299. Mich.—*Auditor-General v. Williams*, 94 Mich. 180, 53 N. W. 1097. Wash.—*Frazee v. Spokane County*, 29 Wash. 278, 69 Pac. 779. Wis.—*Farrington v. Wilson*, 29 Wis. 383.

17. *In re Grayson*, 3 Ind. Ter. 497, 61 S. W. 984; *Daugherty v. Bogy*, 3 Ind. Ter. 197, 53 S. W. 542.

18. *Maynes v. Veale*, 20 Kan. 374.

19. *Taylor v. Vandegrift*, 126 Ind. 325, 25 N. E. 548.

20. *Jones' Heirs v. Walker*, 47 Ala. 175; *Rosser v. Bradford*, 9 Port. (Ala.) 354.

[a] In some earlier decisions it was held, however, that mere restrictions upon voluntary conveyance of land were not such restrictions upon alienation as to take it out of the operation of state law, and exempt such land from sale under execution. U. S. *Love v. Pamplin*, 21 Fed. 755; *Lowry v. Weaver*, 4 McLean 82, 15 Fed. Cas.

No. 8,584. Ind.—*Taylor v. Vandegrift*, 126 Ind. 325, 25 N. E. 548. Miss. *Saffarans v. Terry*, 12 Smed. & M. 690. 21. U. S. Rev. St. (1878), §§1087-8; *McCullum v. United States*, 33 Ct. Cl. 469.

22. U. S.—29 St. at L. 506; 27 St. at L. 260; *United States v. Halliday*, 3 Wall. 407, 18 L. ed. 182; *United States v. Hurshman*, 53 Fed. 543; *In re McDonough*, 49 Fed. 360; *United States v. Earl*, 17 Fed. 75; *United States v. Osborn*, 2 Fed. 58; *United States v. Wirt*, 3 Sawy. 161, 28 Fed. Cas. No. 16,745; *United States v. Shaw-Mux*, 2 Sawy. 364, 27 Fed. Cas. No. 16,268; *United States v. Flynn*, 1 Dill. 451, 25 Fed. Cas. No. 15,124. Cal.—*People v. Bray*, 105 Cal. 344, 38 Pac. 731, 27 L. R. A. 158. Dak.—*United States v. Burdick*, 1 Dak. 142, 46 N. W. 571. Mont.—*Territory v. Guyott*, 9 Mont. 46, 22 Pac. 134. Okla.—*Renfrow v. United States*, 3 Okla. 161, 41 Pac. 88. Ore.—*Territory v. Coleman*, 1 Ore. 191, 75 Am. Dec. 554. Wash.—*Fowler v. United States*, 1 Wash. Ter. 3.

[a] The introduction of intoxicating liquors into the Indian Territory (1) was prohibited by federal statutes. 28 St. at L. 693-7; *Ex parte Webb*, 225 U. S. 663, 32 Sup. Ct. 769, 56 L. ed. 1248; *Burch v. United States*, 7 Ind. Ter. 284, 104 S. W. 619; *United States v. Buckles*, 6 Ind. Ter. 319, 97 S. W. 1022; *United States v. Cohn*, 2 Ind. Ter. 474, 52 S. W. 38. (2) And the enabling act admitting the state of Okla-

an Indian is within the contemplation of such statute.²³ And the statute extends to Indian students at the Carlisle school,²⁴ but does not apply to Indians to whom land was allotted in severalty by the government of the United States prior to May 8, 1906,²⁵ except by specific stipulation of treaty.²⁶

It is prohibited by federal statute to introduce into the Indian country, or manufacture or sell, therein, any intoxicating liquors,²⁷ and an Indian who introduces liquor into the Indian country may be convicted for this offense.²⁸ That defendant did not know one to whom he sold liquor was an Indian cannot constitute a defense to a prosecu-

homa into the union prohibits the manufacture, sale, barter, giving away or in anywise furnishing intoxicating liquors, wines or beer in that part then known as Indian Territory and the Osage Nation, for a period of twenty-one years from the admission of said state. *Evans v. Victor*, 204 Fed. 361, 122 C. C. A. 531.

[b] That part of the state of Oklahoma which was the Indian Territory at the time of the passage of the act for the admission of the new state is still subject to the prohibitions of the Act of March 1, 1895, §8, so far as it relates to the carriage of liquor without the state of Oklahoma into that part which was the Indian Territory, except liquors brought in by the state for the use of state agencies. *Ex parte Webb*, 225 U. S. 663, 32 Sup. Ct. 769, 56 L. ed. 1248.

23. *United States v. Miller*, 105 Fed. 944.

24. *United States v. Belt*, 128 Fed. 168.

25. 24 St. at L. 388; *In re Heff*, 197 U. S. 488, 25 Sup. Ct. 506, 49 L. ed. 848; *Ex parte Viles*, 139 Fed. 68; *United States v. Kopp*, 110 Fed. 160.

26. *Dick v. United States*, 208 U. S. 340, 28 Sup. Ct. 399, 52 L. ed. 520; *Ex parte Crow Dog*, 109 U. S. 556, 3 Sup. Ct. 396, 27 L. ed. 1030; *Bates v. Clark*, 95 U. S. 204, 24 L. ed. 471.

27. *United States v. Mayrand*, 154 U. S. 552, 14 Sup. Ct. 1212, 18 L. ed. 699; *United States v. Forty-Three Gallons of Whiskey*, 108 U. S. 491, 2 Sup. Ct. 906, 27 L. ed. 803; *United States v. Forty-Three Gallons of Whiskey*, 93 U. S. 188, 23 L. ed. 846.

[a] The transportation of liquors across an Indian reservation to a place where they may be lawfully sold, does not constitute an introduction of such

liquors into the Indian country, and they are not subject to seizure while in transit or after they have reached their destination. *United States v. Four Bottles of Sour Mash Whiskey*, 90 Fed. 720; *United States v. Twenty-nine Gallons of Whisky, etc.*, 45 Fed. 847.

[b] Right of way through an Indian reservation granted to a railroad by act of congress is not Indian country within the prohibitory act of Jan. 30, 1897. *Clairmont v. United States*, 225 U. S. 551, 32 Sup. Ct. 787, 56 L. ed. 1201.

[c] It has been held that where, by treaty stipulation, the laws which prohibit the "introduction, manufacture, use of, and traffic in, ardent spirits, wines, or other liquors, in the Indian country, shall continue and be in force within the entire boundaries of the country," until otherwise provided by congress, "it is matter not of judicial, but of legislative discretion, whether the treaty, in view of the small number of Indians entitled to protection as compared with the large population of whites who now form the great majority of inhabitants, and in view of the high state of civilization of the territory, shall not be enforced." *Johnson v. Gearlds*, 234 U. S. 422, 34 Sup. Ct. 794.

[d] The Indian country referred to in the acts of congress includes only those lands originally occupied by Indians, which were not within any existing state at the time of the adoption of the Act of Congress of June 30, 1834, which gives this definition. *Benson v. United States*, 44 Fed. 178.

28. *Hallowell v. United States*, 221 U. S. 317, 31 Sup. Ct. 587, 55 L. ed. 750.

[a] Indian country ceases to be such upon the complete extinction of

tion for such offense, and knowledge or intent is not an essential ingredient to the crime.²⁹

Indictment.—The indictment should contain averments as to the parties and the crime with sufficient particularity to give the court jurisdiction,³⁰ and should otherwise conform to the general rules governing indictments.³¹

the Indian title under which the land was formerly held. *Clairmont v. United States*, 225 U. S. 551, 32 Sup. Ct. 787, 56 L. ed. 1201; *Royal Brew. Co. v. Missouri, K. & T. R. Co.*, 217 Fed. 146; *Schaap v. United States*, 210 Fed. 853, 127 C. C. A. 415; *United States v. Myers*, 206 Fed. 387, 124 C. C. A. 269; *Evans v. Victor*, 204 Fed. 361, 122 C. C. A. 536.

29. *United States v. Miller*, 105 Fed. 944; *United States v. Leathers*, 6 Sawy. 17, 26 Fed. Cas. No. 15,581; *United States v. Stofello*, 8 Ariz. 461, 76 Pac. 611.

30. *Wheeler v. United States*, 159 U. S. 523, 16 Sup. Ct. 93, 40 L. ed.

244; *Westmoreland v. United States*, 155 U. S. 545, 15 Sup. Ct. 243, 39 L. ed. 255.

31. See generally the title "**Indictment and Information.**"

[a] **Duplicity.**—An indictment charging in the same count a violation of Act, March 1, 1895, ch. 145, §8, 28 St. at L. 693, by introducing liquor into "Indian Territory," and also of Act, Jan. 30, 1897, ch. 109, 29 St. at L. 506, by introducing liquor into the "Indian country," charges two distinct offenses and is bad for duplicity. *Ammerman v. United States*, 216 Fed. 326, 132 C. C. A. 470; *Allison v. United States*, 216 Fed. 329, 132 C. C. A. 473.

INDICTMENT AND INFORMATION

By the Editorial Staff.

I. NATURE AND NECESSITY OF, 73

A. *Indictment*, 73

1. *Definition and General Consideration*, 73
2. *When Indictment Proper or Necessary*, 74
 - a. *At Common Law*, 74
 - b. *Under Constitutions and Statutes*, 75
 - (I.) *Federal Constitution*, 75
 - (II.) *State Constitution and Statutes*, 77
 - (A.) *Indictment for Higher Crimes*, 77
 - (B.) *Indictment for Misdemeanors*, 80
 - (C.) *Statutory Offenses and Penalties*, 81

B. *Presentment*, 82

1. *Definition and General Consideration*, 82
2. *When Presentment Proper or Necessary*, 83

C. *Information*, 83

1. *Definition and General Consideration*, 83
2. *When Information Proper or Necessary*, 84
 - a. *At Common Law*, 84
 - b. *Under Constitutions and Statutes*, 85
 - (I.) *United States Constitution*, 85
 - (II.) *State Constitutions and Statutes*, 85

D. *Complaint*, 86

1. *Definition*, 86
2. *When Complaint Proper or Necessary*, 86

II. BY WHOM PROCEEDINGS INSTITUTED, 87

III. FINDING, 88

A. *Prerequisites to*, 88

1. *Jurisdiction and Legal Constitution of Court and Grand Jury*, 88
2. *Detention of Accused*, 90
3. *Preliminary Examination and Commitment*, 90
4. *Leave of Court*, 91

B. *Indictment During Pendency of Other Proceedings*, 92

C. *Term and Time of Finding*, 93

1. *Term*, 93
2. *In Vacation*, 94

IV. RETURN, FILING AND RECORD, 95

A. *Of Indictment*, 95

1. *Return*, 95
 - a. *Manner of Return*, 95
 - b. *Time for Return*, 98
2. *Indorsement and Filing*, 98
3. *Record*, 99
 - a. *As to Impaneling and Organization of Grand Jury*, 99
 - b. *Record of the Finding*, 101
 - c. *Record of Return*, 103
 - d. *Record of Filing*, 107
 - e. *As to Court*, 108
 - f. *As to Offense*, 108
 - g. *As to Witnesses Before Grand Jury*, 109
 - h. *Identifying Indictment in Record*, 109
 - i. *Copy of Indictment in Record*, 110
 - j. *Amendment of Record*, 110

B. *Of Information*, 112

1. *Basis and Prerequisites*, 112
 - a. *Leave of Court*, 112
 - b. *Preliminary Examination*, 113
 - c. *Coroner's Inquest*, 117
 - d. *Consent of Accused*, 117
2. *Filing*, 117
 - a. *Necessity of Filing*, 117
 - b. *Who May File*, 117
 - c. *Where Filed*, 118
 - d. *When Filed*, 119
 - e. *Endorsement and Entry*, 120
 - f. *Effect of Jurisdiction of or Action by Grand Jury*, 121

V. PRELIMINARY COMPLAINT, AFFIDAVIT OR INFORMATION, 122

- A. *Necessity for*, 122
- B. *By Whom Made*, 124
- C. *Before Whom Made*, 129
- D. *When Made*, 130

- E. *Duty of Magistrate To Take Complaint*, 130
- F. *Formal Requisites of the Complaint*, 130
 - 1. *In General*, 130
 - 2. *Title of Court and Cause*, 131
 - 3. *Formal Beginning and Conclusion*, 132
- G. *Statement of Offense*, 132
 - 1. *Averment of Time*, 136
 - 2. *Averment of Place*, 137
 - a. *Place of Commission of Crime*, 137
 - b. *Place of Making Complaint*, 138
 - c. *Averment of Jurisdictional Facts*, 138
 - d. *Name and Description of Person and Property Injured*, 138
 - e. *Negating Exceptions*, 138
 - f. *Separate Counts*, 138
 - g. *Identifying Statute Violated*, 139
 - h. *Effect of Insufficiency of Complaint*, 139
- H. *Name of Accused*, 139
- I. *Names of Witnesses*, 140
- J. *As to Officer*, 140
- K. *As to Affiant*, 140
- L. *Signature*, 140
- M. *Approval by the Prosecuting Attorney*, 141
- N. *Verification*, 141
- O. *Filing*, 144

VI. RECONSIDERATION AND RESUBMISSION OF, AND SUCCESSIVE INDICTMENTS AND INFORMATIONS. 145

- A. *Reconsideration*, 145
- B. *Resubmission*, 146
- C. *Successive Indictments and Informations*, 149
 - 1. *Indictments*, 149
 - a. *In General*, 149
 - b. *Re-examination of Evidence*, 150
 - c. *Time for Finding*, 151
 - d. *Order of Court*, 152
 - e. *Effect*, 152
 - f. *Splitting and Consolidating Offenses*, 154
 - 2. *Informations*, 156
 - a. *In General*, 156
 - b. *Time for Filing*, 158

- c. *Order of Court*, 158
- d. *Effect of Filing Second Information*, 159
- e. *Information Succeeding Indictment*, 159
- 3. *Necessity for New Indictment on Second Trial*, 160

VII. LOST OR MUTILATED INDICTMENTS, INFORMATIONS AND COMPLAINTS, 160

- A. *Supplying or Substituting*, 160
 - 1. *Indictments*, 160
 - 2. *Informations*, 162
 - 3. *Complaints*, 163
- B. *Prerequisites to Supplying or Substituting*, 163
 - 1. *Proof or Suggestion of Loss*, 163
 - 2. *Proof of Copy*, 163
 - 3. *Order and Minutes of Court*, 164
- C. *Objections to Substitution*, 165
- D. *Effect of Failure To Supply Loss*, 166
- E. *Necessity for Second Arraignment or Plea on Substitution*, 166
- F. *Effect of Finding Original After Substitution of Copy*, 166

VIII. FORMAL REQUISITES, 167

- A. *Indictment or Presentment*, 167
 - 1. *In General*, 167
 - 2. *Necessity and Form of Writing*, 167
 - 3. *Caption*, 168
 - a. *Nature and Purpose*, 168
 - b. *Necessity for*, 172
 - c. *What to Contain*, 173
 - (I.) *In General*, 173
 - (II.) *Style of Court Where Found*, 174
 - (III.) *Time When Found*, 178
 - (IV.) *Place Where Found*, 181
 - (V.) *Statements as to Grand Jury*, 183
 - (A.) *Organization, Names and Number*, 183
 - (B.) *Qualifications*, 186
 - (C.) *Swearing of Grand Jury*, 189
 - (VI.) *Names of Parties*, 191
 - (VII.) *Name of Offense*, 191

- (VIII.) *Signature*, 192
- d. *Effect of Defects or Omissions Therein*, 192
- e. *May Aid Indictment*, 193
- 4. *Commencement*, 194
 - a. *Nature and Necessity*, 194
 - b. *What to Contain*, 194
 - (I.) *In General*, 194
 - (II.) *Recitals as to Grand Jury and Presentment by Them*, 196
 - (III.) *Recital of Authority by Which Presentment Made*, 198
 - c. *Effect of Defects or Omissions Therein*, 200
- 5. *Charging Part*, 201
- 6. *Conclusion*, 201
 - a. *In General*, 201
 - b. *Against Peace and Dignity*, 202
 - (I.) *Necessity for*, 202
 - (II.) *Sufficiency of*, 206
 - c. *Against Statute*, 208
 - (I.) *Necessity and Object*, 208
 - (II.) *Sufficiency of*, 211
 - (III.) *In Plural or Singular*, 212
 - d. *Special Conclusions*, 214
 - e. *To Each Count or Charge*, 214
- 7. *Signatures*, 216
 - a. *Foreman of the Grand Jury*, 216
 - (I.) *Necessity for*, 216
 - (II.) *Sufficiency of*, 219
 - b. *Prosecuting Attorney*, 220
 - (I.) *In General*, 220
 - (II.) *Form and Sufficiency*, 224
- 8. *Indorsements*, 225
 - a. *In General*, 225
 - b. *Nature of Offense*, 226
 - c. *Of Finding "a True Bill,"* 226
 - (I.) *Necessity for*, 226
 - (II.) *Sufficiency of*, 229
 - (III.) *Effect of*, 231
 - d. *Not Found*, 231
 - e. *Name of Prosecutor or Informer*, 233
 - (I.) *Necessity for*, 233

- (II.) *Time for Making*, 237
- (III.) *Who May and Who May Not Be Indorsed*, 238
- (IV.) *Sufficiency of Indorsement*, 239
- f. *Names of Witnesses for Prosecution*, 240
 - (I.) *Necessity and Object*, 240
 - (II.) *Particular Names Indorsed*, 245
 - (III.) *Time of Making*, 247
 - (IV.) *Names of Additional Witnesses*, 247
 - (V.) *Sufficiency of Indorsement*, 248
 - (VI.) *Competency and Calling*, 250
- B. *Information or Accusation*, 250
 - 1. *In General*, 250
 - 2. *Caption*, 250
 - 3. *Showing Presentment by Prosecuting Officer*, 252
 - 4. *Showing Authority by Which Prosecuted*, 253
 - 5. *Showing Jurisdictional Prerequisites*, 254
 - 6. *Conclusion*, 256
 - a. *Necessity for*, 256
 - b. *Sufficiency of*, 258
 - 7. *Signature*, 259
 - a. *In General*, 259
 - b. *Time of Signing*, 259
 - c. *Who May Sign*, 260
 - d. *Sufficiency of*, 261
 - 8. *Verification or Accompanying Affidavit*, 262
 - a. *Necessity, Nature and Object*, 262
 - b. *Who May Make*, 270
 - c. *Who May Take*, 270
 - d. *Sufficiency of*, 271
 - (I.) *In General*, 271
 - (II.) *The Jurat*, 274
 - 9. *Indorsements*, 275
 - a. *In General*, 276
 - b. *Nature of Offense*, 276
 - c. *Names of Witnesses for Prosecution*, 276
 - (I.) *Necessity and Object*, 276
 - (II.) *Time of Making*, 279
 - (III.) *Names of Additional Witnesses*, 280
 - (A.) *Before Trial*, 280
 - (B.) *After Commencement of Trial*, 283

- (C.) *Continuance or Postponement*, 285
- (IV.) *Sufficiency of Indorsement*, 285
- (V.) *Competency and Calling*, 285
- C. *Complaint or Information in Justice or Police Courts*, 286
 - 1. *In General*, 286
 - 2. *Conclusion*, 287
 - 3. *Signature*, 288
 - 4. *Verification*, 289
 - 5. *Indorsement of Names of Witnesses*, 293

IX. CHARGING THE OFFENSE, 294

- A. *Constitutional Requirements as to Statement of Offense*, 294
- B. *Statutory Forms*, 299
- C. *Manner of Charging*, 303
 - 1. *In General*, 303
 - 2. *Language, Spelling and Grammatical Errors and Omissions*, 303
 - a. *In General*, 303
 - b. *English Language*, 308
 - c. *Use of Technical Terms and Words*, 308
 - d. *Abbreviations, Numerals and Symbols*, 310
 - e. *Effect of Errors and Mistakes in Writing, Grammar, Spelling or Punctuation*, 311
 - f. *Effect of Omission of Words*, 318
 - g. *Interlineations, Erasures, and Insertion of Words*, 320
 - 3. *Offense Must Be Positively and Directly Alleged*, 321
 - a. *In General*, 321
 - b. *Use of Participles*, 324
 - c. *Use of Scilicet or Videlicet*, 326
 - 4. *Definiteness, Certainty and Particularity*, 327
 - a. *In General*, 327
 - b. *Matters of Inducement*, 332
 - c. *Degree of Certainty*, 333
 - 5. *Disjunctive and Alternative Allegations*, 334
 - 6. *Repugnancy*, 339
- D. *What Must Be Charged*, 342
 - 1. *Facts Constituting Offense*, 342
 - 2. *Name and Character of Offense*, 344
 - 3. *Matters of Evidence*, 346

4. *Presumptions and Matters of Judicial Knowledge*, 347
5. *Conclusions*, 348
6. *Negating Defenses*, 350
7. *Matter in Avoidance of Statute of Limitations*, 352
8. *Matters of Aggravation*, 354
 - a. *In General*, 354
 - b. *Prior Convictions*, 354
 - (I.) *Necessity for Pleading*, 354
 - (II.) *How Averred*, 357
9. *Matters to the Grand Jury Unknown*, 360
- E. *Necessity and Manner of Charging Particular Matters*, 361
 1. *Averments as to Defendant*, 361
 - a. *Necessity for*, 361
 - b. *How Name Alleged*, 362
 - (I.) *In General*, 362
 - (II.) *Where Unknown*, 363
 - c. *Christian Name, Initials and Middle Names*, 364
 - d. *Additions and Descriptions*, 365
 - e. *Alias*, 366
 - f. *Partnerships and Corporations*, 367
 - g. *Misnomer and Errors in Spelling of Names*, 368
 - h. *Necessity of Repeating Name and Errors in Repetition*, 369
 2. *Averments as to Third Parties*, 369
 - a. *Necessity for*, 369
 - b. *How Name Alleged*, 371
 - (I.) *In General*, 371
 - (II.) *Where Unknown*, 372
 - c. *Christian Name, Initials and Middle Names*, 373
 - d. *Additions and Descriptions*, 374
 - e. *Alias*, 374
 - f. *Corporations, Associations and Partnerships*, 374
 - g. *Misnomer and Errors in Spelling of Names*, 377
 3. *Pleading Written Instruments or Papers*, 380
 - a. *In General*, 380
 - b. *How Set Out*, 384
 - c. *By Exhibit*, 386
 4. *Averments as to Property and Ownership Thereof*, 387
 - a. *Describing Realty*, 387
 - b. *Describing Personalty*, 387

- (I.) *In General*, 387
- (II.) *Money*, 386
- (III.) *Degree of Certainty*, 390
- (IV.) *Value*, 392
- c. *Ownership*, 393
- 5. *Averments as to Offense*, 397
 - a. *In General*, 397
 - b. *Manner or Means of Committing Offense*, 397
 - c. *As to Knowledge, Intent, Feloniousness, etc.*, 399
 - (I.) *Knowledge*, 399
 - (A.) *In General*, 399
 - (B.) *How Made*, 401
 - (II.) *Intent*, 402
 - (A.) *In General*, 402
 - (B.) *How Made*, 404
 - (III.) *Feloniousness*, 404
 - (IV.) *Unlawfulness*, 408
 - (V.) *Wrongfulness*, 409
 - (VI.) *Wilfulness*, 409
 - (VII.) *Malice*, 411
 - d. *Averments as to Time*, 411
 - (I.) *In General*, 411
 - (II.) *When Time Must Be Alleged*, 415
 - (III.) *Showing Commission Prior to Finding of Indictment or Filing of Information*, 416
 - (IV.) *Showing Commission Within Period of Limitations*, 416
 - (V.) *Offense Recently Created or Increased*, 417
 - (VI.) *How Made*, 418
 - (A.) *In General*, 418
 - (B.) *On or About a Specified Time*, 419
 - (C.) *Impossible Future or Blank Dates*, 420
 - (D.) *Where Series of Acts Constitute the Offense*, 424
 - (VII.) *Reference as to Time*, 426
 - e. *Averments as to Place*, 426
 - (I.) *Necessity for Generally*, 426
 - (II.) *Manner of Alleging Place of Commission*, 428

- (A.) *In General*, 428
- (B.) *Averments as to County*, 429
- (C.) *Averments as to State*, 431
- (D.) *Particular Locations Within City or County*, 431
- (E.) *Negating Jurisdiction of Federal Courts or State Court*, 432
- (III.) *Offenses Committed Near Boundary Lines*, 432
- (IV.) *Offenses Committed on Trains or Vessels*, 433
- (V.) *Repeating Time and Place*, 433
- (VI.) *Reference to Margin, Commencement, etc.*, 436
- f. *Charging Statutory Offenses*, 437
 - (I.) *In General*, 437
 - (II.) *Reference to Statute*, 440
 - (III.) *Following Language of Statute*, 442
 - (A.) *Must Exact Words Be Followed*, 442
 - (B.) *Sufficiency of Following Language of Statute Alone*, 447
 - (1.) *In General*, 447
 - (2.) *Statute Using General or Specific Words*, 453
 - (3.) *Statute in Disjunctive*, 455
 - (4.) *Statute Including Innocent Acts*, 456
 - (IV.) *Matters in Addition to Statutory Language*, 457
 - (V.) *Negating Provisos and Exceptions*, 458
- F. *Co-defendants, Accessories, and Principals in Second Degree*, 466
 - 1. *Co-defendants*, 466
 - 2. *Accessories and Accomplices*, 467
 - 3. *Principals in Second Degree*, 468
- G. *Assaults, Attempts and Solicitations*, 469
 - 1. *Assaults*, 469
 - 2. *Attempts*, 469
 - 3. *Solicitations*, 471

- H. *By Means of Separate Counts*, 472
 - 1. *Form and Sufficiency*, 472
 - a. *In General*, 472
 - b. *Caption, Commencement, Conclusion and Signature*, 473
 - 2. *Referring From One Count to Other*, 473
- I. *Interpretation and Construction*, 476
 - 1. *In General*, 476
 - 2. *Caption as an Aid to*, 479
 - 3. *Use of Preliminary Affidavit or Complaint*, 479
 - 4. *Reading Statute in Connection With Indictment*, 479
- J. *Surplusage*, 480
 - 1. *What Is Surplusage*, 480
 - a. *In General*, 480
 - b. *Insufficient Charge of Second Offense*, 483
 - c. *Repetition or Redundant Matter*, 484
 - d. *As to Statutory Offenses*, 484
 - e. *Repugnancy*, 484
 - f. *Alternative Allegations*, 485
 - 2. *What Is Not Surplusage*, 485
 - a. *Matters of Description*, 485
 - b. *Matter Showing Prosecution Not Maintainable*, 487
 - 3. *Effect*, 487
- K. *Affidavit or Complaint*, 488
 - 1. *In General*, 488
 - 2. *Necessity of Information Following Affidavit or Complaint*, 489
 - 3. *Necessity of Indictment Following Complaint or Information*, 495

X. JOINDER OF PARTIES, 495

- A. *Who May Be Joined*, 495
- B. *Who May Not Be Joined*, 498
- C. *Right To Convict Lesser Number Where Several Joined*, 499

XI. JOINDER OF OFFENSES, 499

- A. *Duplicity*, 499
 - 1. *General Rule*, 499

2. *Surplusage*, 502
3. *Many Acts Constituting Offense*, 503
4. *Continuing Offenses*, 504
5. *Series of Acts Which Singly or Together Constitute Offense*, 505
 - a. *In General*, 505
 - b. *Statute Punishing Several Acts Disjunctively*, 507
6. *Insufficient Charge of Second Offense*, 510
 - a. *In General*, 510
 - b. *Incidental Reference to Other Offense*, 510
7. *Same Act Affecting Different Persons and Things*, 512
8. *Greater and Lesser Included Offenses*, 515
9. *Different Means or Methods of Committing Same Offense*, 516
10. *Charging Defendant in Different Capacities*, 517
11. *Doing and Causing an Offense To Be Done*, 518
12. *Construction of Pleadings*, 518
- B. *By Means of Separate Counts*, 519
 1. *In General*, 519
 2. *Distinct and Separate Offenses*, 522
 - a. *Felonies and Misdemeanors*, 522
 - b. *Felonies*, 524
 - c. *Misdemeanors*, 526
 - d. *Arising Out of Same Transaction*, 528
 - e. *Of the Same Nature*, 531
 - f. *Specific Offenses Which May Be Joined*, 533
 3. *Charging Same Offense in Different Ways*, 536

XII. AMENDMENT, 542

- A. *Of Indictment*, 542
 1. *By Grand Jury*, 542
 2. *By Order of Court*, 543
 - a. *Generally*, 543
 - b. *Statutes*, 544
 3. *Amendment by Prosecuting Attorney*, 547
 4. *By Consent*, 547
 5. *Time of Amendment*, 548
 6. *How Made*, 548
 7. *Necessity of Making on Face of Pleading*, 549
 8. *Particular Matters Amendable*, 549

- a. *In General*, 549
 - b. *Names of Persons*, 550
 - c. *Time*, 551
 - d. *Place*, 552
 - e. *Of Property*, 552
 - f. *In Case of Variance*, 552
- 9. *Effect of Amendment*, 554
- B. *Of Information*, 555
 - 1. *In the Absence of Statute*, 555
 - 2. *Under Statute*, 557
 - 3. *Amendment of Information by Consent*, 560
 - 4. *By Whom Made*, 560
 - 5. *Number of Amendments Allowable*, 560
 - 6. *How Made*, 560
 - 7. *Particular Matters Amendable*, 561
 - 8. *Effect*, 563
- C. *Caption*, 563
- D. *Conclusion*, 564
- E. *Verification*, 565
- F. *Indorsement*, 565
- G. *Complaint and Affidavit*, 565
 - 1. *Generally*, 565
 - 2. *On Trial De Novo*, 567
 - 3. *Preliminary Complaint*, 567
- H. *Bill of Particulars*, 567

XIII. CONVICTION OF OTHER OFFENSES, 568

- A. *Conviction of Included Offense*, 568
 - 1. *Generally*, 568
 - 2. *Conviction of a Lower Degree*, 572
 - 3. *Conviction of Attempt*, 573
 - 4. *Rule Applied*, 575
 - a. *Abortion*, 575
 - b. *Adultery*, 576
 - c. *Affray*, 576
 - d. *Arson*, 576
 - e. *Assaults*, 576
 - (I.) *Aggravated Assault*, 576
 - (II.) *Felonious Assault*, 576
 - (III.) *Assault With a Deadly Weapon*, 577

- (IV.) *Assault With Intent To Kill or Do Great Bodily Harm*, 577
- (V.) *Assault With Intent To Maim*, 578
- (VI.) *Assault With Intent To Murder*, 578
- (VII.) *Assault With Intent To Ravish*, 581
- (VIII.) *Assault With Intent to Rob*, 582
- f. *Assault and Battery*, 582
- g. *Attempts*, 583
- h. *Bandolerismo or Brigandage*, 585
- i. *Burglary*, 585
- j. *Duelling*, 587
- k. *Embezzlement*, 587
- l. *Forgery*, 587
- m. *Gambling*, 587
- n. *Homicide*, 587
- o. *Larceny*, 593
- p. *Libel*, 595
- q. *Maintaining Blind Tiger*, 595
- r. *Malicious Mischief*, 595
- s. *Mayhem*, 595
- t. *Rape*, 595
- u. *Receiving Stolen Goods*, 597
- v. *Rescue*, 597
- w. *Resisting an Officer*, 597
- x. *Riot*, 597
- y. *Robbery*, 597
- z. *Seduction*, 599
- aa. *Stabbing*, 599
- B. *Conviction of Higher Offense*, 599
- C. *Convicting Joint Defendants of Different Degrees*, 599
- D. *Right To Convict of Misdemeanor*, 599
- E. *Principals Convicted as Accessories*, 601
- F. *To What Crimes Rule Applies*, 601
- G. *Right To Convict as Affected by the Allegations of the Indictment or Information*, 601
 - 1. *Generally*, 601
 - 2. *Where Insufficient To Charge the Higher Crime*, 603
- II. *Right To Convict as Affected by the Evidence*, 603
 - I. *Constitutionality of Statutes*, 604

XIV. EFFECT OF, AND OBJECTIONS TO DEFECTS, 605

- A. *Quashing or Setting Aside*, 605
 - 1. *Grounds in General*, 605
 - a. *Necessity of Appearing on Pleading or Record*, 605
 - b. *Substantial Rights Must Be Affected*, 606
 - c. *Prescribed by Statute*, 607
 - (I.) *Generally*, 607
 - (II.) *Effect*, 610
 - d. *Defects Subject to Demurrer*, 612
 - 2. *Particular Grounds*, 612
 - a. *Want or Insufficiency of Preliminary Affidavit or Complaint*, 612
 - b. *Errors in or Want of Preliminary Examination or Commitment*, 612
 - (I.) *Indictments*, 612
 - (II.) *Informations*, 612
 - c. *No Leave To File Information*, 614
 - d. *Indictment Drawn by Unauthorized Attorney*, 614
 - e. *Objections as to the Grand Jury*, 614
 - (I.) *Irregularities in Selecting and Empanelling*, 614
 - (II.) *No Opportunity To Challenge*, 616
 - (III.) *Matters Not Subject to Challenge*, 617
 - (IV.) *Want of Authority in Grand Jury*, 617
 - f. *Objections to Proceedings Before and by the Grand Jury*, 618
 - (I.) *Matters Pertaining to Court's Charge*, 618
 - (II.) *Errors in Statement by Prosecuting Attorney*, 618
 - (III.) *Unauthorized Person Before Grand Jury*, 618
 - (IV.) *Improper Conduct of Grand Jury*, 619
 - (V.) *Illegal or Insufficient Evidence*, 620
 - (VI.) *Incompetency of Witnesses*, 622
 - (VII.) *Failure To Preserve Evidence*, 624
 - g. *Not Properly Found Endorsed, Presented and Filed*, 624
 - h. *Defects in Form and in Manner of Charging*, 627
 - i. *Defects in List of Grand Jurors*, 631
 - j. *Another Accusation Pending*, 631

- k. *Erroneous Mode of Procedure*, 631
 - l. *Defendant Deprived of a Constitutional Right*, 631
 - m. *Where Law Repealed, or Is Unconstitutional*, 632
 - n. *Where Charge Shows Justification or Bar*, 632
 - (I.) *Generally*, 632
 - (II.) *Bar by Statute of Limitations*, 632
 - o. *Defects in the Record*, 632
- 3. *Motion*, 633
 - a. *Necessity for*, 633
 - b. *To What Court Addressed*, 633
 - c. *Form and Requisites, Written or Oral*, 633
 - d. *Time for Motion*, 634
 - e. *Necessity for Answer*, 636
 - f. *Hearing and Determination*, 637
 - (I.) *Time for*, 637
 - (II.) *Presence of Defendant*, 637
 - (III.) *Appointment of Stenographer*, 637
 - (IV.) *Evidence*, 637
 - (V.) *Determination and Effect*, 640
- 4. *New Trial*, 643
- 5. *Prohibition*, 643
- 6. *Mandamus*, 643
- 7. *Certiorari*, 643
- 8. *Appeal and Error*, 644
- B. *Demurrer*, 646
 - 1. *Propriety and Grounds*, 646
 - a. *General Statement*, 646
 - b. *Enumeration of Grounds*, 647
 - 2. *Time for*, 653
 - 3. *Form and Requisites*, 654
 - 4. *Filing or Entry*, 655
 - 5. *Hearing and Determination*, 655
 - a. *When Heard*, 655
 - b. *Withdrawal*, 655
 - c. *Construction*, 655
 - d. *Effect of Demurrer as Admission*, 655
 - e. *Determination and Effect*, 655
 - (I.) *Generally*, 655
 - (II.) *Indictment Good as to One Count or Lesser Offense*, 656

- (III.) *As to Defendants Jointly Indicted*, 656
- (IV.) *Where Demurrer Sustained*, 656
- (V.) *Where Demurrer Overruled*, 657
- 6. *New Trial*, 658
- 7. *Review*, 658
- C. *Pleas*, 659
- D. *Motion To Strike Out*, 659
- E. *Motion To Compel an Election*, 659
- F. *Objection to Introduction of Evidence*, 659
- G. *Instructions and Motions To Direct Verdict*, 660
- H. *Motions for New Trial*, 661
- I. *Motion in Arrest of Judgment*, 661
- J. *Bill of Particulars*, 661
- K. *Habeas Corpus*, 661

XV. WAIVER, 661

- A. *In General*, 661
 - 1. *By Failure To Make Timely Objection*, 661
 - 2. *Limitations on Rule*, 662
- B. *Waiver of Particular Grounds of Objections*, 663
 - 1. *By Pleading to the Merits*, 663
 - a. *Generally*, 663
 - b. *Admission of Genuineness*, 663
 - c. *Objections as to Preliminary Examination or Commitment*, 663
 - d. *Objections to Selection and Organization of Grand Jury*, 664
 - e. *Irregularities in Proceedings of Grand Jury*, 665
 - f. *Insufficiency as to Matters of Form*, 665
 - (I.) *In General*, 665
 - (II.) *Misnomer*, 666
 - (III.) *Duplicity*, 667
 - (IV.) *Failure To Require Election*, 667
 - (V.) *Variance*, 667
 - (VI.) *Defective or Omitted Verification to Information*, 667
 - (VII.) *Omission or Defects in Endorsement and Signature*, 668
 - g. *Errors in Presenting the Finding*, 668
 - h. *Want of Authority To File Information*, 669

- i. *Failure To Deliver Copy to Accused*, 669
 - j. *Waiver of Objections Made*, 669
- 2. *Waiver by Demurrer*, 669
- 3. *By Entering Into Recognizance*, 670
- C. *By Change of Venue or Continuance*, 670
- D. *By Amendment*, 670

XVI. ELECTION, 670

- A. *Election Between Indictments or Informations*, 670
- B. *Election Between Counts*, 671
 - 1. *Counts Relating to the Same Transaction*, 671
 - a. *Discretion of Court*, 671
 - b. *Election Not Required*, 673
 - c. *Counts Charging the Same Offense*, 677
 - (I.) *Rule Stated*, 677
 - (II.) *Charging the Same Offense To Meet Probable Proof*, 678
 - (III.) *Charging Different Modes or Means of Accomplishing the Crime*, 680
 - d. *Charging Defendant as Principal and Accessory*, 680
 - e. *Time When Election Will Be Required*, 680
 - 2. *Counts Relating to Different Transactions*, 681
 - a. *Election When Required*, 681
 - b. *Motion To Elect or Other Objection*, 684
 - (I.) *Form of Motion or Objection*, 684
 - (II.) *Necessity for*, 685
 - (III.) *Time for Motion*, 685
 - c. *Time for Election*, 686
 - d. *Sufficiency of Election*, 686
 - e. *Effect of Election*, 687
 - (I.) *As a Cure for Misjoinder*, 687
 - (II.) *On Second Trial*, 687
 - (III.) *As an Abandonment of Other Counts*, 687
- C. *Election Between Different Transactions Developed During Trial*, 687
 - 1. *When Election Required*, 687
 - 2. *Motion To Compel Election*, 690
 - a. *Necessity for*, 690

- b. *Time for Motion*, 690
- 3. *Time for Election*, 690
- 4. *Election by Whom Made*, 692
- 5. *Sufficiency of Election*, 692
 - a. *In General*, 692
 - b. *Implied Election*, 693
 - c. *Election by Court*, 694
- 6. *Effect of Election*, 694
 - a. *Generally*, 694
 - b. *On Subsequent Trial*, 695
 - c. *As Abandonment of Offenses Not Elected*, 695
- 7. *Misdemeanors*, 695
 - a. *General Statement*, 695
 - b. *Under Several Counts*, 695
 - c. *Under a Single Count*, 695
- D. *Election Between Different Charges in the Same Count*, 696
- E. *Election as to Which of Several Statutes the State Will Proceed Under*, 697

XVII. AIDER BY VERDICT, 697

- A. *General Rule*, 697
 - 1. *Generally*, 697
 - 2. *Application of Rule to Criminal Cases Generally*, 698
- B. *Particular Application*, 699
 - 1. *Insufficient or Defective Charge*, 699
 - a. *Statement of Offense*, 699
 - b. *Averment of Place*, 700
 - c. *Averment of Time*, 700
 - d. *Names and Description of Persons Involved*, 700
 - e. *Duplicity and Misjoinder*, 701
 - 2. *Defects in the Formal Parts*, 701
 - a. *Conclusion*, 701
 - b. *Endorsements*, 701
- C. *Verdict on Good and Bad Counts*, 701
 - 1. *General Verdict*, 701
 - a. *Generally*, 702
 - b. *Effect of Objection*, 703
 - 2. *Special Verdict*, 704

XVIII. INFORMATIONS IN CIVIL CASES, 704

- A. *Informations at Law*, 704
- B. *Informations in Equity*, 704
 - 1. *Generally*, 704
 - 2. *When Information Will Lie*, 706
 - 3. *Power of Attorney General*, 709
 - a. *To File Information*, 709
 - b. *Over Subsequent Proceedings*, 709
 - c. *Appearance of Attorney General*, 710
 - 4. *In Whose Name Filed*, 711
 - 5. *Effect of Death of Relator or Refusal To Act*, 712
 - 6. *Parties*, 713
 - a. *Generally*, 713
 - b. *Who May Be a Relator*, 713
 - 7. *Pleadings*, 714
 - a. *Generally*, 714
 - b. *Prayer of Relief*, 715
 - c. *Signature of Attorney General*, 715
 - d. *Amendments*, 715
 - 8. *Dismissal for Want of Prosecution*, 716
 - 9. *Costs*, 716
 - 10. *Appeals*, 717
- C. *In Admiralty*, 717

CROSS-REFERENCES:

Arraignment and Plea;	Names;
Arrest of Judgment;	Nolle Prosequi;
Certainty in Pleading;	Penalties, Forfeitures and Fines;
Extradition;	Preliminary Examination;
Grand Jury;	Service of Process and Papers;
Habeas Corpus;	Variance and Failure of Proof;
Juries and Jurors;	Verdict.
Motions;	

For the application of general principles to specific offenses see the titles dealing with such offense.

For further references and cross-references, see the index to this work.

I. NATURE AND NECESSITY OF.—A. INDICTMENT.—1. **Definition and General Consideration.**—Various definitions of the term indictment are to be found in the works of law writers¹ and in the decisions² and the statutes and codes of the various states.³

It may be defined to be a written accusation presented by a grand jury under oath to the proper court and in the form prescribed by law, charging a person therein named with a crime.⁴

1. 3 Bl. Com. 299; Co. Litt. 126; 2 Hale P. C. 152; Bac. Abr., Com. Dig.; 1 Chitty Cr. Law 168; Bouv. Law Dict. 1018.

2. **U. S.**—*In re Wilson*, 140 U. S. 575, 11 Sup. Ct. 870, 35 L. ed. 513; *Ex parte Bain*, 121 U. S. 1, 7 Sup. Ct. 781, 30 L. ed. 849. **Ala.**—*Lindsey v. State*, 48 Ala. 169; *Mose v. State*, 35 Ala. 421. **Ark.**—*State v. Whitlock*, 41 Ark. 403; *State v. Cox*, 8 Ark. 436. **Colo.**—Bd. of County Comrs. v. Graham, 4 Colo. 201. **Conn.**—*Goddard v. State*, 12 Conn. 448. **Ga.**—*Hawkins v. State*, 54 Ga. 653. **Ia.**—*Norris' House v. State*, 3 Greene 513. **Ky.**—*Blyew v. Com.*, 12 Ky. L. Rep. 742, 15 S. W. 356. **Md.**—*Richardson v. State*, 66 Md. 205, 7 Atl. 43, quoting Lord Hale's definition of an indictment. **Mich.**—*Alderman v. People*, 4 Mich. 414, 69 Am. Dec. 321. **Mo.**—*State v. Carr*, 142 Mo. 607, 44 S. W. 776; *Ex parte Slater*, 72 Mo. 102; *State v. Grady*, 12 Mo. App. 361. **Nev.**—*State v. Chamberlain*, 6 Nev. 573; *State v. Millain*, 3 Nev. 371. **N. Y.**—*Mack v. People*, 82 N. Y. 235; *Lambert v. People*, 9 Cow. 578; *Jones v. People*, 101 App. Div. 55, 92 N. Y. Supp. 275; *People v. Dorothy*, 20 App. Div. 308, 46 N. Y. Supp. 970; *People v. Flaherty*, 79 Hun 48, 29 N. Y. Supp. 641; *People v. Stark*, 59 Hun 51, 12 N. Y. Supp. 688. **N. C.**—*State v. Morris*, 104 N. C. 837, 10 S. E. 454; *State v. Walker*, 32 N. C. 234; *State v. Tomlinson*, 25 N. C. 32; *State v. Christmas*, 20 N. C. 410. **Ohio.**—*Wolf v. State*, 19 Ohio St. 248; *Lasure v. State*, 19 Ohio St. 43; *Fouts v. State*, 8 Ohio St. 98. **S. C.**—*State v. Faile*, 43 S. C. 52, 20 S. E. 798; *State v. Starling*, 15 S. C. 120. **Tenn.**—*Campbell v. State*, 9 Yerg. 333, 30 Am. Dec. 417. **Tex.**—*Hewitt v. State*, 25 Tex. 722; *Williams v. State*, 12 Tex. App. 395. **W. Va.**—*State v. Schnelle*, 24 W. Va. 767.

3. **Ia.**—Code, §2915. **Ky.**—Crim. Code, §118. **Minn.**—Code, §5278.

[a] "An indictment is an accusation in writing, presented by a grand

jury to a competent court, charging a person with a crime." New York Code Crim. Proc., §254.

[b] An indictment is a written accusation of the grand jury accusing a person therein named of some act or omission which by law is declared to be an offense. Tex. Code Crim. Proc., §419.

4. See authorities cited in preceding notes.

[a] An indictment within the meaning of the fifth amendment to the United States constitution is the presentation to the proper court, under oath, by a grand jury duly impaneled of a charge describing an offense against the law for which the party charged may be punished. *Ex parte Bain*, 121 U. S. 1, 7 Sup. Ct. 781, 30 L. ed. 849.

[b] **Derivation of the Word.**—"Indictment cometh of the French word enditer, and signifieth in law an accusation found upon an inquest of twelve or more upon their oath." Quoting from 3 Coke Litt. 553. *Mose v. State*, 35 Ala. 421.

[c] **Distinguished From Declaration.** A declaration is a statement of his cause of action by the party himself or his counsel not under oath. An indictment is a statement of the facts which constitute the alleged offense against the public, on the part of the accused, made under oath by a grand jury and which to be good in law must have certain formalities. The one is good even though it be not signed by counsel. The other is nothing if it does not bear the name of the foreman of the grand jury and the words "a true bill." *John v. State*, 2 Ala. 290; *Bradshaw v. Com.*, 16 Gratt. (Va.) 507, 86 Am. Dec. 722.

[d] **Differs From Presentment at Common Law.**—The chief distinction between an indictment and a presentment at common law was that the former was made upon knowledge of one or more of the jurors, and instead

Nature and Purpose of Indictment.—An indictment, therefore, implies the finding of a legally constituted grand jury,⁵ and is designed to inform the person charged of the fact and nature and scope of the accusation.⁶

2. When Indictment Proper or Necessary.—a. *At Common Law.* Indictment at common law is a general remedy for the redress of public injuries,⁷ and in the absence of statutory provision changing the rule, it may be invoked in every case where an offense is committed *contra bonos mores*, whether such offense amount to treason, felony or misdemeanor.⁸ Moreover, where the crime is of the grade of felony, it cannot be prosecuted otherwise than by indictment.⁹

of being endorsed "a true bill" by the foreman alone was signed by all the jurors. *In re Grosbois*, 109 Cal. 445, 42 Pac. 444; *Jones v. People*, 101 App. Div. 55, 92 N. Y. Supp. 275. And see charge of Mr. Justice Field to the grand jury in 2 Sawy. 667, 30 Fed. Cas. No. 18,255: "A presentment differs from an indictment in that it wants technical form, and is usually found by the grand jury upon their own knowledge, or upon the evidence before them, without having any bill from the public prosecutor. It is an informal accusation, which is generally regarded in the light of instructions upon which an indictment can be framed."

[e] **An accusation differs from an indictment** in that the former is delivered to the district attorney; the latter presented in open court. Again, the proceedings on an indictment and the consequences following a judgment thereon are entirely different from those accompanying the trial on an accusation. *In re Burleigh*, 145 Cal. 35, 78 Pac. 242.

[f] An indictment is not so called until it has been found "a true bill" by a grand jury. Before that time it is termed a bill only. *Bd. of County Comrs. v. Graham*, 4 Colo. 201.

[g] **Distinguished From Information.**—3 Bac. Abr. 635; *State v. Minor*, 193 Mo. 597, 92 S. W. 466. See *infra*, I, C, 1.

5. *Grin v. Shine*, 187 U. S. 181, 23 Sup. Ct. 98, 47 L. ed. 130; *Eason v. State*, 11 Ark. 481; *State v. Cox*, 8 Ark. 436.

6. *In re Wilson*, 140 U. S. 575, 11 Sup. Ct. 870, 35 L. ed. 513; *United States v. Loring*, 91 Fed. 881; *Mitchell v. State*, 5 Verg. (Tenn.) 340.

[a] **Identifying the Offense.**—The

indictment should so identify the offense that the defendant if acquitted or convicted, can plead the judgment in bar of any future prosecution for the same crime. *United States v. Loring*, 91 Fed. 881.

[b] The accusation is the very gist and essence of an indictment and without it there can not legally or truthfully be said to be any indictment; it is as though the sheet of paper was entirely blank. *Vanvickle v. State*, 22 Tex. Civ. App. 625, 2 S. W. 642.

7. *Williamson v. Com.*, 4 B. Mon. (Ky.) 146; *State v. Clayton*, 11 S. C. 581.

[a] "In all criminal causes the most regular and safe way, and the most consonant to the statutes of Magna Carta . . . is by presentment or indictment of twelve sworn men." 2 Hale P. C. 151.

[b] **Injury Must Be of a Public Nature.**—An indictment will not lie in respect of injuries of a private nature to individuals unless such injuries in some way concern the public. *State v. Deberry*, 27 N. C. 371; *Rex v. Richards*, 8 T. R. 634, 101 Eng. Reprint 1588; *Rex v. Blake*, 3 Burr. 1731, 97 Eng. Reprint 1070.

8. **U. S.**—*Ex parte Wilson*, 114 U. S. 417, 5 Sup. Ct. 935, 29 L. ed. 89. **Ark.** *State v. Cadle*, 19 Ark. 613. **La.**—*State v. Williams*, 7 Rob. 252. **Mo.**—*State v. Carter*, 48 Mo. 481. **Neb.**—*State v. Sinnott*, 15 Neb. 472, 19 N. W. 613. **N. J.**—*State v. Anderson*, 40 N. J. L. 224. **N. Y.**—*People v. Goshen & M. Tpk. Rd.*, 11 Wend. 597. **Okla.**—*Evans v. Willis*, 22 Okla. 310, 97 Pac. 1047, 19 L. R. A. (N. S.) 1050. **Va.**—*Matthews v. Com.*, 18 Gratt. 989; *Com. v. Barrett*, 9 Leigh 665.

9. **U. S.**—*Ex parte Wilson*, 114 U. S.

b. *Under Constitutions and Statutes.*—(I.) Federal Constitution. There are provisions in the federal constitution and in the constitutions of many of the states bearing upon the prosecution of crimes. The former, of course, are not designed to regulate the procedure in state courts, but are limitations upon the tribunals of the federal government¹⁰ and those of the territories¹¹ and the District of Columbia.¹²

Such, for example, is the scope of the fifth amendment to the United States constitution which requires that capital or otherwise infamous offenses be prosecuted by indictment or presentment of a grand jury,¹³ and of the fourth amendment to the effect that no warrants shall issue but upon probable cause supported by oath or

417, 5 Sup. Ct. 935, 29 L. ed. 89; *Hurtado v. People*, 110 U. S. 516, 4 Sup. Ct. 111, 292, 28 L. ed. 232. **Ga.** *Gordon v. State*, 102 Ga. 673, 29 S. E. 444. **Mo.**—*State v. Kyle*, 166 Mo. 287, 65 S. W. 763, 56 L. R. A. 115. **Va.** *Com. v. Barrett*, 9 Leigh 665.

10. **Ohio** *ex rel. Lloyd v. Dollison*, 194 U. S. 445, 24 Sup. Ct. 703, 48 L. ed. 1062; *Adams v. New York*, 192 U. S. 585, 24 Sup. Ct. 372, 48 L. ed. 575; *Mackin v. United States*, 117 U. S. 348, 6 Sup. Ct. 777, 29 L. ed. 909; *State v. Rudolph*, 187 Mo. 67, 85 S. W. 584; *State v. Jones*, 168 Mo. 398, 68 S. W. 566.

11. **Alaska.**—*United States v. Powers*, 1 Alaska 180. **Ariz.**—*Territory v. Blomberg*, 2 Ariz. 204, 11 Pac. 671. **Mont.**—*State v. Kingsly*, 10 Mont. 537, 26 Pac. 1066; *Territory v. Farnsworth*, 5 Mont. 303, 5 Pac. 869. **Okla.**—*Royce v. Territory*, 5 Okla. 61, 47 Pac. 1083; *Ex parte Adair*, 5 Okla. Crim. 374, 115 Pac. 277; *Gibbons v. Territory*, 5 Okla. Crim. 212, 115 Pac. 129. **Wash.**—*McCarty v. State*, 1 Wash. 377, 25 Pac. 299, 22 Am. St. Rep. 152.

12. *In re Fry*, 3 Mackey (D. C.) 135.

13. **U. S.**—*Ohio ex rel. Lloyd v. Dollison*, 194 U. S. 445, 24 Sup. Ct. 703, 48 L. ed. 1062; *Adams v. New York*, 192 U. S. 585, 24 Sup. Ct. 372, 48 L. ed. 575; *Hallinger v. Davis*, 146 U. S. 314, 13 Sup. Ct. 105, 36 L. ed. 986; *Eilenbecker v. District Court*, 134 U. S. 31, 10 Sup. Ct. 424, 33 L. ed. 801; *Kelly v. Pittsburgh*, 104 U. S. 78, 26 L. ed. 658. **Alaska.**—*United States v. Powers*, 1 Alaska 180. **Ariz.** *Territory v. Blomberg*, 2 Ariz. 204, 11 Pac. 671. **D. C.**—*In re Fry*, 3 Mackey 135. **Ind.**—*Spurgeon v. Rhodes*, 167

Ind. 1, 78 N. E. 228. **Ind. Ter.**—*Williams v. United States*, 4 Ind. Ter. 204, 69 S. W. 849. **Kan.**—*State v. Newton*, 74 Kan. 561, 87 Pac. 757; *State v. Barnett*, 3 Kan. 244. **Mont.**—*State v. Kingsley*, 10 Mont. 537, 26 Pac. 1066; *Territory v. Farnsworth*, 5 Mont. 303, 5 Pac. 869. **Nev.**—*State v. Millain*, 3 Nev. 371. **Okla.**—*Ex parte Adair*, 5 Okla. Crim. 374, 115 Pac. 277; *Garnsey v. State*, 4 Okla. Crim. 547, 112 Pac. 24; *Thompson v. State*, 4 Okla. Crim. 236, 111 Pac. 662; *Hayes v. State*, 3 Okla. Crim. 1, 103 Pac. 1061. **Pa.** *Page v. Williamsport Suspender Co.*, 191 Pa. 511, 43 Atl. 345; *Krug v. Behringer & Co.*, 20 Pa. Co. Ct. 81.

[a] In commenting upon this article, Mr. Justice Story says: "The first clause requires the interposition of a grand jury, by way of presentment or indictment before the party accused can be required to answer any capital and infamous crime charged against him. And this is regularly true, at common law, of all offences above the grade of common misdemeanors." Quoted in *McGinnis v. State*, 9 Humph. (Tenn.) 43, 49 Am. Dec. 697.

[b] **Meaning of "Infamous Crime" in the Constitution.**—Although there have been conflicting opinions as to the meaning of the term "infamous crime," it is now settled that any crime is infamous which is punishable by imprisonment in the state prison with or without hard labor. *In re Claasen*, 140 U. S. 200, 11 Sup. Ct. 735, 35 L. ed. 409; *United States v. De Walt*, 128 U. S. 393, 9 Sup. Ct. 111, 32 L. ed. 485; *Ex parte Bain*, 121 U. S. 1, 7 Sup. Ct. 781, 30 L. ed. 849; *Ex parte McClusky*,

affirmation,¹⁴ and the sixth amendment guaranteeing to the accused a speedy and public trial by an impartial jury.¹⁵

Nor are the states limited to prosecution by indictment, by those clauses of the fourteenth amendment prohibiting them from depriving any person of life, liberty or property without due process of law,¹⁶ or from passing any law abridging the privileges or immunities of citizens of the United States,¹⁷ or from denying to any person within

40 Fed. 71; *United States v. Fuller*, 1 N. M. 367, 9 Pac. 597.

[c] The following, among other crimes, have been held to be infamous: (1) Assault with intent to kill. *Ex parte Brown*, 40 Fed. 81. (2) Infringement of the United States revenue laws. *United States v. Johannessen*, 35 Fed. 411. (3) Grand larceny. *Williams v. United States*, 4 Ind. Ter. 204, 69 S. W. 849; *United States v. Fuller*, 1 N. M. 367, 9 Pac. 597. (4) Carrying on liquor business in the Indian Territory without having paid special tax. *In re Mills*, 135 U. S. 263, 10 Sup. Ct. 762, 34 L. ed. 107. (5) Passing counterfeit money. *Ex parte Wilson*, 114 U. S. 417, 5 Sup. Ct. 935, 29 L. ed. 89.

14. *State v. Jones*, 168 Mo. 398, 68 S. W. 566; *In re Boulter*, 5 Wyo. 329, 40 Pac. 520.

15. *State v. Jones*, 168 Mo. 398, 68 S. W. 566.

16. **U. S.**—*Maxwell v. Dow*, 176 U. S. 581, 20 Sup. Ct. 448, 494, 44 L. ed. 597; *Bolln v. Nebraska*, 176 U. S. 83, 20 Sup. Ct. 287, 44 L. ed. 382; *Hodgson v. Vermont*, 168 U. S. 262, 18 Sup. Ct. 80, 42 L. ed. 461; *McNulty v. California*, 149 U. S. 645, 13 Sup. Ct. 959, 37 L. ed. 882; *Vincent v. California*, 149 U. S. 648, 13 Sup. Ct. 960, 37 L. ed. 884; *Hurtado v. People*, 110 U. S. 516, 4 Sup. Ct. 111, 292, 28 L. ed. 232. **Cal.**—*People v. Flannelly*, 128 Cal. 83, 60 Pac. 670. **Colo.**—*Nesbit v. People*, 19 Colo. 441, 36 Pac. 221; *Jordan v. People*, 19 Colo. 417, 36 Pac. 218; *In re Dolph*, 17 Colo. 35, 28 Pac. 470; *In re Lowrie*, 8 Colo. 499, 9 Pac. 489, 54 Am. Rep. 558. **Ind.**—*State v. Boswell*, 104 Ind. 541, 4 N. E. 675. **Mont.**—*State v. Little Whirlwind*, 22 Mont. 425, 56 Pac. 820; *State v. Brett*, 16 Mont. 360, 40 Pac. 873. **Ore.**—*State v. Guglielmo*, 46 Ore. 250, 79 Pac. 577, 80 Pac. 103, 69 L. R. A. 466; *State v. Tucker*, 36 Ore. 291, 61 Pac. 894, 51 L. R. A. 246. **Utah.**—*In re McKee*, 19 Utah 231, 57 Pac. 23. **Vt.**—*State*

v. Stimpson, 78 Vt. 124, 62 Atl. 14, 1 L. R. A. (N. S.) 1153. **Wash.**—*State v. Humason*, 5 Wash. 499, 32 Pac. 111. **Wis.**—*Rowan v. State*, 30 Wis. 129, 11 Am. Rep. 559. **Wyo.**—*In re Boulter*, 5 Wyo. 329, 40 Pac. 520.

[a] **Meaning of "Due Process of Law."**—"Its (14th amendment) design was not to confine the states to a particular mode of procedure in judicial proceedings and prohibit them from prosecuting for felonies by information, instead of by indictment, if they chose to abolish the grand jury system. And the words 'due process of law,' in this amendment, do not mean and have not the effect to limit the powers of the state governments to prosecutions for crimes by indictments, but these words do mean law in its regular course of administration according to the prescribed forms and in accordance with the general rules for the protection of individual rights." *Rowan v. State*, 30 Wis. 129, 11 Am. Rep. 559.

[b] **"Law of the Land."**—Every valid statute of the state now in existence whenever enacted is the present "law of the land," in respect to the subject-matter of the statute. *Rowan v. State*, 30 Wis. 129, 11 Am. Rep. 559.

[c] **"Due process of law"** and **"law of the land"** mean the same thing. *Hurtado v. People*, 110 U. S. 516, 4 Sup. Ct. 111, 292, 28 L. ed. 232.

17. *Maxwell v. Dow*, 176 U. S. 581, 20 Sup. Ct. 448, 494, 44 L. ed. 597; *State v. Little Whirlwind*, 22 Mont. 425, 56 Pac. 820; *State v. Brett*, 16 Mont. 360, 40 Pac. 873.

[a] A state act authorizing courts to determine whether prosecutions shall be by information or by indictment is not an abridgment of the privileges and immunities of the citizens. *State v. Little Whirlwind*, 22 Mont. 425, 56 Pac. 820.

[b] A law allowing felonies to be prosecuted by information does not

their jurisdiction the equal protection of the laws.¹⁸

(II.) **State Constitution and Statutes.**—(A.) **INDICTMENT FOR HIGHER CRIMES.**—Many state constitutions contain provisions relative to criminal procedure. Necessarily, where these either in terms¹⁹ or by implication²⁰ require an indictment or presentment in the prosecution of certain offenses, it is not within the power of the legislature to dispense therewith. Nor can the accused himself in such cases, by consent, or otherwise, confer jurisdiction upon the court where the form of accusation is contrary to the constitutional requirement.²¹

Indictment or presentment have, by a few constitutions, been made necessary in every criminal charge.²² More often, however, it is

conflict with this amendment. *State v. Brett*, 16 Mont. 360, 40 Pac. 873.

18. *Jordan v. People*, 19 Colo. 417, 36 Pac. 218; *In re Dolph*, 17 Colo. 35, 28 Pac. 470.

[a] This amendment does not prevent a state from providing for indictment and information as concurrent remedies. *Jordan v. People*, 19 Colo. 417, 36 Pac. 218; *In re Dolph*, 17 Colo. 35, 28 Pac. 470.

19. **Ark.**—*Lewis v. State*, 21 Ark. 209. **Fla.**—*English v. State*, 31 Fla. 340, 12 So. 689. **Mass.**—*Com. v. Horregan*, 127 Mass. 450; *Nolan's Case*, 122 Mass. 330; *Jones v. Robbins*, 8 Gray 329. **N. J.**—*State v. Anderson*, 40 N. J. L. 224. **Tex.**—*Lott v. State*, 18 Tex. App. 627. **W. Va.**—*State v. Schnelle*, 24 W. Va. 767.

20. *Matthews v. Com.*, 18 Gratt. (Va.) 989.

[a] **Due Process of Law.**—Where the state constitution guarantees due process of law in criminal prosecutions, an indictment is not thereby made necessary. **Colo.**—*Parker v. People*, 13 Colo. 155, 21 Pac. 1120, 4 L. R. A. 803. **Ore.**—*State v. Tucker*, 36 Ore. 291, 61 Pac. 894, 51 L. R. A. 246. **Wis.**—*Rowan v. State*, 30 Wis. 129, 11 Am. Rep. 559.

[b] An indictment is not required by a constitutional provision giving the accused a right to be informed of the charge against him and to a copy of the indictment. *State v. Glenn*, 54 Md. 572.

[c] A provision of the state constitution that "the constitution of the United States is the supreme law of the land," has reference only to matters wherein the general government assumes to control the individual states, and does not prevent the legislature from dispensing with indictments. *In re Bafferty*, 1 Wash. 382, 25 Pac. 465.

[d] **Laws of the Land.**—A constitutional provision that no one shall be deprived of his liberty "except by the laws of the land" does not necessitate an indictment. *State v. Stimpson*, 78 Vt. 124, 62 Atl. 14, 1 L. R. A. (N. S.) 1153.

[e] **The constitutional guaranty of trial by jury** does not include the right to demand an indictment by grand jury. *Gordon v. State*, 102 Ga. 673, 29 S. E. 444.

21. **U. S.**—*Ex parte M'Clusky*, 40 Fed. 71. **Ind.**—*State v. Burnett*, 119 Ind. 392, 21 N. E. 972. **N. Y.**—*People v. Campbell*, 4 Park. Crim. 386. **N. C.**—*State v. Queen*, 91 N. C. 659. **Ohio.**—*Doyle v. State*, 17 Ohio 222. **Tenn.**—*Rice v. State*, 3 Heisk. 215.

22. **Mass.**—*Com. v. Horregan*, 127 Mass. 450; *Nolan's Case*, 122 Mass. 330; *Jones v. Robbins*, 8 Gray 329. **Mich.**—*Byrnes v. People*, 37 Mich. 515; *Slaughter v. People*, 2 Doug. 334. **N. J.**—*State v. Anderson*, 40 N. J. L. 224; *State v. Powell*, 7 N. J. L. 244. **N. C.**—*State v. Barker*, 107 N. C. 913, 12 S. E. 115, 10 L. R. A. 50; *State v. Christmas*, 20 N. C. 410. **S. C.**—*State v. Mitchell*, 1 Bay 267.

[a] The indictment mentioned in the constitution is a common law indictment. *Mott v. State*, 29 Ark. 147; *Eason v. State*, 11 Ark. 480.

[b] Violation of municipal ordinances are criminal offenses within the meaning of such constitutional provision. *State v. Anderson*, 47 Minn. 270, 50 N. W. 226; *State v. West*, 42 Minn. 147, 43 N. W. 845.

[c] **Assault and battery** is a criminal offense within the meaning of the constitution. *Eason v. State*, 11 Ark. 480; *Durr v. Howard*, 6 Ark. 461; *Rector v. State*, 6 Ark. 187.

[d] **In Oregon** by amendment of 1908 to the constitution (Const., art.

offenses of the higher grade, only, which must be indicted or presented; such, for instance, as are capital²³ or otherwise infamous,²⁴ or are punishable by death or life imprisonment,²⁵ or by death and imprisonment for a specified number of years,²⁶ or amount to a felony,²⁷ or such as are "indictable."²⁸

vii, §18), no person can be tried for crime or misdemeanor in the circuit court except by indictment.

[e] **Crimes Not Punishable by Civil Suit.**—Crimes must be punished by indictment or presentment, and cannot be punished by a civil suit instituted by any of the municipalities of the state. *McMinnville v. Stroud*, 109 Tenn. 569, 72 S. W. 949; *State ex rel. Wilson v. Haynes*, 104 Tenn. 406, 58 S. W. 120.

23. *State v. Woods*, 31 La. Ann. 267; *State v. Anderson*, 30 La. Ann. 557.

24. **Fla.**—*English v. State*, 31 Fla. 340, 12 So. 689 (holding that the constitutional provision contemplated a grand jury such as was known at common law, and that the legislative provision permitting conviction upon the assent of eight jurymen is void as being unconstitutional); *Ex parte Bell*, 19 Fla. 608; *King v. State*, 17 Fla. 183. **Me.**—*Butler v. Wentworth*, 84 Me. 25, 24 Atl. 456, 17 L. R. A. 764. **Nev.** *State v. Chamberlain*, 6 Nev. 573; *State v. Millain*, 3 Nev. 371. **N. Y.**—*Mack v. People*, 82 N. Y. 235; *People v. Fisher*, 20 Barb. 652; *People v. Campbell*, 4 Park. Crim. 386; *People ex rel. Sampson v. Dunning*, 113 App. Div. 35, 98 N. Y. Supp. 1067; *People v. Cox*, 67 App. Div. 344, 73 N. Y. Supp. 774; *People v. Scannell*, 37 Misc. 345, 75 N. Y. Supp. 500. **Ohio.**—*State v. Barlow*, 70 Ohio St. 363, 71 N. E. 726; *Lane v. State*, 39 Ohio St. 312; *Dillingham v. State*, 5 Ohio St. 280; *Lougee v. State*, 11 Ohio 68; *Smith v. State*, 1 Ohio C. C. (N. S.) 493. **R. I.**—*State v. Nolan*, 15 R. I. 529, 10 Atl. 481. **Tenn.**—*McGinnis v. State*, 9 Humph. 43, 49 Am. Dec. 697.

[a] The attempt to procure the absence of a witness for a criminal prosecution is not an "infamous" offense which must be prosecuted by indictment. *State v. Keyes*, 8 Vt. 57, 30 Am. Dec. 450.

[b] **Criminal libel**, not being an "infamous crime," may be prosecuted without indictment or information. *In re Westenber*, 167 Cal. 309, 139 Pac. 674.

25. *Romero v. State*, 60 Conn. 92, 22 Atl. 496; *State v. Danforth*, 3 Conn. 112.

26. **In Vermont** crimes that were neither capital nor punishable by imprisonment for more than seven years could be prosecuted by information. *State v. Dyer*, 67 Vt. 690, 32 Atl. 814; *State v. Magoon*, 61 Vt. 45, 17 Atl. 729; *State v. Haley*, 52 Vt. 476.

[a] The period is now twenty years. *State v. Leach*, 77 Vt. 166, 59 Atl. 168.

27. **Ia.**—*Zelle v. McHenry*, 51 Iowa 572, 2 N. W. 264; *State v. Beneke*, 9 Iowa 203. **Tex.**—*Graham v. State*, 43 Tex. 550; *Bills v. State*, 42 Tex. 305; *Kinley v. State*, 29 Tex. App. 410, 16 S. W. 339; *Lott v. State*, 18 Tex. App. 627; *Schultz v. State*, 15 Tex. App. 258, 49 Am. Rep. 194; *Williams v. State*, 12 Tex. App. 395. **Va.**—*Chahoon v. Com.*, 20 Gratt. 733; *Jones v. Com.*, 19 Gratt. 478; *Matthews v. Com.*, 18 Gratt. 989; *Com. v. Barrett*, 9 Leigh 665.

[a] **Only Felonies.**—The provision of the Tennessee constitution that no person shall be put to answer any criminal charge but by presentment, indictment or impeachment has reference only to those offenses which were felonies at common law. *State v. Manz*, 6 Coldw. 557; *State v. Bess*, 5 Coldw. 55; *McGinnis v. State*, 9 Humph. 43, 49 Am. Dec. 697; *State v. Maze*, 6 Humph. 17. See *State v. Witherspoon*, 115 Tenn. 138, 90 S. W. 852; *Lewis v. State*, 3 Heisk. 333; *Williams v. Karnes*, 4 Humph. 9.

28. *Com. v. Avery*, 14 Bush (Ky.) 625, 29 Am. Rep. 429; *Harrison v. Chiles*, 3 Litt. (Ky.) 194; *State v. Berlin*, 42 Mo. 572; *State v. Ebert*, 40 Mo. 186; *State v. Ledford*, 3 Mo. 102.

[a] But by amendment to the Missouri constitution felonies may now be prosecuted by information. See *State v. Rudolph*, 187 Mo. 67, 85 S. W. 584; *State v. Jones*, 168 Mo. 398, 68 S. W. 566.

[b] **"Indictable"** as used in this connection means indictable at common

But sometimes the constitution itself authorizes trial upon information as well as upon indictment,²⁹ or else empowers the legislature to abolish the grand jury system, thus enabling it to dispense with indictment and presentment.³⁰ And of course when not prohibited by the fundamental law, the legislature may provide other modes of procedure than indictment.³¹

Ex Post Facto Laws. — According to some authorities a constitutional or statutory provision permitting other modes of prosecution than indictment or presentment is not *ex post facto* as to offenses committed before its enactment.³² Other courts, however, take the view that a provision of this kind does more than affect the remedy, that it deprives the accused of a substantial right and is therefore *ex post facto*.³³

law. Consequently the offense of betting on elections, not being indictable at common law, does not come within this constitutional prohibition and may be prosecuted by information. *Com. v. Avery*, 14 Bush (Ky.) 625, 29 Am. Rep. 429. See also *State v. Kyle*, 166 Mo. 287, 65 S. W. 763, 56 L. R. A. 115.

29. **Colo.**—*Nesbit v. People*, 19 Colo. 441, 36 Pac. 221. **Ill.**—*Gould v. People*, 89 Ill. 216. **Mo.**—*State v. Sillbaugh*, 250 Mo. 308, 157 S. W. 352; *State v. Rudolph*, 187 Mo. 67, 85 S. W. 584; *State v. Kyle*, 166 Mo. 287, 65 S. W. 763, 56 L. R. A. 115. **Okla.**—*Ex parte McNaught*, 23 Okla. 285, 100 Pac. 27; *Evans v. Willis*, 22 Okla. 310, 97 Pac. 1047, 19 L. R. A. (N. S.) 1050. **Tex.**—*Hewitt v. State*, 25 Tex. 722. **Wash.**—*In re Barbee*, 19 Wash. 306, 53 Pac. 155.

30. **Ala.**—*Witt v. State*, 130 Ala. 129, 30 So. 473. **Ore.**—*State v. Tucker*, 36 Ore. 291, 61 Pac. 894, 51 L. R. A. 246, but by amendment to the Oregon constitution (1908), art. vii, §18, indictment is necessary to every trial in the circuit court. **S. D.**—*State v. Ayers*, 8 S. D. 517, 67 N. W. 611. **Wyo.**—*In re Boulter*, 5 Wyo. 329, 40 Pac. 520; *In re Wright*, 3 Wyo. 478, 27 Pac. 565, 31 Am. St. Rep. 94, 13 L. R. A. 748.

31. *Webber v. Harding*, 155 Ind. 408, 58 N. E. 533.

32. **Cal.**—*People v. Campbell*, 59 Cal. 243, 43 Am. Rep. 257, a constitutional provision authorizing the prosecution of offenses upon information or indictment instead of upon indictment alone. **Ind.**—*Sage v. State*, 127 Ind. 15, 26 N. E. 667. **Mo.**—*State v. Parks*, 165 Mo. 496, 65 S. W. 1132. **Wash.**—*State*

v. Hoyt, 4 Wash. 818, 30 Pac. 1060; *Lybarger v. State*, 2 Wash. 552, 27 Pac. 449, 1029. But see *McCarty v. State*, 1 Wash. 377, 25 Pac. 299, 22 Am. St. Rep. 152. **Wyo.**—*In re Wright*, 3 Wyo. 478, 27 Pac. 565, 31 Am. St. Rep. 94, 13 L. R. A. 748.

[a] "The amendment, although providing for another mode of procedure for the prosecution of felonies than by indictment, does not fall within the meaning of an *ex post facto* law as thus defined; for it does not make an action done before its adoption criminal, nor does it aggravate the crime or in any way affect it, nor change the punishment, nor alter the legal rules of evidence, but, as has been said, goes merely to the mode of procedure. 'The mode of investigating the facts remains as before, and this through a trial by a jury of defendant's own choosing, surrounded by certain safeguards guaranteed to him by the laws of the land, which cannot be dispensed with.' " *State v. Kyle*, 166 Mo. 287, 65 S. W. 763, 56 L. R. A. 115.

33. **Mont.**—*State v. Kingsly*, 10 Mont. 537, 26 Pac. 1066. **Okla.**—*Garnsey v. State*, 4 Okla. Crim. 547, 112 Pac. 24. **Utah.**—*State v. Rock*, 20 Utah 38, 57 Pac. 532.

[a] "To hold that a state could deprive the accused of his liberty by examination before a magistrate and by the filing of an information by the prosecuting attorney, without the presentment of an indictment found by a grand jury, for an offense committed while Utah was a territory and under the laws of Congress, would be to recognize in a state power to do that which

(B.) INDICTMENT FOR MISDEMEANORS.—The constitution of the United States does not guarantee to a person charged with a misdemeanor the right to an indictment by a grand jury.³⁴ And generally, though not in every jurisdiction,³⁵ state constitutional and statutory provisions requiring an indictment either expressly except from their operation petty offenses, or are held inapplicable to summary proceedings before magistrates and misdemeanor cases.³⁶

Not only is an indictment unnecessary in such cases³⁷ but it is usually

Congress could not do by legislation, and the right to take from the accused a constitutional right which belonged to him when the offense was committed." *State v. Rock*, 20 Utah 38, 57 Pac. 532.

34. **U. S.**—*Maekin v. United States*, 117 U. S. 348, 6 Sup. Ct. 777, 29 L. ed. 909. **Colo.**—*Chas v. People*, 2 Colo. 509. **Mo.**—*Territory v. Farnsworth*, 5 Mont. 303, 5 Pac. 869.

35. *Lewis v. State*, 21 Ark. 209; *Eason v. State*, 11 Ark. 480; *Rector v. State*, 6 Ark. 187.

36. **Colo.**—*In re Creation of New Counties*, 9 Colo. 624, 21 Pac. 472. **Fla.** *Ex parte Bell*, 19 Fla. 608; *King v. State*, 17 Fla. 183. **Ga.**—*Daughtry v. State*, 115 Ga. 819, 42 S. E. 248; *Welborne v. Donaldson*, 115 Ga. 563, 41 S. E. 999; *Turner v. State*, 114 Ga. 421, 40 S. E. 308; *Gordon v. State*, 102 Ga. 673, 29 S. E. 444. **Ill.**—*Paulson v. People*, 195 Ill. 507, 63 N. E. 144; *Brewster v. People*, 183 Ill. 143, 55 N. E. 640. **Ind.**—*Williams v. State*, 169 Ind. 384, 82 N. E. 790; *Webber v. Harding*, 155 Ind. 408, 58 N. E. 533. **Ia.** *Zelle v. McHenry*, 51 Iowa 572, 2 N. W. 264; *State v. Beneke*, 9 Iowa 203. **Ky.** *Louisville v. Wehmhoff*, 116 Ky. 812, 76 S. W. 876, 79 S. W. 201; *Arnold v. Com.*, 80 Ky. 300, 44 Am. Rep. 480; *Lowry v. Com.*, 18 Ky. L. Rep. 481, 36 S. W. 1117. **La.**—*State v. Gutierrez*, 15 La. Ann. 190. **Md.**—*State v. Glenn*, 54 Md. 572. **Ohio.**—*State v. Barlow*, 70 Ohio St. 363, 71 N. E. 726; *Cole v. State*, 29 Ohio St. 226; *Dillingham v. State*, 5 Ohio St. 280. **Pa.**—*Com. v. Leigh*, 38 Leg. Int. 184. **Tenn.**—*State v. Manz*, 6 Coldw. 557; *State v. Maze*, 6 Humph. 17.

See cases cited, *supra*, I, A, 2, b, (II), (A); and the title "Summary Proceedings."

[a] The offense of taking lobsters contrary to law need not be prosecuted upon indictment or presentment in a

magistrate's court. *State v. Craig*, 80 Me. 85, 13 Atl. 129.

[b] Violation of a city ordinance may be prosecuted without indictment. *State v. Berlin*, 42 Mo. 572.

[c] A constitutional provision requiring all offenses to be prosecuted by information or indictment does not require information or indictment against a person charged with assault and battery. *State v. Gleason*, 15 Wash. 509, 46 Pac. 1043.

[d] Contempt may be punished without indictment. *Arnold v. Com.*, 80 Ky. 300, 44 Am. Rep. 480; *People ex rel. Attorney General v. News Times Pub. Co.*, 35 Colo. 253, 84 Pac. 912.

[e] The offense of betting on elections may be prosecuted in a summary proceeding. *Com. v. Avery*, 14 Bush (Ky.) 625, 29 Am. Rep. 429.

[f] Corporations (1) may be proceeded against in the inferior courts without indictment. *People v. Palermo Land & W. Co.*, 4 Cal. App. 717, 89 Pac. 723, 725; *Goodman Co. v. Com.*, 30 Ky. L. Rep. 519, 99 S. W. 252; *Louisville & N. R. Co. v. Lebanon*, 8 Ky. L. Rep. 59. (2) The rule seems to be otherwise in Canada. *In re Chapman*, 19 Ont. 33; *Ex parte Woodstock Elec. L. Co.*, 4 Can. Crim. Cas. 107.

[g] Juvenile Offenders.—A child under sixteen may be prosecuted in the court of special sessions without an indictment, since all crimes committed by children under sixteen are by statute reduced to the grade of misdemeanors. *People v. Kaminsky*, 208 N. Y. 389, 102 N. E. 515.

37. **Ia.**—*State v. Shawbeck*, 7 Iowa 322; *State v. Koehler*, 6 Iowa 398; *State v. Walters*, 5 Iowa 507. **Kan.** *Guy v. State*, 1 Kan. 448. **Mass.**—*Com. v. Rawson*, 183 Mass. 491, 67 N. E. 605. **Ohio.**—*Finnical v. Cadiz*, 61 Ohio St. 494, 56 N. E. 200. **S. C.**—*State v. Meyer*, 1 Spears 305.

held improper, although such is not the universal rule.³⁸ And in some states an indictment or information is necessary where the misdemeanor is triable in the higher courts.³⁹

(C.) STATUTORY OFFENSES AND PENALTIES. — An act though not a public offense at common law may be made so by statute and a punishment prescribed therefor; in such cases an indictment will lie,⁴⁰ unless the statute provides some other mode of procedure,⁴¹ for the mention of another method of prosecution impliedly excludes that by indictment unless it is likewise specified,⁴² or unless the statutory remedy is contained in a succeeding statute to that prohibiting the act or in a subsequent substantive clause of the same statute.⁴³ And the statutory remedy becomes merely cumulative to that by indictment where the matter prohibited was already at common law indictable.⁴⁴

[a] Prosecution for violation of the by-laws of a town can only be begun by complaint, and cannot be begun by indictment. *Com. v. Rawson*, 183 Mass. 491, 67 N. E. 605.

38. *Ala.*—*Davis v. State*, 141 Ala. 84, 37 So. 454, 109 Am. St. Rep. 19. *Tenn.*—*McGinnis v. State*, 9 Humph. 43, 49 Am. Dec. 697; *State v. Hunter*, 5 Humph. 597; *Smith v. State*, 1 Humph. 396. *Va.*—*Jackson v. Com.*, 13 Gratt. 795.

And see *Ex parte Wade*, 2 Okla. Crim. 100, 100 Pac. 35.

39. *Ill.*—*Gould v. State*, 89 Ill. 216; *Parris v. People*, 76 Ill. 274. *Ore.* Const. (1908), art. vii, §17. *Tex.*—*Garza v. State*, 11 Tex. App. 410; *Deon v. State*, 3 Tex. App. 435.

[a] **Juvenile Act.**—Misdemeanors, jurisdiction of which has been conferred upon the juvenile court, cannot be tried in the juvenile department of the superior court upon complaint, even though authorized by special code provision, since such provision would be unconstitutional; it is a special law and contrary to the general law which requires information or indictment in the superior court. *Gardner v. Superior Court*, 19 Cal. App. 548, 126 Pac. 501.

[b] For trial of misdemeanors transferred from county court to the circuit court, unless the matter is brought up on appeal. *Clark v. State*, 46 Ala. 307.

40. *Cal.*—*Ex parte McCarthy*, 53 Cal. 412. *La.*—*State v. Williams*, 7 Rob. 252. *Mo.*—*State v. Bittinger*, 55 Mo. 596; *State v. Carter*, 48 Mo. 481 (distinguishing between offenses punishable by fine and imprisonment and those punishable by fine only. The

former are indictable while the latter give rise only to a civil action).

41. *Mo.*—*State v. Bittinger*, 55 Mo. 596; *State v. Stewart*, 47 Mo. 382; *State v. Huffscheidt*, 47 Mo. 73. *Tenn.* *State v. Maze*, 6 Humph. 17. *Eng.*—*Rex v. Robinson*, 2 Burr. 799, 97 Eng. Reprint 568; *Rex v. Buck*, 1 Str. 679, 93 Eng. Reprint 778.

42. *Ind.*—*State v. Hailstock*, 2 Blackf. 257. *Kan.*—*Guy v. State*, 1 Kan. 448. *Mo.*—*State v. Ebert*, 40 Mo. 186; *Williams v. State*, 4 Mo. 481; *State v. Ledford*, 3 Mo. 102. *N. Y.* *People ex rel. Hislop v. Cowles*, 77 N. Y. 331; *People v. Brown*, 16 Wend. 561. *Tenn.*—*State v. Maze*, 6 Humph. 17. *Eng.*—*Rex v. Wright*, 1 Burr. 543, 97 Eng. Reprint 441.

43. *Woods v. Com.*, 12 Serg. & R. (Pa.) 213; *Rex v. Harris*, 4 T. R. 202, 100 Eng. Reprint 973; *Rex v. Briggs*, 1 K. B. 381.

[a] In such cases the prosecutor proceeds by indictment, on the prohibitory clause as for a misdemeanor at common law. *State v. Bishop*, 7 Conn. 181; *Phillips v. State*, 19 Tex. 158.

44. *Rex v. Robinson*, 2 Burr. 799, 97 Eng. Reprint 568.

[a] Where an act is indictable under the state law and likewise prohibited by a city ordinance, its commission will subject the offender to an indictment by the state and also to a civil suit by the city. *State v. Plunkett*, 18 N. J. L. 5.

[b] Indictment and the common law remedy are concurrent whenever the former is given by statute for a matter actionable at common law and the statute neither expressly nor im-

The prohibitory statute may impose a penalty for its violation. If no remedy is specified by which to recover such penalty, indictment is the proper method.⁴⁵ But if a particular mode of recovering the penalty is given by the statute that mode must be followed whether it be by indictment⁴⁶ or other remedy.⁴⁷

B. PRESENTMENT. — 1. Definition and General Consideration.

A presentment is an informal statement in writing by the grand jury, made on their own motion either on their own knowledge or on evidence before them, representing to the court that a public offense has been committed, and that there is reasonable ground for believing that a particular individual named or described therein has committed it.⁴⁸

pliedly negatives the previously existing remedy. *State v. Bittinger*, 55 Mo. 596.

45. **Md.**—*Keller v. State*, 11 Md. 525, 69 Am. Dec. 226. **Pa.**—*Gearheart v. Dixon*, 1 Pa. 224. **S. C.**—*State v. Helgen*, 1 Spears (S. C.) 310; *State v. Meyer*, 1 Spears (S. C.) 305; *State v. Mathews*, 2 Brev. (S. C.) 82. **Eng.** *Rex v. Davis*, *Sayer* 163, 96 Eng. Reprint 839.

See generally the title “Penalties, Forfeitures and Fines;” and *infra*, XVII.

46. Information will not lie to recover a penalty where the statute specifies the remedy by indictment. *Com. v. Howes*, 15 Pick. (Mass.) 231.

[a] A penal action will not lie to recover a fine imposed by statute for the commission of an offense, where indictment is the remedy prescribed. *Com. v. Louisville & N. R. Co.*, 18 Ky. L. Rep. 610, 37 S. W. 589.

47. *United States v. Lyman*, 1 Mason (U. S.) 498; *Adams v. Woods*, 2 Cranch (U. S.) 336, 2 L. ed. 297; *Williams v. State*, 4 Mo. 481. See the title “Penalties, Forfeitures and Fines;” and *infra*, XVII.

[a] Where a civil action is pointed out as the method of recovering a fine, a common law indictment will not lie. *State v. Huffscheidt*, 47 Mo. 73.

[b] Thus where the legislature has specified a “bill, plaint, or information” as the mode of recovering a fine or penalty an indictment will not lie. *State v. Corwin*, 4 Mo. 610.

[c] But an indictment will lie where the statute provides a recovery by bill, plaint, information, or otherwise. *Journey v. State*, 1 Mo. 428.

[d] Complaint for Violation of City Ordinance.—Prosecution for the viola-

tion of a by-law of a town cannot be begun by indictment where the act fixing the penalty authorizes its recovery by complaint. *Com. v. Rawson*, 183 Mass. 491, 67 N. E. 605.

[e] Where a statute creates a new offense and prescribes a pecuniary penalty, recoverable by action, an indictment will not lie for a violation. *Com. v. Porber*, 37 Leg. Int. (Pa.) 283; *Rex v. Malland*, 2 Str. 828, 93 Eng. Reprint 877.

48. **Ark.**—*State v. Whitlock*, 41 Ark. 403; *State v. Cox*, 8 Ark. 436. **Cal.** *In re Grosbois*, 109 Cal. 445, 42 Pac. 444. **Fla.**—*Collins v. State*, 13 Fla. 651. **Ga.**—*Nunn v. State*, 1 Ga. 243; *Ex parte Chauvin*, *Charlt.* 14. **N. Y.** *Maek v. People*, 82 N. Y. 235; *Jones v. People*, 101 App. Div. 55, 92 N. Y. Supp. 275. **N. C.**—*State v. Wilcox*, 104 N. C. 847, 10 S. E. 453; *State v. Morris*, 104 N. C. 837, 10 S. E. 454; *Lewis v. Bd. of Comrs.*, 74 N. C. 194. **Pa.** *Com. v. Green*, 126 Pa. 531, 17 Atl. 878. **Va.**—*Com. v. Christian*, 7 Gratt. 631; *Com. v. Towles*, 5 Leigh 743.

[a] “If we regard the term ‘presentment’ in its stricter meaning as an accusation of the grand jury sua sponte, or as Judge Story puts it, ‘an accusation made ex mero motu,’ as distinguished from an indictment which was a written accusation preferred to the grand jury and presented upon oath at the instance of government, then I agree that it is not a final accusation—the alternative, so to speak, of an indictment. For a presentment was regarded as the basis of an indictment. The distinction does not now often practically appear, inasmuch as the grand jury is rarely the origin of accusation, as was its prototype under the Assize of Clarendon . . . , though

2. When Presentment Proper or Necessary.—At common law, an offender was generally not put upon trial upon a presentment; it served merely as the basis for an indictment.⁴⁹ But in some jurisdictions a presentment is regarded as a final accusation upon which prosecution may be based, and is thus in effect the same as an indictment.⁵⁰

The right of the grand jury to make presentments of offenses generally is recognized in some states, as part of their common law;⁵¹ in others it exists by virtue of statute;⁵² while in a few states presentment has either been expressly abolished⁵³ or else is recognized only in a limited sense.⁵⁴

C. INFORMATION.—1. Definition and General Consideration.

power to act *ex mero motu* is preserved in section 259 of our Code of Criminal Procedure.” *Jones v. People*, 101 App. Div. 55, 92 N. Y. Supp. 275.

[b] The only difference in Tennessee between a presentment and bill of indictment is that the presentment is signed by all the jurors and the indictment only by the foreman. *State v. Darnal*, 1 Humph. 290.

49. **Fla.**—*Collins v. State*, 13 Fla. 651. **Ga.**—*Ex parte Chauvin*, Charlt. 14. **Tenn.**—*State v. Darnal*, 1 Humph. 290.

[a] In North Carolina this is the rule by statute. *State v. Cain*, 8 N. C. 352.

[b] It was nothing more than an informal statement of the grand jury calling attention to the existence of some violation of the law which the jury might think needed correction. *State v. Millain*, 3 Nev. 371.

50. **Ga.**—*Groves v. State*, 73 Ga. 205; *Conner v. State*, 25 Ga. 515, 71 Am. Dec. 184; *Ivey v. State*, 23 Ga. 576. **Tenn.**—*State v. Hunter*, 5 Humph. 597; *Smith v. State*, 1 Humph. 396. **Va.** *Com. v. Towles*, 5 Leigh 743.

[a] Where it was objected that the defendant was put upon his trial upon the presentment of the grand jury instead of an indictment, the court used this language: “This practice has been so long followed in this State that it is now too late to question its legality, although it may not be sanctioned by established principles.” *Smith v. State*, 1 Humph. (Tenn.) 396.

[b] In Virginia the presentment has in itself the character of a criminal proceeding until it is embodied and merged in an indictment for the same

offense, or in an information filed upon it, and may stand in the place of an indictment on which the prosecution for a misdemeanor may proceed, without indictment or information. *Com. v. Christian*, 7 Gratt. 631; *Com. v. Towles*, 5 Leigh 743.

51. **Md.**—*Blaney v. State*, 74 Md. 153, 21 Atl. 547. **Mass.**—*Com. v. Hayden*, 163 Mass. 453, 40 N. E. 846, 47 Am. St. Rep. 468, 28 L. R. A. 318. **N. C.**—*State v. Wilcox*, 104 N. C. 847, 10 S. E. 453; *Lewis v. Bd. of Comrs.*, 74 N. C. 194. **Pa.**—*Com. v. Green*, 126 Pa. 531, 17 Atl. 878, 12 Am. St. Rep. 894; *McCullough v. Com.*, 67 Pa. 30. **Va.**—*Com. v. Towles*, 5 Leigh 743.

See generally as to necessity of presentment, *supra*, I, A, 2, b, (I) and (II).

52. **Conn.**—*Goddard v. State*, 12 Conn. 448. **Ga.**—*In re Lester*, 77 Ga. 143; *Groves v. State*, 73 Ga. 205. **La.** *State v. Richard*, 50 La. Ann. 210, 23 So. 331. **Mo.**—*State v. Terry*, 30 Mo. 368. **N. Y.**—*Jones v. People*, 101 App. Div. 55, 92 N. Y. Supp. 275. **Tenn.** *State v. Lewis*, 87 Tenn. 119, 9 S. W. 427; *State v. Lee*, 87 Tenn. 114, 9 S. W. 425; *Smith v. State*, 1 Humph. 396.

53. **Ariz.** Penal Code, §933; **Cal.** St., 1905, p. 693.

54. *Jones v. People*, 101 App. Div. 55, 92 N. Y. Supp. 275.

[a] Presentment is unknown in New York, but “sometimes, however, our grand juries make a sort of general presentment of evil and evil things, to call public attention to them, yet not as instructions for any specific indictment. No one could be called to answer to such a presentment.” *In re Gardiner*, 31 Misc. 364, 64 N. Y. Supp. 760.

An information is a written accusation of crime against a person or persons, filed by a public officer, without the intervention of a grand jury.⁵⁵

The common law of England recognized two kinds of information. The one which was filed by the attorney general without leave of the court⁵⁶ has generally been adopted in the United States.⁵⁷

2. When Information Proper or Necessary. — a. *At Common Law.* At the common law informations were not allowed for capital crimes nor for felonies, but solely for misdemeanors.⁵⁸

55. *State v. Starling*, 15 S. C. 120; *State v. Corbit*, 42 Tex. 88.

[a] **Filed by Private Prosecutor.** An information exhibited under the common law by leave of the court by a private prosecutor is in effect merely a complaint within the provision of the constitution allowing prosecution by complaint for misdemeanors. *Evans v. Willis*, 22 Okla. 310, 97 Pac. 1047, 19 L. R. A. (N. S.) 1050.

[b] At common law an information was a surmise or suggestion upon record made on behalf of the sovereign to a court of criminal jurisdiction charging a person with the commission of a misdemeanor. *United States v. Tureaud*, 20 Fed. 621.

[c] A prosecution by information means a prosecution instituted by some officer whose duty it is to prosecute criminal offenses, and the affidavit of a private individual is not an information. *State v. Shortell*, 93 Mo. 123, 5 S. W. 691; *State v. Kelm*, 79 Mo. 515.

56. **S. C.**—*State v. Starling*, 15 S. C. 120. **Tenn.**—*McGinnis v. State*, 9 Humph. 43, 49 Am. Dec. 697. **Eng.** *Rex v. Williams*, 3 B. & Ald. 582, 106 Eng. Reprint 774; *Rex v. Willett*, 6 T. R. 294, 101 Eng. Reprint 560.

57. **Ala.**—*State v. Moore*, 19 Ala. 514. **Mo.**—*State v. Kyle*, 166 Mo. 287, 65 S. W. 763, 56 L. R. A. 115; *State v. Kelm*, 79 Mo. 515. **Okla.**—*Evans v. Willis*, 22 Okla. 310, 97 Pac. 1047, 19 L. R. A. (N. S.) 1050.

[a] "The latter officers (district attorneys) would seem to be entitled, under our common law, to prosecute by information as a right adhering to their office, and without leave of court." *State v. Kelm*, 79 Mo. 515.

[b] The other, filed by the master of the crown office, upon leave of the court, probably does not exist in the United States. *State v. Gleason*, 32

Kan. 245, 4 Pac. 363; *Evans v. Willis*, 22 Okla. 310, 97 Pac. 1047, 19 L. R. A. (N. S.) 1050.

58. **U. S.**—*Ex parte Wilson*, 114 U. S. 417, 5 Sup. Ct. 935, 29 L. ed. 89; *Hurtado v. People*, 110 U. S. 516, 4 Sup. Ct. 111, 292, 28 L. ed. 232. **Ala.** *State v. Moore*, 19 Ala. 514. **Ga.**—*Gordon v. State*, 102 Ga. 673, 29 S. E. 444. **Kan.**—*State v. Gleason*, 32 Kan. 245, 4 Pac. 363. **Mo.**—*State v. Kyle*, 166 Mo. 287, 65 S. W. 763, 56 L. R. A. 115; *State v. Kelm*, 79 Mo. 515. **Okla.** *Evans v. Willis*, 22 Okla. 310, 97 Pac. 1047, 19 L. R. A. (N. S.) 1050. **Tenn.** *McGinnis v. State*, 9 Humph. 43, 49 Am. Dec. 697; *Mitchell v. State*, 5 Yerg. 340. **Va.**—*Matthews v. Com.*, 18 Gratt. 989; *Com. v. Barrett*, 9 Leigh 665. **Eng.** *Reg. v. Baldwin*, 8 Ad. & El. 168, 112 Eng. Reprint 801, 1100; *Rex v. Williams*, 3 B. & Ald. 582, 106 Eng. Reprint 774; *Rex v. Willett*, 6 T. R. 294, 101 Eng. Reprint 560; *Rex v. Bull*, 1 Wills. 93; *Rex v. Hilbers*, 2 Chit. 163.

[a] At common law the question whether the prosecution must be by indictment or might be by information depended upon the consequence to the convict himself. *Ex parte Wilson*, 114 U. S. 417, 5 Sup. Ct. 935, 29 L. ed. 89.

[b] "It appears to have been the common and usual practice, sustained by numerous precedents, for informations to be exhibited, whether in the name of the King's Attorney General, or of the master of the crown office, for batteries, cheats, seducing a young man or woman from their parents in order to marry them against their consent, or for other wicked purposes, spiriting away a child, rescuing persons from legal arrest, perjuries, subornation of perjuries, forgery, conspiracies and other like crimes done principally to a private person, as well as for offenses done principally to the

b. *Under Constitutions and Statutes.*—(I.) United States Constitution. As already noted, by the fifth amendment to the United States constitution, capital or otherwise infamous crimes cannot be prosecuted by information in the federal courts, or those of the territories or the District of Columbia. But there is nothing in this provision of the federal constitution, nor in any other provision thereof, which prevents any state from dispensing with indictment and proceeding by information.⁵⁹

(II.) *State Constitutions and Statutes.*—In many of the states constitutional provisions limit or discountenance informations.⁶⁰ On the other hand information is by the constitutions or statutes of some states made a concurrent remedy with indictment, it being within the discretion of the prosecuting attorney which to pursue.⁶¹

The use of information is sometimes confined to offenses not capital,⁶² or to offenses that are neither capital nor entail imprisonment for a specified period, such as for life,⁶³ or for a number of years.⁶⁴

king and, in general, for any other offenses against the public good, or against the first and obvious principles of justice and common honesty. 3 Bac. Abr. tit. 'Information;' 2 Hawk. P. C. c. 26, §1; Cole's Crim. Inf. p. 9; Com. Dig. tit. 'Information.''' Evans v. Willis, 22 Okla. 310, 97 Pac. 1047, 19 L. R. A. (N. S.) 1050.

[c] Criminal informations are to be filed on particular acts of parliament which inflict a penalty upon conviction, one-half to the use of the king and the other to the use of the informer. 1 Chitty's Cr. Law 137, quoted in State v. Williams, 7 Rob. (La.) 252.

59. See *supra*, I, A, 1, b, (I).

60. See *supra*, I, A, 1, b, (II).

61. Cal.—People v. Prather, 134 Cal. 436, 66 Pac. 589, 863; People v. Ebanks, 120 Cal. 626, 52 Pac. 1078; People v. Whelan, 117 Cal. 559, 49 Pac. 583. Colo.—Nesbit v. People, 19 Colo. 441, 36 Pac. 221; *In re Dolph*, 17 Colo. 35, 28 Pac. 470. But see Parker v. People, 13 Colo. 155, 21 Pac. 1120, 4 L. R. A. 803; *In re Lowrie*, 8 Colo. 499, 9 Pac. 489, 54 Am. Rep. 558. Ill.—Gould v. People, 89 Ill. 216. Mo.—State v. Rudolph, 187 Mo. 67, 85 S. W. 584; State v. Taylor, 171 Mo. 465, 71 S. W. 1005; State v. Kyle, 166 Mo. 287, 65 S. W. 763, 56 L. R. A. 115; State v. Bennett, 102 Mo. 356, 14 S. W. 865, 10 L. R. A. 717; State v. Shortell, 93 Mo. 123, 5 S. W. 691; State v. Kelm, 79 Mo. 515. Mont.—State v. District Court, 24 Mont. 33, 60 Pac. 493. Okla.—*Ex parte Mc-*

Naught, 23 Okla. 285, 100 Pac. 27; Evans v. Willis, 22 Okla. 310, 97 Pac. 1047, 19 L. R. A. (N. S.) 1050. Tex. Hewitt v. State, 25 Tex. 722. Wash. *In re Barbee*, 19 Wash. 306, 53 Pac. 155.

[a] In Montana the constitution provides that all criminal actions in the district court, except those on appeal, shall be prosecuted by information after examination and commitment by a magistrate or after leave granted by the court, or shall be prosecuted by indictment without such examination or commitment or without such leave of court. Mont. Const., art. 3, §8.

[b] A contempt of court is not a criminal offense to be prosecuted by information or indictment. State v. District Court, 24 Mont. 33, 60 Pac. 493.

[c] *Sense in Which Terms Used.* The terms indictment and information as used in the constitutional amendment, Nov. 8, 1900 (Mo.), are to be understood in their common-law sense—information meaning a criminal charge presented by the attorney-general or the prosecuting attorney under the official oath. State v. Kyle, 166 Mo. 287, 65 S. W. 763, 56 L. R. A. 115.

62. State v. Stewart, 47 La. Ann. 410, 16 So. 945; State v. Woods, 31 La. Ann. 267.

63. State v. Keena, 64 Conn. 212, 29 Atl. 470.

64. State v. Leach, 77 Vt. 166, 59 Atl. 168.

Felonies cannot in some states be prosecuted by information.⁶⁵

D. COMPLAINT.—1. Definition.—A complaint is an accusation or charge against an offender made by a private person or an informer to a justice of the peace or other officer alleging that the offender has violated the law.⁶⁶

2. When Complaint Proper or Necessary.—Unless prohibited by constitutional mandate⁶⁷ the legislature may dispense with indictments and informations in misdemeanor cases⁶⁸ and provide for their prosecution by affidavit or complaint.⁶⁹

Violations of police regulations and city ordinances, not being regarded as crimes to which constitutional provisions apply, are properly prosecuted upon complaint or affidavit.⁷⁰

Although prosecutions in the higher courts cannot be begun by complaint or affidavit,⁷¹ save in a few jurisdictions,⁷² a case appealed from the justice court will be tried *de novo* upon the original com-

65. Fla.—*King v. State*, 17 Fla. 183. Ga.—*Gordon v. State*, 102 Ga. 673, 29 S. E. 444. Ia.—*Santo v. State*, 2 Iowa 165, 63 Am. Dec. 487. Va.—*Matthews v. Com.*, 18 Gratt. 989; *Com. v. Barrett*, 9 Leigh 665.

66. *Goddard v. State*, 12 Conn. 448.

[a] The term complaint is a technical one descriptive of proceedings before magistrates. *Com. v. Davis*, 11 Pick. (Mass.) 432.

[b] A complaint differs from an information in that it is a written accusation of an offense made by a private individual, while the information is an accusation made by the public prosecutor. *Goddard v. State*, 12 Conn. 448.

[c] Complaint differs from an indictment or presentment which are the accusations of a grand jury. *Goddard v. State*, 12 Conn. 448.

67. See *supra*, I, A, 2, b; I, C, 2, b.

[a] A law is unconstitutional which authorizes the prosecution of offenses upon an affidavit when the constitution requires an information or indictment. *State v. Briscoe*, 80 Mo. 643.

68. *Glassecock v. State*, 159 Ala. 90, 48 So. 700; *Frost v. State*, 124 Ala. 71, 27 So. 550. See *supra*, I, A, 1, b, (II), (B).

[a] The assembly may provide for prosecuting misdemeanors before justices of the peace upon sworn complaint or other information even though the constitutional provision provides for the prosecution of offenses by indictment or information. *In re Creation of New Counties*, 9 Colo. 624, 21 Pac. 472.

69. Ala.—*Frost v. State*, 124 Ala. 71, 27 So. 550. Ind.—*Webber v. Harding*, 155 Ind. 408, 58 N. E. 533. Vt. *Lincoln v. Smith*, 27 Vt. 328. Wash. *State v. Gleason*, 15 Wash. 509, 46 Pac. 1043.

[a] In Missouri (1) prosecutions before justices of the peace for misdemeanors must be commenced by an information in the form and nature of an affidavit. *State v. Russel*, 88 Mo. 648. (2) But an affidavit alone will not sustain a criminal prosecution; there also must be an information by the prosecuting attorney based upon the affidavit. *State v. Shortell*, 93 Mo. 123, 5 S. W. 691; *State v. Thompson*, 81 Mo. 163; *State v. Kelm*, 79 Mo. 515; *State v. Sebecca*, 76 Mo. 55; *State v. Huddleston*, 75 Mo. 667; *State v. Rockwell*, 18 Mo. App. 395.

70. *Mayor v. Meuer*, 35 La. Ann. 1192; *State v. Noble*, 20 La. Ann. 325; *State v. Gutierrez*, 15 La. Ann. 190; *New Orleans v. Costello*, 14 La. Ann. 37.

71. *Faulkner v. State* (Tex. Crim.), 66 S. W. 787; *Prewitt v. State* (Tex. Crim.), 34 S. W. 924; *Deon v. State*, 3 Tex. App. 435. See *supra*, I, A, 2, b, (II), (B).

72. *Witt v. State*, 130 Ala. 129, 30 So. 473.

[a] In Alabama a prosecution for misdemeanor may be begun in a county court by affidavit and if the defendant demand a jury the case is transferred to the circuit court and there tried on the affidavit without indictment by the grand jury. *Witt v. State*, 130 Ala. 129, 30 So. 473.

plaint and no indictment or information need be filed in such case.⁷³

II. BY WHOM PROCEEDINGS INSTITUTED.—In some jurisdictions under certain circumstances proceedings for the indictment of a criminal or for the filing of an information, may⁷⁴ or must⁷⁵ be begun on the complaint or request of certain persons called prosecutors or informers,⁷⁶ whose name must be endorsed thereon.⁷⁷

Generally, however, the prosecution is instituted by the grand jury *ex mero motu*,⁷⁸ or upon a bill presented by the prosecuting attorney,⁷⁹ or is begun by information,⁸⁰ or by a complaint and examination before a magistrate, followed by indictment or information,⁸¹ or, in the case of petty crimes, by complaint alone.⁸²

⁷³ *Ex parte Morris*, 45 Fla. 157, 34 So. 89; *State v. Quick*, 72 N. C. 241.

⁷⁴ **Ark.**—*State v. Stanford*, 20 Ark. 145; *State v. Harrison*, 19 Ark. 565; *State v. Brown*, 10 Ark. 104. **Ill.**—*Gallagher v. People*, 120 Ill. 179, 11 N. E. 335; *People v. Paul*, 167 Ill. App. 557. **Ky.**—*Com. v. Gore*, 3 Dana 475; *Com. v. Hutcheson*, 1 Bibb 355.

But see **Kan.**—*State v. Brown*, 63 Kan. 262, 65 Pac. 213. **Mo.**—*State v. Kelm*, 79 Mo. 515; *Ex parte Thomas*, 10 Mo. App. 24. **Okl.**—*Evans v. Willis*, 22 Okla. 310, 97 Pac. 1047, 19 L. R. A. (N. S.) 1050.

[a] **In Illinois** (1) before a private person can file an information one of the judges of the municipal court is required to examine the information and may examine the informant, and if he is satisfied that there is probable cause for filing it he shall endorse it. *Gallagher v. People*, 120 Ill. 179, 11 N. E. 335; *People v. Paul*, 167 Ill. App. 557. (2) But the absence of the indorsement is a mere irregularity which is waived by pleading. *People v. Paul*, 167 Ill. App. 557.

⁷⁵ *The King v. Lukens*, 1 Dall. (U. S.) 5, 1 L. ed. 13; *United States v. Flanakin*, Hempst. 30, 25 Fed. Cas. No. 15,119a. See *United States v. Sandford*, 1 Cranch C. C. 323, 27 Fed. Cas. No. 16,221; *Blackman v. State*, 98 Ala. 77, 13 So. 316.

[a] At common law, see *King v. Wood*, 3 B. & Ad. 657, 23 E. C. L. 290; *Reg. v. Gurney*, 11 Cox C. C. (Eng.) 414.

[b] **Prosecutions for Benefit of Prosecutor.**—See *State v. Robinson*, 29 N. H. 274.

[c] **In Tennessee** (1) a prosecutor has been held to be necessary in prosecutions for larceny (*Wattingham*

v. State, 5 Sneed 64; *Medaris v. State*, 10 Yerg. 239), (2) or bigamy (*State v. Tankersly*, 6 Lea 582), (3) but not in prosecutions for retailing liquors on Sunday. *Neideiser v. State*, 6 Baxt. 499.

⁷⁶ *Wortham v. Com.*, 5 Rand. (Va.) 669.

For practice at common law, see 1 Chit. Cr. Law 316; *Thompson & Merriam on Juries*, §§609, 629; 1 Bishop Cr. Proc., §278; 1 Whart. Cr. Law, §453; *Harris Cr. Law* 288; *Edwards, Grand Juries* 100; *Sir. J. Kelyng* 8; 5 How. St. Tr. 972.

[a] **Who Are Prosecutors.**—"A prosecutor . . . is one who appears before the grand jury, and has his name entered as prosecutor, and undertakes the prosecution of a particular case, subject to the burdens and penalties which that office and undertaking impose. It does not include one who merely complains and makes known to the grand jury that a particular offense has been committed by a particular person and asks that the complaint be investigated and acted upon." *Blackman v. State*, 98 Ala. 77, 13 So. 316.

As to who is prosecutor, see 5 STANDARD PROC. 784, and *infra*, VIII, A, 8, e.

⁷⁷ *Com. v. Hutcheson*, 1 Bibb (Ky.) 355; *State v. Crossett*, 81 N. C. 579; *State v. Hodson*, 74 N. C. 151. See *infra*, VIII, A, 8; VIII, B, 9.

⁷⁸ See *supra*, I, B.

⁷⁹ See *infra*, III, A, 4.

⁸⁰ See *infra*, IV, B.

⁸¹ See *supra*, I, D; *infra*, III, A, 3; III, B, 1, b; V.

⁸² See *supra*, I, D.

III. FINDING.⁸³ — A. **PREREQUISITES TO.** — 1. **Jurisdiction and Legal Constitution of Court and Grand Jury.** — It is essential to the validity of an indictment or presentment, that both the court⁸⁴ under whose authority the finding is made, and the grand jury itself,⁸⁵ be legally constituted and organized and that the court have jurisdiction.⁸⁶

83. See generally the title "Grand Jury."

84. **Ala.**—*Ex parte State ex rel. Attorney General*, 142 Ala. 87, 38 So. 835, 110 Am. St. Rep. 20; *Davis v. State*, 46 Ala. 80. **Ga.**—*Jenkins v. State*, 93 Ga. 1, 18 S. E. 992. **Ind.** *Cook v. State*, 7 Blackf. 165. **Kan.** *In re Davis*, 62 Kan. 231, 61 Pac. 809. **Mass.**—*Com. v. Hardy*, 2 Mass. 303. **Mo.**—*State v. O'Brian*, 68 Mo. 153. **N. C.**—*State v. Shuford*, 128 N. C. 588, 38 S. E. 808. **Va.**—*Jackson v. Com.*, 13 Gratt. 795.

[a] **Temporary absence of judge** at the time of the finding of the grand jury does not render the indictment invalid. *Com. v. Bannon*, 97 Mass. 214.

[b] **De Facto Judge.**—An indictment is not void by reason of the fact that subsequent to the finding by the grand jury it was ascertained that the appointment of the judge was invalid. *Ex parte State ex rel. Attorney General*, 142 Ala. 87, 38 So. 835, 110 Am. St. Rep. 20; *Walker v. State*, 142 Ala. 32, 38 So. 241; *In re Hatch*, 9 Cal. App. 333, 99 Pac. 398.

85. **U. S.**—*Crowley v. United States*, 194 U. S. 461, 24 Sup. Ct. 731, 48 L. ed. 1075; *United States v. London*, 176 Fed. 976; *United States v. Hammond*, 2 Woods 197, 26 Fed. Cas. No. 15,294. **Ala.**—*Pope v. State*, 165 Ala. 68, 51 So. 521; *Untreinor v. State*, 146 Ala. 26, 41 So. 285; *Roe v. State*, 2 So. 459; *Nixon v. State*, 68 Ala. 535; *Benson v. State*, 68 Ala. 513; *Weston v. State*, 63 Ala. 155. **Ark.**—*Wilburn v. State*, 21 Ark. 198. **Conn.**—See *State v. Hamlin*, 47 Conn. 95, 36 Am. Rep. 54. **Fla.**—*English v. State*, 31 Fla. 340, 12 So. 689; *Kitral v. State*, 9 Fla. 9. **Ga.**—*Ridling v. State*, 56 Ga. 601; *Reich v. State*, 53 Ga. 73, 21 Am. Rep. 265. **Ill.**—*Allen v. People*, 77 Ill. 484. **Ind.**—*Hardin v. State*, 22 Ind. 347; *Barger v. State*, 6 Blackf. 188; *State v. Conner*, 5 Blackf. 325. **Ia.**—*State v. Ostrander*, 18 Iowa 435. **La.**—*State v. Furco*, 51 La. Ann. 1082, 25 So. 951; *State v. Smith*, 31 La. Ann. 406. **Me.**—*State v. Haskell*, 76 Me. 399;

State v. Flemming, 66 Me. 142, 22 Am. Rep. 552; *State v. Doherty*, 60 Me. 504; *State v. Lightbody*, 38 Me. 200; *State v. Symonds*, 36 Me. 128. **Md.** *State v. Vincent*, 91 Md. 718, 47 Atl. 1036, 69 Am. Dec. 351, 52 L. R. A. 83; *Clare v. State*, 30 Md. 163. **Mich.** *People v. Thompson*, 122 Mich. 411, 81 N. W. 344. **Miss.**—*Miller v. State*, 33 Miss. 356, 69 Am. Dec. 351; *Portis v. State*, 23 Miss. 578; *Baker v. State*, 23 Miss. 243; *Barney v. State*, 12 Smed. & M. 68; *Rawls v. State*, 8 Smed. & M. 599. **Mo.**—*State v. Vaughn*, 132 Mo. App. 135, 112 S. W. 728. **Nev.** *State v. McNamara*, 3 Nev. 70. **N. J.** *State v. Fox*, 9 N. J. L. 244; *State v. Rockafellow*, 6 N. J. L. 332. **N. Y.** *People v. Scannell*, 37 Misc. 345, 16 N. Y. Supp. 321; *People v. Duff*, 1 N. Y. Crim. 307, 75 N. Y. Supp. 500. **N. C.** *State v. Durham Fertilizer Co.*, 111 N. C. 658, 16 S. E. 231; *State v. Sharp*, 110 N. C. 604, 14 S. E. 504. **Ohio.** *Huling v. State*, 17 Ohio St. 583; *Doyle v. State*, 17 Ohio 222. **Tenn.**—*State v. Tilly*, 8 Baxt. 381; *State v. Duncan*, 7 Yerg. 271; *State v. Baker*, 4 Humph. 12. **Tex.**—*Martin v. State*, 22 Tex. 214; *Stanley v. State*, 16 Tex. 557; *State v. Foster*, 9 Tex. 65; *State v. Jacobs*, 6 Tex. 99; *Ogle v. State*, 43 Tex. Crim. 219, 63 S. W. 1009, 96 Am. St. Rep. 860; *Wells v. State*, 21 Tex. App. 594, 2 S. W. 806. **Vt.**—*State v. Ward*, 60 Vt. 142, 14 Atl. 187. **Wis.** *State v. Cole*, 17 Wis. 674.

[a] Mr. Justice Harlan in *Crowley v. United States*, 194 U. S. 461, 24 Sup. Ct. 731, 48 L. ed. 1075 (*quoted* in *United States v. Lewis*, 192 Fed. 633), in speaking of irregularities in the selection of a grand jury said such action "cannot be regarded as a mere defect or imperfection in form; it is a matter of substance which cannot be disregarded without prejudice to an accused."

As to what constitutes a properly organized and constituted grand jury, see the title "Grand Jury."

86. **U. S.**—*Post v. United States*, 161

But irregularities affecting the grand jury which do not imperil the substantial rights of the defendant⁷ or amount to corruption,⁸

U. S. 583, 16 Sup. Ct. 611, 40 L. ed. 816; *United States v. Dixon*, 44 Fed. 401; *United States v. Hill*, 1 Brock. 156, 26 Fed. Cas. No. 15,364. **Ark.** *State v. Kirkpatrick*, 32 Ark. 117. **Ind.** *State v. Henning*, 33 Ind. 189; *Beal v. State*, 15 Ind. 373. **Me.**—*State v. Doherty*, 60 Me. 504. **Mo.**—*State v. Smiley*, 98 Mo. 605, 12 S. W. 247. **N. Y.**—*People v. McCarthy*, 168 N. Y. 549, 61 N. E. 899; *People v. Knott*, 156 N. Y. 302, 50 N. E. 835. **Tex.**—*Pigg v. State* (Tex. Crim.), 160 S. W. 691.

[a] **Statutes Authorizing Indictments Outside County of Offense.**—A statute authorizing the grand jury of a county other than that in which the offense is committed to find the indictment is unconstitutional. *Ex parte Slater*, 72 Mo. 102; *In re McDonald*, 19 Mo. App. 371.

[b] Where the statute requires the trial to be had in the county where the crime was committed, the indictment must also be found in that county. *Case of Fries*, 9 Fed. Cas. No. 5,126.

[c] **Where Magistrate Has Exclusive Jurisdiction.**—An indictment in the county court for assault and battery will be quashed where the committing magistrate had jurisdiction and the law required him to impose sentence. *Com. v. Smith*, 23 Pa. Co. Ct. 491.

As to what courts have jurisdiction, see generally the title "Jurisdiction," and particularly the specific title dealing with the crime in question.

87. **Ia.**—*State v. Brandt*, 41 Iowa 593. **Md.**—*State v. Keating*, 85 Md. 188, 36 Atl. 840. **Mass.**—*Com. v. Williams*, 171 Mass. 461, 50 N. E. 1035; *Com. v. Colton*, 11 Gray 1. **N. Y.** *Dolan v. People*, 64 N. Y. 485; *People v. Dolan*, 6 Hun 232. **Tex.**—*Owens v. State*, 25 Tex. App. 552, 8 S. W. 658. **W. Va.**—*State v. Martin*, 38 W. Va. 568, 18 S. E. 748.

[a] **In Connecticut** a disqualification of a grand jurymen discovered after indictment cannot be taken advantage of unless it be one that is pronounced such by the common law or by the statute, and one that absolutely disqualifies, as alienage or the want of

freehold. *State v. Hamlin*, 47 Conn. 95, 36 Am. Rep. 54.

[b] **Irregularity in Selection.**—An indictment will not be abated, merely because one of the jurors was selected from the bystanders instead of from the venire. *Epperson v. State*, 5 Lea (Tenn.) 291. See *infra*, XV, A, 4.

[c] **Members of Grand Jury Active in Prosecution of Crime.**—(1) The fact that members of the grand jury have taken an active interest in the prosecution of crimes committed within the county, either by contributions to aid in prosecutions (*Koch v. State*, 32 Ohio St. 353), (2) or by becoming members of organizations having for their object the suppression of crime (*Fooshee v. State*, 3 Okla. Crim. 666, 108 Pac. 554), will not affect the validity of an indictment found by them.

[d] **Complaining Witness Member of Grand Jury.**—The fact that the complaining witness was a member of the grand jury which found the indictment will not invalidate the finding. *United States v. Williams*, 1 Dill. 485, 28 Fed. Cas. No. 16,716; *Krause v. State*, 88 Neb. 473, 129 N. W. 1020, 1912 B Ann. Cas. 736. See also *Nash v. State*, 73 Ark. 399, 84 S. W. 497; *Yates v. State*, 43 Fla. 177, 20 So. 965.

[e] **Relative of Prosecutor Member of Grand Jury.**—The indictment is not invalid because found by a grand jury of which the son of the prosecutor was a member. *State v. Sharp*, 110 N. C. 604, 14 S. E. 504.

[f] **Effect of Failure To Order Venire.**—A statutory provision to the effect that no grand jury should be summoned unless the judge orders a venire to issue therefor, held to have no effect upon the validity of an indictment found by a grand jury summoned without such order. *Breese v. United States*, 203 Fed. 824, 122 C. C. A. 142.

[g] **De Facto Grand Jury.**—If the grand jury is a de facto organization it will be sufficient. *In re Hatch*, 9 Cal. App. 333, 99 Pac. 398.

Strictness in compliance with statutes, see 10 STANDARD PROC. 608.

88. *Dorman v. State*, 56 Ind. 454; *State v. Donaldson*, 43 Kan. 431, 23

will not invalidate the indictment,⁸⁹ and some statutes specifically point out those defects which will invalidate the indictment.⁹⁰

2. Detention of Accused.—Generally the arrest and custody of the accused is not an essential prerequisite to the validity of an indictment;⁹¹ but under the provisions of some statutes the rule is otherwise.⁹² The illegality of the arrest and detention will not invalidate the indictment.⁹³

3. Preliminary Examination and Commitment.⁹⁴—The general rule is that a preliminary examination and commitment prior to the finding of an indictment is unnecessary,⁹⁵ unless specially required by statute or the practice of the particular jurisdiction.⁹⁶

Pac. 650; *State v. Skinner*, 34 Kan. 256, 8 Pac. 420.

89. As to the effect of particular irregularities, see the title "**Grand Jury**;" and *infra*, XIV, A, 2, h and i.

90. In Alabama under the code the only available objection to an indictment for defect in the grand jury is that the jurors were not drawn in the presence of the officers designated by law. *Stoneking v. State*, 118 Ala. 68, 24 So. 47; *Murphy v. State*, 86 Ala. 45, 5 So. 432; *Billingslea v. State*, 68 Ala. 486; *Phillips v. State*, 68 Ala. 469; *Cross v. State*, 63 Ala. 40; *Bonlo v. State*, 51 Ala. 18.

91. U. S.—*United States v. Kilpatrick*, 16 Fed. 765. **Me.**—*State v. Haskell*, 76 Me. 399. **S. C.**—*State v. Bullock*, 54 S. C. 300, 32 S. E. 424; *State v. Bowman*, 43 S. C. 108, 20 S. E. 1010.

[a] Preliminary complaint or arrest prior to finding indictment unnecessary. *United States v. Baumert*, 179 Fed. 735.

92. *State v. Sweetsir*, 53 Me. 438; *State v. Fitzgerald*, 75 Mo. 571; *State v. Griswold*, 53 Mo. 181; *State v. Corson*, 12 Mo. 404. See *Houser v. People*, 46 Barb. (N. Y.) 33.

93. *State v. Brooks*, 92 Mo. 542, 5 S. W. 257, 330; *State v. Chyo Chiagk*, 92 Mo. 395, 4 S. W. 704.

[a] An indictment will not be dismissed for the reason that the defendant was brought back from Canada without the permission of the authorities of the province. *State v. Brewster*, 7 Vt. 118.

94. See generally the title "**Preliminary Examination**."

95. U. S.—*United States v. Fuers*, 12 Int. Rev. Rec. 43, 25 Fed. Cas. No. 15,174. See *United States v. Kilpatrick*, 16 Fed. 765. **Cal.**—*People v.*

Goldenson, 76 Cal. 328, 19 Pac. 161, examination before informations only. **Idaho.**—*State v. Schieler*, 4 Idaho 120, 37 Pac. 272. **Ky.**—*Osborn v. Com.*, 14 Ky. L. Rep. 246, 20 S. W. 223. **La.** *State v. Conradi*, 130 La. 701, 58 So. 515; *State v. Werner*, 128 La. 1, 54 So. 402; *State ex rel. Matranga v. Recorder*, 42 La. Ann. 1091, 8 So. 279, 10 L. R. A. 137; *State v. Bungler*, 14 La. Ann. 461. **Md.**—*Blaney v. State*, 74 Md. 153, 21 Atl. 547. **Mich.**—*Annis v. People*, 13 Mich. 511. **N. H.**—*State v. Webster*, 39 N. H. 96. **N. Y.**—*People v. McCarthy*, 168 N. Y. 549, 61 N. E. 899; *People v. Diamond*, 72 App. Div. 281, 76 N. Y. Supp. 57; *People v. Wenk*, 71 Misc. 363, 127 N. Y. Supp. 702; *French v. People*, 3 Park. Crim. 114; *People v. Hyler*, 2 Park. Crim. 566. **N. C.**—See *Lewis v. Board of Comrs.*, 74 N. C. 194. **Ohio.**—*Kendle v. Tarbell*, 24 Ohio St. 196; *Harper v. State*, 7 Ohio St. 73. **S. C.**—*State v. Rabens*, 79 S. C. 542, 60 S. E. 442; *State v. Brown*, 62 S. C. 374, 40 S. E. 776; *State v. Bullock*, 54 S. C. 300, 32 S. E. 424; *State v. Bowman*, 43 S. C. 108, 20 S. E. 1010. **Va.**—*Jones v. Com.*, 86 Va. 661, 10 S. E. 1005. **W. Va.** *State v. Mooney*, 49 W. Va. 712, 39 S. E. 657; *State v. Strauder*, 8 W. Va. 686. **Can.**—*Rex v. Houle*, 17 Can. Crim. Cas. 407.

96. *State v. Jackson*, 32 Me. 40.

[a] In Virginia prior to the adoption of the code of 1887 a person could not be indicted for a felony without a preliminary examination. *Butler v. Com.*, 81 Va. 159. But see the code and *Jones v. Com.*, 86 Va. 661, 10 S. E. 1005.

[b] A statute providing that where an objection has been sustained to an indictment and a resubmission is or-

And some of those statutes which require an examination and commitment provide exceptions to the rule,⁹⁷ and also recognize the power of the defendant to waive such examination.⁹⁸

Where a preliminary examination is necessary the offense charged in the indictment must be the one for which the defendant is held to answer by the examining court.⁹⁹

A second preliminary examination is not necessary as a basis of a second indictment charging the same offense.¹

4. Leave of Court.—In some jurisdictions the prosecuting attorney should ordinarily submit a bill to the grand jury only upon order or by leave of court.² It is not necessary that such order show cause

dered, the defendant may be examined before a magistrate as in other cases held to be not mandatory. *People v. Sexton*, 132 Cal. 37, 64 Pac. 107.

97. A grand jury cannot indict without a preliminary examination before a magistrate, except in offenses of public notoriety, such as are within their own knowledge, as are given them in charge by the court, and as are sent to them by the district attorney. *McCullough v. Com.*, 67 Pa. 30.

[a] "The district attorney in an exigency, or when the occasion seems to require, may prefer an indictment before a grand jury without a previous binding over or commitment, but this power is only to be exercised under the circumstances stated for the public good, and then the proceeding is always under the supervision and control of the court." *Com. v. Green*, 126 Pa. 531, 17 Atl. 878, 12 Am. St. Rep. 894; *Rowand v. Com.*, 82 Pa. 405. See also *Com. v. Reynolds*, 2 Kulp (Pa.) 345; *Com. v. Ramsey*, 42 Pa. Super. 25.

98. Okla.—*Tucker v. State*, 9 Okla. Crim. 587, 132 Pac. 825. **Va.**—*Butler v. Com.*, 81 Va. 159. **W. Va.**—*State v. Stewart*, 7 W. Va. 731, 23 Am. Rep. 623.

99. *State v. Stevens*, 36 N. H. 59; *State v. Bean*, 36 N. H. 122; *Com. v. Mock*, 23 Pa. Super. 51; *Com. v. Gouger*, 21 Pa. Super. 217; *Com. v. Hunter*, 2 Pa. Dist. 707; *Com. v. Porter*, 10 Phila. (Pa.) 217.

[a] But an offense of the same nature as that contained in the information upon which the indictment is based may be included in the indictment. For example, where the information was for seduction under promise of marriage, it is not improper to include in the indictment therefor a

count for fornication and bastardy. *Nicholson v. Com.*, 91 Pa. 390, 96 Pa. 503.

[b] An indictment will be quashed which charges a felony—arson—while the return sets out a misdemeanor—conspiracy. *Com. v. Edwards*, 5 Kulp (Pa.) 192.

[c] The magistrate's return upon which the indictment is based need not contain as full a statement of the offense as the indictment. *Com. v. Carson*, 166 Pa. 179, 30 Atl. 985.

[d] Different bills may be framed upon one return in which an offense is specifically set out and other offenses are apparent from the fact stated upon the face of the return itself. *Com. v. Henszey*, 12 Phila. (Pa.) 594.

1. *Stuart v. Com.*, 28 Gratt. (Va.) 950, 967.

2. Pa.—Where there has been no preliminary information and hearing, and where the district attorney does not file the indictment on his own responsibility, leave of court is necessary to the preferment of a bill of indictment. *Rowand v. Com.*, 82 Pa. 405; *Brown v. Com.*, 76 Pa. 319; *McCullough v. Com.*, 67 Pa. 30; *Com. v. Shubel*, 4 Pa. Co. Ct. 12; *Com. v. Moister*, 3 Pa. Co. Ct. 539. **S. C.**—*State v. Bowman*, 43 S. C. 108, 20 S. E. 1010 (*affirmed* in *State v. Bullock*, 54 S. C. 300, 32 S. E. 424), holding that the action of the prosecuting attorney in bringing the attention of the grand jury to the case should be cautiously exercised, generally under the court's direction. **Tenn.**—*Lawless v. State*, 4 Lea 173, when it appears to the court that an indictable offense has been committed and that no one will be prosecutor, the court may order the district attorney to file a bill of indictment officially.

or state the person on whom the offense has been committed;³ nor is it necessary to notify the accused before presenting an indictment to the grand jury upon order of the court.⁴

B. INDICTMENT DURING PENDENCY OF OTHER PROCEEDINGS.—An indictment may be found during the pendency of an examination by the coroner,⁵ or before a previous indictment has been disposed of,⁶ or during the pendency of a preliminary examination before a magistrate,⁷ where such examination is not a prerequisite to the

[a] **Leave To File Information.**—See *infra*, IV, B, 1, a.

[b] **The power of a district attorney** to prefer an indictment in certain extreme cases without previous commitment, must be exercised under the supervision of the proper criminal court. *Com. v. Ramsey*, 42 Pa. Super. 25; *Com. v. Taylor*, 12 Pa. Co. Ct. 326; *Com. v. Hughes*, 11 Pa. Co. Ct. 470.

[c] “Cases can be conceived where the ends of justice would be defeated by the delay and publicity of a motion in open court for leave to send up an indictment and in such cases it would be the duty of the prosecuting officer to act promptly and upon his own responsibility. While, however, the possession of this exceptional power by prosecuting officers cannot be denied, its employment can only be justified by some pressing and adequate necessity. When exercised without such necessity, or merely to suit the convenience, the pleasure or other private purpose of the prosecutor, it is the duty of the court to set the officer’s act aside. In such cases, that is, where the indictment is sent up by the district attorney without first obtaining the leave of the court, the discretion of the court may be invoked, and is exercisable upon a motion to quash.” *Com. v. Sheppard*, 20 Pa. Super. 417. See *Rowand v. Com.*, 82 Pa. 405.

[d] **Leave To File Indictment Based on Constable’s Return.**—Leave of court is required to send to the grand jury an indictment based on a constable’s return. *Com. v. Pfaff*, 17 Pa. Co. Ct. 302.

[e] **Where Previous Grand Jury Has Failed To Indict.**—See *People v. Warren*, 109 N. Y. 615, 15 N. E. 880; and *infra*, VI, B.

[f] **Leave To Charge Different Offense Than That Returned by Justice.** *Com. v. March*, 1 Pa. Co. Ct. 81.

[g] **A previous presentment for the same offense is not necessary** before the court orders an indictment to be filed. *United States v. Thompkins*, 2 Cranch C. C. 46, 28 Fed. Cas. No. 16,483; *United States v. Madden*, 1 Cranch C. C. 45, 26 Fed. Cas. No. 15,705.

[h] **Court’s approval may be presumed** from its subsequent refusal to quash the indictment. *Com. v. Brown*, 23 Pa. Super. 470, 497.

3. *State v. Kittrell*, 7 Baxt. (Tenn.) 167.

[a] Where leave of court is required to file a bill of indictment when no one will prosecute, if the order fails to state that no one will prosecute it will be presumed that this fact was properly made known to the court before the order was made. *Bennett v. State*, 8 Humph. (Tenn.) 123.

[b] **Order Need Not Show Examination of Witnesses.**—It was held in the case of *Simpson v. State*, 4 Humph. (Tenn.) 456, that it was not necessary that the order should show that it was made upon examination of witnesses as directed by the statute of Tennessee but that it would be presumed, in the absence of proof to the contrary, that he had legally discharged his duty.

4. *Com. v. Kaufman*, 9 Pa. Super. 310.

5. *People v. Molineux*, 26 Misc. 589, 57 N. Y. Supp. 643; *People v. Hyler*, 2 Park. Crim. (N. Y.) 566.

6. See *infra*, VI.

7. **La.**—*State v. Werner*, 128 La. 1, 54 So. 402. **Mo.**—*State v. Gieseke*, 209 Mo. 331, 108 S. W. 525. **Nev.**—*Knight v. District Court*, 32 Nev. 346, 108 Pac. 358, 1912 C. Ann. Cas. 143. **N. Y.** *People v. Westbrook*, 12 Hun 646. **S. C.** *State v. Rabens*, 72 S. C. 542, 60 S. E. 442, 1110.

Continuance of Examination After Finding of Indictment.—See *Matter of Gessner*, 53 How. Pr. (N. Y.) 515; and the title “**Preliminary Examination.**”

finding,⁸ or pending proceedings in another court for the prisoner's discharge,⁹ or pending certiorari proceedings to review the action of the magistrate by whom the accused had previously been committed,¹⁰ or pending an appeal from the findings of another tribunal concerning the same offense.¹¹

C. TERM AND TIME OF FINDING.¹² — 1. **Term.** — An indictment to be valid must be found at a term of court authorized by law,¹³ and at which a grand jury may be impaneled.¹⁴

The indictment may be found, however, during any part of the term for which the grand jury was impaneled,¹⁵ or during a special¹⁶ or adjourned term,¹⁷ or during the temporary absence of the court,¹⁸ or when the grand jury is legally recalled during a subsequent term.¹⁹

And it has even been held that a grand jury summoned to meet prior to the regular term has power to find an indictment.²⁰ Nor is

8. See *supra*, III, A, 3.

9. *Clark v. Com.*, 123 Pa. 555, 16 Atl. 795.

10. *People v. Friedman*, 205 N. Y. 161, 98 N. E. 471, 45 L. R. A. (N. S.) 55.

11. *Com. v. Hurd*, 177 Pa. 482, 35 Atl. 682.

12. See the title "Grand Jury."

13. *Davis v. State*, 46 Ala. 80; *Com. v. Hardy*, 2 Mass. 303.

[a] The objection that the designation of a trial term by the justices of the appellate division was not in strict compliance with the provision of the New York constitution or the statute, is not available as a ground of attack upon the regularity of an indictment found at such term, by a grand jury selected and organized under the forms of law. *People v. Youngs*, 151 N. Y. 210, 45 N. E. 460.

[b] "The omission of the judges to make the apportionment, or designate the respective judges who should hold the terms in the several counties, cannot affect the right of any judge to hold court in any county of his district," and hence could not render invalid any proceeding at a term so held. *State v. Thomas*, 61 Ohio St. 444, 56 N. E. 276, 48 L. R. A. 459.

14. Indictment found at an extra term is invalid where the statute makes no provision for a grand jury at such term. *State v. Brown*, 127 N. C. 562, 37 S. E. 330.

15. *State v. Winebrenner*, 67 Iowa 230, 25 N. W. 146; *Traviss v. Com.*, 106 Pa. 597.

[a] Indictment may be found by grand jury reconvened during same

term after having been dismissed. *Long v. State*, 46 Ind. 582; *Ulmer v. State*, 14 Ind. 52.

[b] An indictment may be found for offenses committed subsequent to the commencement of the term at which found. **Cal.**—*People v. Beatty*, 14 Cal. 566. **Ga.**—*Oglesby v. State*, 121 Ga. 602, 49 S. E. 706. **Mass.** *Com. v. Gee*, 6 Cush. 174. **Wis.**—*Allen v. State*, 5 Wis. 329.

[c] The indictment may be had at a special session during the term. *Long v. State*, 46 Ind. 582; *Ulmer v. State*, 14 Ind. 52; *State v. Reid*, 20 Iowa 413.

16. **Ala.**—*Aaron v. State*, 39 Ala. 684; *Harrington v. State*, 36 Ala. 236. **Ark.**—*Hamilton v. State*, 62 Ark. 543. 36 S. W. 1054. **Ia.**—*Sharp v. State*, 2 Iowa 454. **Miss.**—*Young v. State*, 2 How. 865. **Mo.**—*Mary v. State*, 5 Mo. 71. **Wis.**—*Oshoga v. State*, 3 Pinn. 56.

[a] An indictment may be found by a grand jury drawn for an extraordinary term of the court (of oyer and terminer) although the regular grand jury of the county was also in session. *People v. McKane*, 80 Hun 322, 30 N. Y. Supp. 95.

17. **Ga.**—*Sims v. State*, 51 Ga. 495. **Ind.**—*Ulmer v. State*, 14 Ind. 52. **Ia.** *Sharp v. State*, 2 Iowa 454. **Mo.**—*State v. Sweeney*, 68 Mo. 96; *State v. Pate*, 67 Mo. 488; *State v. Barnes*, 20 Mo. 413. **Neb.**—*Smith v. State*, 4 Neb. 277.

18. *Nealon v. Peoples*, 29 Ill. App. 481; *Com. v. Bannon*, 97 Mass. 214.

19. *State v. McEvoy*, 9 S. O. 288.

20. *Com. v. Smith*, 16 Pa. Co. Ct. 568. But see *Com. v. Haggerty*, 3 Brewst. (Pa.) 285.

it essential that the grand jury shall have been organized on the first day of the term.²¹

2. In Vacation.—But an indictment should not be found by a grand jury convened in vacation,²² unless by express statutory provision.²³

Delay in Finding.—Under the modern rules of criminal procedure the accused is entitled to a speedy trial and with this end in view some of the states have declared it to be necessary that the indictment or information be filed within a certain number of days after the accused is held to answer,²⁴ or during the term at which he has been held to answer,²⁵ or before the end of the second term²⁶ in some

21. Acts requiring the court to impanel the grand jury on the first day of the term are directory, and the fact that the jury is impaneled on a subsequent day does not render the indictment invalid. *State v. Dillard*, 35 La. Ann. 1049; *State v. Davis*, 14 La. Ann. 678.

22. *Miller v. State*, 69 Ind. 284. But see *State v. Hunter*, 5 Humph. (Tenn.) 597.

23. By statute the court in certain emergencies may convene a grand jury in vacation time. *Holman v. State*, 79 Ga. 155, 4 S. E. 8.

24. Indictment must be found within thirty days after the accused is held to answer. *People v. Quijada*, 154 Cal. 243, 97 Pac. 689; *People v. Wickham*, 113 Cal. 283, 48 Pac. 123; *State v. Reynolds*, 24 Utah 29, 66 Pac. 614.

25. U. S.—*In re Esselhorn*, 8 Fed. 904. **Ky.**—*Sutton v. Com.*, 97 Ky. 308, 30 S. W. 661. **Neb.**—*Cerny v. State*, 62 Neb. 626, 87 N. W. 336; *Leisenberg v. State*, 60 Neb. 628, 84 N. W. 6; *State ex rel Conroy v. Miller*, 43 Neb. 860, 62 N. W. 238; *Ex parte Two Calf*, 11 Neb. 221, 9 N. W. 44. **Nev.**—*Ex parte Job*, 17 Nev. 184, 30 Pac. 699. **Tex.**—*Bennett v. State*, 27 Tex. 701.

See also *State v. Graham*, 136 Ala. 134, 33 So. 826; *Ex parte Stearnes*, 104 Ala. 93, 16 So. 122; *Rogers v. State*, 79 Ala. 59; *Ex parte Bull*, 42 Cal. 196. But see *United States v. Bates*, 24 Fed. Cas. No. 14,544.

[a] The object of the statutory provision that a person held to answer shall be indicted at the next term of the court is to protect the citizen from imprisonment upon insufficient cause, such provision has no bearing upon the validity of an indictment found at a

subsequent term. *State v. Lambert*, 9 Nev. 321.

[b] **In Minnesota.**—If the magistrate has concurrent jurisdiction of the offense he may either bind the prisoner over to answer to the higher court or he may enter a conviction, but under the state constitution providing for a speedy trial, unless the grand jury is in session at the time the accused is committed or will meet shortly afterwards, it is an abuse of the powers of the committing magistrate to hold the accused to await the action of the grand jury in such a case and the accused is entitled to redress by habeas corpus. *State ex rel Thurston v. Sargent*, 71 Minn. 28, 73 N. W. 626, the court saying: "If the complaint before the committing magistrate charges a crime of which a justice of the peace would not have jurisdiction (as it usually does) a new complaint would have to be filed, charging only the grade of crime shown by the evidence, in order to give the justice jurisdiction to try the accused. But, instead of filing such new complaint before the justice, the prosecution may prefer to present the matter to the grand jury, and if this causes no unreasonable delay the accused cannot complain. But if it causes such delay, he can complain."

26. *Cummins v. People*, 4 Colo. App. 71, 34 Pac. 734.

[a] The "second term" spoken of is the second term at which a grand jury is directed to be summoned. *Jones v. Com.*, 19 Gratt. (Va.) 478.

[b] If any indictment be found against the accused before the end of the second term, it is sufficient though he be actually tried upon an indictment found after that time. *Waller &*

states; otherwise the prisoner will be discharged from custody.²²

IV. RETURN, FILING AND RECORD.—A. OF INDICTMENT.

1. **Return.**—a. *Manner of Return.*—After an indictment has been found by the grand jury and indorsed a true bill, it must then²³ be

Boggs' Case, 84 Va. 492, 5 S. E. 364.

[c] When during a term of the court accused is sent on for indictment, that term is not considered one of the two terms at which he must be indicted. *Glover v. Com.*, 86 Va. 382, 10 S. E. 420.

[d] A statute providing that two "no bills" shall be a bar to another indictment unless they have been procured by fraud does not authorize the discharge of the accused from the crime upon the finding "no bill" by two successive grand juries. *Christmas v. State*, 53 Ga. 81.

27. *Bennett v. State*, 27 Tex. 701.

[a] The defendant is entitled to be discharged at end of term when no indictment is found against him, providing the grand jury heard evidence against him during the term. *People v. Hessing*, 28 Ill. 410; *Cerny v. State*, 62 Neb. 626, 87 N. W. 336; *Leisenberg v. State*, 60 Neb. 628, 84 N. W. 6.

[b] But if, at a subsequent term of the court an information is filed, and defendant pleads not guilty, the court has power to try the issue raised; and, after verdict of conviction has been rendered, it is not error to deny a motion in arrest of judgment. *Cerny v. State*, 62 Neb. 626, 87 N. W. 336, citing with approval *Leisenberg v. State*, 60 Neb. 628, 84 N. W. 6.

[c] **Discharge From Custody Only.** Under a statute authorizing the court to discharge a defendant from imprisonment if an indictment shall not be presented to the grand jury at the next session, the court cannot discharge him generally, but only from imprisonment. *Wentzel's Appeal*, 160 Pa. 252, 28 Atl. 694. See also *Ex parte Job*, 17 Nev. 184, 30 Pac. 699; *State v. Garthwaite*, 23 N. J. L. 143. But see *Ex parte McGehan*, 22 Ohio St. 442; *State v. Fasket*, 5 Rich. L. (S. C.) 255.

[d] *State v. Buyek*, 2 Bay (S. C.) 563, held that an accused admitted to bail was not entitled to his discharge under the habeas corpus act where he was not in actual confinement though if he had been confined in prison the court would have admitted him to bail

if no bill had been found against him at the first term.

[e] **Accused Should Show That Charge Was Investigated.**—Where one who has been committed to jail by a justice of the peace on a criminal charge seeks to be discharged from custody by habeas corpus proceedings on the ground that the grand jury had adjourned without finding a bill of indictment against him, he should show in addition that the charge against him was fully investigated by the grand jury. *Ex parte Jefferson*, 62 Miss. 223, the court saying: "The 'speedy trial' guaranteed by the constitution does not operate to deprive the state of a reasonable opportunity of fairly prosecuting criminals. It must be presumed in the absence of testimony that the justice of the peace performed his duty and that a preliminary examination was waived."

[f] **Where Accused Became a Fugitive.**—One who has been admitted to bail after a preliminary examination on a criminal charge, and who becomes a fugitive, is not, after his return or apprehension, entitled to be discharged because no information was filed against him at the term at which he was recognized to appear, and while he was a fugitive. *Ex parte Trester*, 53 Neb. 148, 73 N. W. 545.

[g] In Utah the prisoner is not discharged but the prosecuting attorney is liable to punishment for contempt. *State v. Reynolds*, 24 Utah 29, 66 Pac. 614.

28. **U. S.**—*Renigar v. United States*, 172 Fed. 616, 97 C. C. A. 172, 26 L. R. A. (N. S.) 683; *Angle v. United States*, 172 Fed. 658, 97 C. C. A. 184. **Ala.** *Spigener v. State*, 62 Ala. 383. **Ark.** *Shinn v. State*, 93 Ark. 299, 124 S. W. 263. **Colo.**—*Thornell v. People*, 11 Colo. 305, 17 Pac. 904. **Fla.**—*Goodman v. State*, 29 Fla. 511, 19 So. 738, 40 Am. St. Rep. 135. **Ga.**—*Barlow v. State*, 127 Ga. 58-61, 56 S. E. 131; *Samson v. State*, 124 Ga. 776, 53 S. E. 332, 4 Am. & Eng. Ann. Cas. 525. **Idaho.**—*State v. Quarles*, 13 Idaho 252, 89 Pac. 209. **Ill.** *Fitzpatrick v. People*, 28 Ill. 209;

returned into open court by the grand jury²⁰ through their fore-

Gardner v. People, 20 Ill. 430; *Rainey v. People*, 8 Ill. 71. **Ind.**—*State v. Dixon*, 97 Ind. 125; *Heacock v. State*, 42 Ind. 393; *Adams v. State*, 11 Ind. 304. **Ia.** *State v. Glover*, 3 Greene 249. **La.** *State v. Pitts*, 39 La. Ann. 914, 3 So. 118; *State v. Shields*, 33 La. Ann. 991; *State v. Mason*, 32 La. Ann. 1018. **Miss.** *Pond v. State*, 47 Miss. 39. **Mo.**—*State v. Vincent*, 91 Mo. 662, 4 S. W. 430. **N. C.**—*State v. Ledford*, 133 N. C. 714, 45 S. E. 944; *State v. Bordeaux*, 93 N. C. 560; *State v. Lee*, 80 N. C. 483; *State v. Cox*, 28 N. C. 440. **Tex.**—*Code Crim. Proc.*, §433; *Moore v. State*, 46 Tex. Crim. 520, 81 S. W. 48; *Hardy v. State*, 1 Tex. App. 556. **Va.**—*Watts v. Com.*, 99 Va. 872, 39 S. E. 706; *Hodges v. Com.*, 89 Va. 265, 15 S. E. 513; *Simmons v. Com.*, 89 Va. 156, 15 S. E. 386; *Com. v. Cawood*, 2 Va. Cas. 527-541. **W. Va.**—*State v. Heaton*, 23 W. Va. 773.

[a] An indictment is not found until it is presented to the court, and there received and filed. *People v. Oishei*, 20 Misc. 163, 45 N. Y. Supp. 49; *People v. Flaherty*, 110 N. Y. Supp. 154.

[b] **Mode and Effect of Return.**—In *Com. v. Cawood*, 2 Va. Cas. 527-541 (*cited in Renigar v. United States*, 172 Fed. 646, 97 C. C. A. 172, 26 L. R. A. [N. S.] 683), the court said: "If they (the grand jury) find it so (to be a true bill) the foreman of the grand jury indorses on it 'A True Bill,' and signs his name as foreman, and then the bill is brought into court by the whole grand jury, and in open court it is publicly delivered to the clerk, who records the fact. It is necessary that it should be presented publicly by the grand jury; that is the evidence required by law to prove that it is sanctioned by the accusing body, and until it is so presented by the grand jury, with the indorsement aforesaid, the party charged by it is not indicted, nor is he required or bound to answer any charge against him which is not so presented."

[c] "1 Chitty Crim. Law 324, describes the mode in which the grand jury returns the results of their inquiries to the court, by indorsing 'A True Bill' if found, and 'Not a True Bill' if rejected; and says, 'When the

jury have made these indorsements on the bills, they bring them publicly into court, and the clerk of the peace at sessions or clerk of assize on the circuit, calls all the jurymen by name, who severally answer to signify that they are present, and then the clerk of the peace or assize asks the jury whether they agreed upon any bills, and bids them present them to the court, and then the foreman of the jury hands the indictments to the clerk of the peace or clerk of assize.'" *Renigar v. United States*, 172 Fed. 646, 97 C. C. A. 172, 26 L. R. A. (N. S.) 683; *Sampson v. State*, 124 Ga. 776, 53 S. E. 332, 4 Am. & Eng. Ann. Cas. 525.

[d] **Presentation to Judge.**—An indorsement upon the indictment that it was presented to the presiding judge, etc., is a compliance with the code requiring it to be presented to the court. *Hannegan v. State*, 5 Ala. App. 142, 59 So. 376.

[e] **The order of court is the only legitimate evidence of the presentation of the indictment to the court.** *Com. v. English*, 6 Bush (Ky.) 431.

[f] **Due Return Is Jurisdictional** See *People v. Blackwell*, 27 Cal. 65, holding that it is a matter of jurisdictional consequence that the indictment should in fact be presented by the foreman of the grand jury and in their presence.

29. **U. S.**—*Renigar v. United States*, 172 Fed. 646, 97 C. C. A. 172, 26 L. R. A. (N. S.) 683. **Ark.**—*Robinson v. State*, 33 Ark. 180. **La.**—*State v. Mason*, 32 La. Ann. 1018. **Mass.**—*Com. v. Johnson*, Thach. Cr. Cas. 284. **N. C.** *State v. Bordeaux*, 93 N. C. 560. **Va.** *Com. v. Cawood*, 2 Va. Cas. 527, 541. **W. Va.**—*State v. Heaton*, 23 W. Va. 773.

[a] Where a bill of indictment had been mislaid until after the grand jury had been discharged and then brought into court by a grand juror who had discovered it, it was held in *Queen v. Thompson*, 1 Cox C. C. (Eng.) 268, that there had been no presentation.

[b] **Return by Solicitor-General.** "When a grand jury as a body present themselves in open court and the solicitor-general acts merely, in presence of the court and public, as the

man,³⁰ in their presence,³¹ or in the presence of such number as is prescribed by statute.³²

In some states, however, it is not necessary that the grand jury be present in court when the return is made, but the foreman alone³³

medium of transmission between the jury and clerk there is nothing improper; . . . but the matter is far different when the solicitor-general undertakes to receive in private . . . and brings them (indictments) into court during the absence of the jury from the court room." *Bowen v. State*, 81 Ga. 482, 8 S. E. 736.

30. *Ala.*—*Hannegan v. State*, 5 Ala. App. 142, 59 So. 376. *Ark.*—*Robinson v. State*, 33 Ark. 180. *Cal.*—*In re Matter of Burleigh*, 145 Cal. 35, 78 Pac. 242; *People v. Blackwell*, 27 Cal. 65. *Idaho.*—*State v. Quarles*, 13 Idaho 252-256, 89 Pac. 636. *Kan.*—*Laurent v. State*, 1 Kan. 313. *La.*—*State v. Mason*, 32 La. Ann. 1018. *Mass.*—*Com. v. Johnson*, Thach. Cr. Cas. 284. *Miss.*—*Cachute v. State*, 50 Miss. 165; *Pond v. State*, 47 Miss. 39. *N. C.*—*State v. Cox*, 28 N. C. 440.

[a] *By Another Member of Jury.* *Laurent v. State*, 1 Kan. 313, holding that although the record does not show the indictment was presented by the foreman, "It might well be inferred from the record that that body (the grand jury) acted through their proper officer, the foreman. But it is unimportant, as it could make no difference to the accused whether it was handed in by the foreman or some other member of the body in their presence."

31. *Ark.*—*Robinson v. State*, 33 Ark. 180-182. *Cal.*—*In the Matter of Burleigh*, 145 Cal. 35, 78 Pac. 242; *People v. Blackwell*, 27 Cal. 65. *Idaho.*—*State v. Quarles*, 13 Idaho 252-256, 89 Pac. 636. *Ia.*—*State v. Glover*, 3 Greene 249. *Kan.*—*Laurent v. State*, 1 Kan. 313. *N. H.*—*State v. Squire*, 10 N. H. 558. *N. C.*—*State v. Bordeaux*, 93 N. C. 560; *State v. Gainus*, 86 N. C. 632.

[a] *In Breese v. United States*, 226 U. S. 1, 33 Sup. Ct. 1, 57 L. ed. 97, in which the foreman returned the indictment into court alone, the grand jury remaining in the ante-room where they could have seen his actions had they so desired, it was held that an objection to the return first raised after the expiration of the term and after plea came too late.

32. See statutes of various states.

For a treatment of the number of grand jurors who must be present and concur in the finding of an indictment, see the title "Grand Jury," 10 STANDARD PROC. 648, 656.

[a] *In Alabama* the code requires all indictments to be presented to the court by the foreman in the presence of at least eleven other members of the grand jury. *McCuller v. State*, 49 Ala. 39.

[b] A record stating that the indictment was returned by the grand jury shows that twelve if not the entire body performed this service. *Parnell v. State*, 129 Ala. 6, 29 So. 860.

[c] *In Louisiana* the grand jury consists of twelve members and nine must concur to find an indictment. In such case when an indictment is presented to the court it is only necessary that nine be present. *State v. Griggsby*, 117 La. 1046, 42 So. 497.

[d] *In Mississippi*, the indictment must be presented in the presence of at least twelve of the grand jury. *Pond v. State*, 47 Miss. 39.

[e] *In New York* it is provided by statute that "the presence of at least sixteen (of the grand jury) is necessary for the transaction of any business," and in consequence thereof at least sixteen members of the grand jury must be present at the presentation of the indictment. *People v. Herrmans*, 69 Misc. 303, 125 N. Y. Supp. 143.

[f] *In Tennessee*, twelve only of the grand jury are necessary to concur in the finding of the indictment and consequently at least twelve must be present at the return thereof. *Chappel v. State*, 8 Yerg. 166.

[g] *In Texas* nine grand jurors constitute a quorum and this number is sufficient to return an indictment. *Smith v. State*, 19 Tex. App. 95 108.

33. *Breese v. United States*, 226 U. S. 1, 33 Sup. Ct. 1, 57 L. ed. 97, following North Carolina practice. See Ohio Gen. Code, §13,575.

may return the bill, or it may be returned by the bailiff.³⁴

b. *Time for Return.*—An indictment returned at a time other than that provided by law is invalid.³⁵

2. *Indorsement and Filing.*—When an indictment has been returned and presented to the court, it should be endorsed³⁶ and filed³⁷ by the clerk,³⁸ but this need not be done in open court. The failure of the clerk to file the indictment, however, will not invalidate it, or the proceedings thereunder.³⁹

Statutes generally require the clerk to indorse his file mark upon the indictment,⁴⁰ but such a requirement is merely directory.⁴¹

[a] In North Carolina subsequent to 1889. Revisal, §3242. Cases decided prior to 1889 holding indictment must be returned by the foreman in the presence of the grand jury. *State v. Bordeaux*, 93 N. C. 560; *State v. Cox*, 28 N. C. 440.

34. *Danforth v. State*, 75 Ga. 614, 58 Am. Rep. 480; *Davis v. State*, 74 Ga. 869-882.

[a] In Georgia by a provision of the code the bailiff is substituted "for the grand jury as the medium for returning the indictments and presentments found by that body to the court," but he too is required to return the indictment into open court: *Sampson v. State*, 124 Ga. 776, 53 S. E. 332, 4 Am. & Eng. Ann. Cas. 525; *Barlow v. State*, 127 Ga. 58, 56 S. E. 131.

35. *McDaniel v. State* (Ala.), 39 So. 919. See *Brewer v. State* (Ala.), 39 So. 927, and *supra*, III, C.

As to the validity of an indictment returned on Sunday or a legal holiday, see the title "**Sunday and Holidays.**"

36. See *Hall v. State*, 134 Ala. 90-112, 32 So. 750; *Spigener v. State*, 62 Ala. 383.

As to other indorsements, see *infra*, VI, A, 8.

37. *Idaho*.—*State v. Quarles*, 13 Idaho 252, 89 Pac. 636. *Ind.*—See *Engleman v. State*, 2 Ind. 91, 52 Am. Dec. 494. *Miss.*—*Pond v. State*, 47 Miss. 39. *Mo.*—*State v. Lord*, 118 Mo. 1, 23 S. W. 764.

38. *Willey v. State*, 46 Ind. 363.

39. *State v. Rivers*, 58 Iowa 102, 12 N. W. 117, 43 Am. Rep. 112; *Dawson v. People*, 25 N. Y. 399. See *State v. Glover*, 3 Greene (Iowa) 249, holding that the filing is indispensable and a failure to file is fatal. But see Code, §2916, and *State v. Axt*, 6 Iowa 511, holding the statute upon which the *Glover* case is based is merely di-

rectory. See also *State v. Jolly*, 7 Iowa 15.

[a] In *State v. Clark*, 18 Mo. 432, it was held that "the failure of the clerk to enter the day of the return of the indictment by the grand jury into court, could not authorize the court to discharge the defendant."

40. Where the minutes of the evidence are attached to the indictment, one file mark suffices for the whole. *State v. Ottley*, 147 Iowa 329-332, 126 N. W. 334; *State v. Doss*, 110 Iowa 713-717, 80 N. W. 1069. And see *State v. Cross*, 95 Iowa 629, 64 N. W. 614; *State v. Craig*, 78 Iowa 637, 43 N. W. 462; *State v. Briggs*, 68 Iowa 416, 27 N. W. 358 (holding it to be unnecessary that the minutes of evidence returned with the indictment be endorsed filed by the clerk. His endorsement is evidence only of the filing).

[a] *Indorsement by Stranger in Presence of Clerk.*—It is no objection to an indictment that the indorsements upon the indictment were made by a stranger in the presence and under the direction of the clerk. *Jackson v. State*, 55 Miss. 530.

[b] In Nevada the indorsement of the clerk upon the indictment of the fact of its presentation, filing, etc., although useful and proper, is not prescribed by law. *State v. Harris*, 12 Nev. 414-419.

41. *Ala.*—*Spear v. State*, 120 Ala. 351-356, 25 So. 46; *Stanley v. State*, 88 Ala. 154, 7 So. 273; *Ex parte Winston*, 52 Ala. 419. *Ark.*—*State v. Gowen*, 12 Ark. 62. *Ill.*—*Kirkham v. People*, 170 Ill. 9, 48 N. E. 465. *Ky.*—*Pence v. Com.*, 95 Ky. 618, 26 S. W. 810. *Mo.*—*State v. Jackson*, 221 Mo. 478, 492, 120 S. W. 66, 133 Am. St. Rep. 477. *Tex.*—*Reynolds v. State*, 11 Tex. 120.

[a] The failure of the indorsement on the indictment to state that it was

Mere clerical errors in the indorsement do not affect the validity of the indictment.⁴² The indorsement may be made by the clerk at any time while the cause is in fieri.⁴³

"Filing Away" Indictments.—In Kentucky if the court or the prosecution should desire to retain control of the case after the term, it may be done by an order filing the indictment away, to be re-docketed on motion of the commonwealth.⁴⁴

3. Record.—a. *As to Impaneling and Organization of Grand Jury.*—Although there are authorities apparently to the contrary,⁴⁵

filed in open court does not authorize a dismissal of the indictment. *Schroufe v. Com.*, 141 Ky. 554, 133 S. W. 205; *Pence v. Com.*, 95 Ky. 618, 26 S. W. 810; *Com. v. Stegala*, 8 Ky. L. Rep. 142.

[b] **Where the record shows a due return** (1) of the indictment, a failure of the clerk to sign the indorsement on the back that it was filed in open court will not authorize a dismissal of the indictment (*Com. v. Stegala*, 8 Ky. L. Rep. 142), (2) and is not ground for reversal. *Williams v. State*, 168 Ind. 87, 93, 79 N. E. 1079.

42. *Ala.*—*Germolgez v. State*, 99 Ala. 216, 13 So. 517. *Miss.*—*Holland v. State*, 60 Miss. 939-944. *Tex.*—*Terrell v. State*, 41 Tex. 463. *Vt.*—*State v. Bartlett*, 11 Vt. 650.

[a] See *State v. Smouse*, 50 Iowa 43, holding an indictment presented in the proper court and properly filed therein, is not invalid because of an endorsement thereon reciting that it was found in another county.

[b] In *State v. Jackson*, 106 La. 189-192, 30 So. 309, an objection to the indorsement showing date of receipt and filing as on "January 24-901" was held to be without force, especially as the error was cured by a proper entry in the minutes showing the date to have been "January 24, 1901."

[c] Statute requiring the clerk to make a minute of "the true day, month, and year," when presented in court upon all indictments does not require that the name of the month should appear in the minute, if from the records of the whole term, it admits of no doubt at what time the minute was made. *State v. Bartlett*, 11 Vt. 650.

43. *Stanley v. State*, 88 Ala. 154, 7 So. 273; *Hubbard v. State*, 72 Ala. 164; *Wesley v. State*, 52 Ala. 182.

44. *Com. v. Smith*, 140 Ky. 580, 131

S. W. 391; *Jones v. Com.*, 114 Ky. 599, 71 S. W. 643; *Gross v. Com.*, 26 Ky. L. Rep. 870, 82 S. W. 618; *Ashlock v. Com.*, 7 B. Mon. (Ky.) 44. See *Com. v. Bottoms*, 105 Ky. 222, 48 S. W. 974.

[a] This practice should not be indulged where the accused has been served with process and objects to the order; and an order "filing away" is sufficiently final to be appealable. *Jones v. Com.*, 114 Ky. 599, 71 S. W. 643.

45. *Harriman v. State*, 2 Greene (Iowa) 270-278.

[a] **The record need not show the due organization of the grand jury**, it being enough if it appears "that the grand jury came into court and presented an indictment in due form." From this entry, in the absence of specific objection and of affirmative proof to the contrary, it will be presumed the grand jury was properly organized. *State v. Tazwell*, 30 La. Ann. 884. See also *State v. Watson*, 31 La. Ann. 379. But see *State v. Shields*, 83 La. Ann. 991, holding that where a record shows nothing with regard to the finding of the indictment, the impaneling of the grand jury, the appointing of the foreman, or the due presentation by the grand jury, it would not be presumed these necessary requirements had been fulfilled.

[b] **Presumption as to Grand Jury.** Although the clerk should have entered the names of the grand jurors in the record and the fact of their being duly impaneled, sworn, and charged, yet where the record is silent regularity is presumed and it will be presumed there was a legal grand jury of twelve men. *State v. Vaughn*, 132 Mo. App. 135, 112 S. W. 728. See also *Epps v. State*, 102 Ind. 539, 1 N. E. 491; *Holloway v. State*, 53 Ind. 554; *Long v. State*, 46 Ind. 582. See *Bailey v. State*, 39 Ind. 438-449.

the general rule is that the record should in some way affirmatively show the due impaneling and organization of the grand jury.⁴⁶

The names of the grand jurors sworn and impaneled should be set out⁴⁷

46. *Ala.*—*Parmer v. State*, 41 *Ala.* 416. But see *Shaw v. State*, 18 *Ala.* 547. *Ind.*—*Bailey v. State*, 39 *Ind.* 438-444 (*disapproving* *Alley v. State*, 32 *Ind.* 476); *Hall v. State*, 21 *Ind.* 268; *Conner v. State*, 19 *Ind.* 98; *Conner v. State*, 18 *Ind.* 428; *State v. Conner*, 5 *Blackf.* 325. *Miss.*—*Mulligan v. State*, 47 *Miss.* 304; *Woodside v. State*, 2 *How.* 655. *Tenn.*—*State v. Davidson*, 2 *Coldw.* 184-196; *Grandison v. State*, 2 *Humph.* 451. *Tex.*—*De Olles v. State*, 20 *Tex. App.* 145.

[a] The indictment reciting that it was presented in the court of the proper county by the grand jury of said county, duly elected, impaneled, sworn and charged as such, it is presumed the indictment was presented by a legal grand jury of the proper county. *De Olles v. State*, 20 *Tex. App.* 145.

[b] Recitals in the indictment as copied into the record, to the effect that the grand jury were duly impaneled, sworn and charged, are sufficient to show the due organization of the grand jury. *Stout v. State*, 93 *Ind.* 150; *Powers v. State*, 87 *Ind.* 144; *Lovell v. State*, 45 *Ind.* 550; *Bailey v. State*, 39 *Ind.* 438; *Weinzorpflin v. State*, 7 *Blackf.* (*Ind.*) 186. See also *Henning v. State*, 106 *Ind.* 386, 6 *N. E.* 803, 7 *N. E.* 4, 55 *Am. Rep.* 756.

[c] An indorsement upon the indictment of a true bill, signed by the foreman of the grand jury, is insufficient to show the organization of the grand jury. *Parmer v. State*, 41 *Ala.* 416.

[d] Swearing of Foreman.—In *Roe v. State* (*Ala.*), 2 *So.* 459, it was held that where a record showed that the foreman had been appointed and then recited that the remainder of the jurors were sworn, and thereby failed to show the swearing of the foreman, the grand jury were not legally organized, and the indictment was invalid.

[e] Presumption Grand Jury Were Duly Summoned.—Under a statute requiring the grand jury to be summoned pursuant to an order of the court, where a record states that the grand jury was impaneled, it will be presumed they were summoned as pro-

vided by statute. *Bell v. State*, 42 *Ind.* 335.

[f] *Venire Facias*.—Neither the fact that a venire facias had been issued to summon the grand jury nor the return thereon need affirmatively appear upon the record. *Curtis v. Com.*, 87 *Va.* 589, 13 *S. E.* 73.

[g] Presumption of Qualification of Jurors.—“It was not necessary to specify the qualifications of the (grand) jurors, or to allege that they were good and lawful men. All this must be presumed” when the record comes from a superior court. *Weinzorpflin v. State*, 7 *Blackf.* (*Ind.*) 186; *Beauchamp v. State*, 6 *Blackf.* (*Ind.*) 299. See *Willey v. State*, 46 *Ind.* 363; *Turns v. Com.*, 6 *Metc.* (*Mass.*) 224-235.

[h] The record need not show that the court performed the duty of ascertaining the qualifications of the grand jurors. *James v. State*, 53 *Ala.* 380.

[i] Term For Which Impaneled. See *Holton v. State*, 2 *Fla.* 476-505; *Epps v. State*, 102 *Ind.* 539, 1 *N. E.* 491.

[j] The proceedings as to the drawing of the grand jury need not be shown by the record. *Collier v. State*, 2 *Stew.* (*Ala.*) 388; *State v. Howard*, 10 *Iowa* 101.

[k] The fact that the proceedings had in drawing the jury were not incorporated in the record is not such an irregularity as would invalidate the indictment, for such proceedings can be recorded after the finding of the indictment without affecting its validity. *Tervin v. State*, 37 *Fla.* 396-404, 20 *So.* 551.

47. *Fla.*—See *Holton v. State*, 2 *Fla.* 476-505. *Miss.*—*Mulligan v. State*, 47 *Miss.* 304. *Mo.*—*State v. Vaughn*, 132 *Mo. App.* 135, 112 *S. W.* 728. *Ohio.*—*Mahan v. State*, 10 *Ohio* 232. *Eng.*—*Faulkner's Case*, 1 *Saund.* 248-250.

[a] Names in General Record.—It is not necessary in the record of every case to insert the names of the grand jurors as this can be ascertained from the general record. *Turns v. Com.*, 6 *Metc.* (*Mass.*) 224-233.

in some part of the record, but there are cases which hold that this is not necessary.⁴⁸

Appointment of Foreman.—It has been held that the record need not show the appointment of a foreman,⁴⁹ although better practice would seem to require it.⁵⁰

Fact of Swearing Grand Jury.—The record must contain an entry that the grand jury were sworn.⁵¹ A statement that they were duly sworn is sufficient to show that they were sworn in the manner provided by law.⁵²

b. *Record of the Finding.*—The record must show that the indict-

[b] A record sufficiently shows the number and names of the grand jurors where their names are written in the minute book of the clerk and the indorsement upon the indictment is signed by them. *State v. O'Brien*, 18 R. I. 105, 25 Atl. 910.

[c] Where a record of the swearing shows the names of the grand jurors, a subsequent entry, showing the return of the indictment, need not repeat their names. *State v. Vincent*, 91 Mo. 662, 4 S. W. 430.

[d] **Variance in Name.**—Objection to insufficient setting out of names of the grand jurors in the record is untenable though the record includes "A. J. Moore" among the grand jurors and states "Andrew J. Moore," was appointed foreman. *Stone v. State*, 30 Ind. 115.

[e] Where the name James Langford appeared in the jury book and James Lankford in the list of jurors, the variance is immaterial. *State v. Mahan*, 12 Tex. 283.

48. *Epps v. State*, 102 Ind. 539, 1 N. E. 491; *Harriman v. State*, 2 Greene (Iowa) 270-278.

[a] **Omission of Name of Grand Juror.**—The omission of the name of one of the grand jurors who were "duly impaneled, sworn and charged" from the record recital of the formation of the grand jury, will not invalidate the indictment. *Tanner v. State*, 92 Ala. 1, 9 So. 613.

49. Cal.—*People v. Roberts*, 6 Cal. 214. Ill.—*Yates v. People*, 38 Ill. 527. Ind.—*McGregg v. State*, 4 Blackf. 101. N. C.—See *State v. Guilford*, 49 N. C. 83. Tenn.—*State v. Gouge*, 13 Lea 132. *Contra*, *Mulligan v. State*, 47 Miss. 304.

[a] The record need not show that the person signing the indorsement on the indictment was the grand jury's

foreman. *Epps v. State*, 102 Ind. 539, 1 N. E. 491.

[b] A record stating "that a grand jury was empanelled and sworn to inquire in and for the body of the county of Warren, to wit, Joseph Castleman, foreman, etc.," sufficiently shows the appointment of foreman. *Byrd v. State*, 1 How. (Miss.) 247-254.

[c] A recital in the record of the fact that B— was sworn as foreman necessarily implies his appointment by the court. *Woodside v. State*, 2 How. (Miss.) 655.

[d] **Presumption as to Appointment of Foreman.**—The fact of the appointment of a foreman of the grand jury should be recited in the record, but if the record is silent it will be presumed that the proceedings were regular and that a foreman had been duly appointed. *State v. Vaughn*, 132 Mo. App. 135, 112 S. W. 728.

50. *People v. Roberts*, 6 Cal. 214.

51. Ala.—*Roe v. State*, 2 So. 459. Ill.—*Lyman v. People*, 7 Ill. App. 345. Ind.—*Bailey v. State*, 29 Ind. 438-441. Miss.—*Mulligan v. State*, 47 Miss. 304; *Foster v. State*, 31 Miss. 421; *Abram v. State*, 25 Miss. 589.

52. Ark.—*Brown v. State*, 10 Ark. 607. Ill.—*Bruen v. People*, 206 Ill. 417, 425, 69 N. E. 24. Tex.—*Arthur v. State*, 3 Tex. 403.

[a] That the oath was first administered to the foreman, and then to the others will be presumed from an entry that the grand jurors were duly sworn. *State v. Weaver*, 104 N. C. 758, 10 S. E. 486. See also *Shields v. People*, 132 Ill. App. 109-125.

[b] **Particular Oath Need Not Be Set Out.**—*O'Donnell v. People*, 224 Ill. 218, 79 N. E. 639. See *Pierce v. State*, 12 Tex. 210.

[c] **Time When Sworn.**—If a record shows that the grand jury were

ment against the defendant has been found a true bill,⁵³ and the omission of such an entry cannot be supplied by a recital in any entry nunc pro tunc or otherwise,⁵⁴ or by a recital that he stands indicted,⁵⁵ or by a plea of not guilty;⁵⁶ nor can it be supplied by intendment or presumption.⁵⁷ But it has been held that a special entry of the find-

sworn, it will be presumed that they were "then and there" sworn. *Wood-sides v. State*, 2 How. (Miss.) 655.

53. **Ill.**—*Gardner v. People*, 4 Ill. 83. **Ia.**—*Harriman v. State*, 2 Greene 270. **Miss.**—*Wood-sides v. State*, 2 How. 655. **N. C.**—*State v. Brown*, 81 N. C. 568. **Tenn.**—*Canupp v. State*, 97 Tenn. 635, 37 S. W. 547; *Gunkle v. State*, 6 Baxt. 625; *State v. Muzingo*, Meigs 112; *Hite v. State*, 9 Yerg. 198-204. **Va.**—*Jeremy Imp. Co. v. Com.*, 106 Va. 482, 56 S. E. 224; *Simmons v. Com.*, 89 Va. 156, 15 S. E. 386; *Com. v. Cawood*, 2 Va. Cas. 527. **W. Va.**—*State v. Thacker Coal & Coke Co.*, 49 W. Va. 140, 38 S. E. 539; *State v. Heaton*, 23 W. Va. 773; *State v. Gilmore*, 9 W. Va. 641, 645; *State v. Fitzpatrick*, 8 W. Va. 707. But see *People v. Lee*, 2 Utah 441.

[a] **For illustrations of sufficient records** of the finding of indictments, see: **Ia.**—*State v. Onnmacht*, 10 La. Ann. 198. **Va.**—*Watts v. Com.*, 99 Va. 872, 39 S. E. 706; *Com. v. Nutter*, 8 Gratt. 699. **W. Va.**—*State v. Gilmore*, 9 W. Va. 641.

[b] **Form of Record.**—In *State v. Guilford*, 49 N. C. 83, approved in *State v. Harwood*, 60 N. C. 226, it was held that the following form was sufficient, "and thereupon by the oath of" (18 persons naming them) "good and lawful men, of the county aforesaid, then and there drawn from the said venire, and then and there empannelled and sworn, and charged to enquire for the State, of, and concerning, all crimes and offences committed within the body of the said county, it is presented in manner and form following: that is to say," setting out the bill of indictment at large.

[c] **Word "Indorsed" Unnecessary.** The indorsement is no part of the indictment further than as a mark of identification, but the record of the finding by the grand jury is made up from the indorsement. Hence a record showing that the indictment had been returned into court a true bill signed by S—foreman, without using the word indorsed is sufficient record of

the finding. *State v. Thacker Coal & Coke Co.*, 49 W. Va. 140, 38 S. E. 539.

[d] **By Requisite Number.**—The return of an indictment indorsed "a true bill" is sufficient evidence that the statutory number of grand jurors concurred in finding the indictment. *Lanekton v. United States*, 18 App. Cas. (D. C.) 348; *Guy v. State*, 37 Ind. App. 691, 77 N. E. 855.

[e] The words "indictment filed" and the entry "a true bill" upon the calendar or calendar list, prepared for the use of the judge are insufficient as a record of the finding of the indictment. *United States v. Levally*, 36 Fed. 687.

[f] **Defendants Not Named.**—A record which states that two indictments against surveyors of roads are found true bills by the grand jury, without naming the surveyors, is not a sufficient record of the finding against any particular surveyors. *Com. v. Snider*, 2 Leigh (Va.) 744.

[g] **But by statute in Mississippi** the indorsements required to be made by the clerk are exclusive evidence of the finding and return of the indictment. *Stanford v. State*, 76 Miss. 257, 24 So. 536.

[h] **The date of the finding** of the indictment need not be specified in the record. *State v. McGuire*, 87 Iowa 142, 54 N. W. 202.

[i] **Term at Which Found.**—It was held in *Price v. Com.*, 21 Gratt. (Va.) 846, that it was not necessary that the record show at what term the indictment is found. Where an indictment was found by a grand jury of eight members it will be presumed that the indictment was found at a term when only eight persons were necessary to constitute a grand jury.

54. *Hite v. State*, 9 Yerg. (Tenn.) 198-294.

55. *State v. Brown*, 81 N. C. 568; *Com. v. Cawood*, 2 Va. Cas. 527.

56. *State v. Brown*, 81 N. C. 568

57. *Simmons v. Com.*, 89 Va. 156, 15 S. E. 386.

ing is unnecessary, it being sufficient if the record shows the return of an indictment,⁵⁸ and that the endorsement of the foreman upon an indictment copied into the record is a sufficient record of the finding of the grand jury.⁵⁹

The foreman's name endorsed upon the indictment need not be copied into the minutes.⁶⁰

Position in Record.—The relative position which the entry occupies in the record will not affect the validity of the indictment.⁶¹

Presentment.—An entry as to the finding has been held to be unnecessary in case of a presentment.⁶²

c. Record of Return.—The record must show a due return of the indictment by a grand jury in open court in the manner prescribed by law.⁶³ No set phraseology is required; any apt words showing the

58. *Fla.*—*Collins v. State*, 13 *Fla.* 651-661. *Pa.*—See *Hopkins v. Com.*, 50 *Pa.* 9-16, 88 *Am. Dec.* 518.

[a] **Indorsement.**—The record need not show that the indictment was indorsed a true bill. *Townsend v. State*, 2 *Blackf. (Ind.)* 151. See also *Beard v. State*, 57 *Ind.* 8; *Brown v. State*, 7 *Humph. (Tenn.)* 155.

[b] **The indictment itself being a part of the record** it is not necessary that the record, independently of the indictment, should show it has been returned a true bill. *State v. McCarty*, 17 *Minn.* 76; *State v. O'Brien*, 18 *R. I.* 105, 25 *Atl.* 910. See also *Pickrel v. Com.*, 17 *Ky. L. Rep.* 120, 30 *S. W.* 617. But see *State v. Brown*, 81 *N. C.* 568.

59. *Beard v. State*, 57 *Ind.* 8; *Canup v. State*, 97 *Tenn.* 635, 37 *S. W.* 547; *Bennett v. State*, 8 *Humph. (Tenn.)* 118; *Fletcher v. State*, 6 *Humph. (Tenn.)* 249; *Calhoun v. State*, 4 *Humph. (Tenn.)* 477.

[a] **By statute** it is the duty of the clerk to transcribe upon the minutes of the court the indorsement "a true bill," and the foreman's signature, as well as the body of the indictment itself. But when the original bearing proper indorsements is on file in the case, the failure of the clerk to copy the indorsement and signature on the minutes will not vitiate the original. *State v. Herron*, 86 *Tenn.* 442, 7 *S. W.* 37.

60. *Gardner v. People*, 4 *Ill.* 83; *State v. Clay*, 45 *La. Ann.* 269, 12 *So.* 307; *State v. Rideau*, 45 *La. Ann.* 268, 12 *So.* 307; *State v. Bennett*, 45 *La. Ann.* 54, 12 *So.* 306.

61. The fact that the clerk entered

of record the discharge of the grand jury before he entered the title of the cases against those indicted is immaterial. *State v. Starr*, 52 *La. Ann.* 610, 26 *So.* 998.

62. *State v. Muzingo, Meigs (Tenn.)* 112.

[a] The record need not show the finding of a true bill, as in the case of an indictment. *Jeremy Imp. Co. v. Com.*, 106 *Va.* 482, 56 *S. E.* 224.

[a] **Form of Record.**—In the case of *Com. v. Tiernan*, 4 *Gratt. (Va.)* 345, the record after having given the names of the grand jury, stated that they had been sworn and charged, and retired to consider of their presentments and indictments, "and after some time returned into court with a presentment for unlawful gaming against J. T." This was held a sufficient record of the finding of the presentment.

63. *Ark.*—*Felker v. State*, 54 *Ark.* 489, 16 *S. W.* 663; *Holcomb v. State*, 31 *Ark.* 427; *McKenzie v. State*, 24 *Ark.* 636; *Green v. State*, 19 *Ark.* 178. But see *Shinn v. State*, 93 *Ark.* 290, 124 *S. W.* 263. *Colo.*—*Thornell v. People*, 11 *Colo.* 305, 17 *Pac.* 904. *Ga.*—*Bowen v. State*, 81 *Ga.* 482, 8 *S. E.* 736. *Ill.*—*People v. Dennis*, 246 *Ill.* 559, 92 *N. E.* 964; *Yundt v. People*, 65 *Ill.* 372; *Aylesworth v. People*, 65 *Ill.* 301; *Sattler v. People*, 59 *Ill.* 68; *Kelly v. People*, 39 *Ill.* 157; *Gardner v. People*, 29 *Ill.* 430; *Rainey v. People*, 8 *Ill.* 71. *Ind.*—*Mitchell v. State*, 63 *Ind.* 276; *Heacock v. State*, 42 *Ind.* 393; *Hall v. State*, 21 *Ind.* 268; *Jackson v. State*, 21 *Ind.* 171, *s. c.*, 21 *Ind.* 79; *Springer v. State*, 19 *Ind.* 180; *Conner v. State*, 19 *Ind.* 98; *Adams v. State*, 11 *Ind.* 304. But see

indictment has been returned into court are sufficient.⁶⁴ It has been

Wall *v.* State, 23 Ind. 150, *overruling* Springer *v.* State, 19 Ind. 180, and Adams *v.* State, 11 Ind. 304. **Ky.** See Pearce *v.* Com., 10 Ky. L. Rep. 178, 8 S. W. 893. **La.**—See State *v.* Pitts, 39 La. Ann. 914, 3 So. 118; and State *v.* Sandoz, 37 La. Ann. 376. **Miss.** Cachute *v.* State, 50 Miss. 165; Mulligan *v.* State, 47 Miss. 304; Pond *v.* State, 47 Miss. 39; Jenkins *v.* State, 30 Miss. 408. **N. C.**—State *v.* Bordeaux, 93 N. C. 560. **Tenn.**—Canupp *v.* State, 97 Tenn. 635, 37 S. W. 547; State *v.* Willis, 3 Head 157; Henry *v.* State, 4 Humph. 270; Chappel *v.* State, 8 Yerg. 166. **Tex.**—Moore *v.* State, 46 Tex. Crim. 520, 81 S. W. 48; English *v.* State (Tex. App.), 18 S. W. 678; Lynn *v.* State, 28 Tex. App. 515, 13 S. W. 867; Strong *v.* State, 18 Tex. App. 19; Kennedy *v.* State, 9 Tex. App. 399; Walker *v.* State, 7 Tex. App. 52; Hardy *v.* State, 1 Tex. App. 556. **Va.**—Simmons *v.* Com., 89 Va. 156, 15 S. E. 386; Com. *v.* Cawood, 2 Va. Cas. 527-541-547.

[a] **Practice in Federal Court.**—In the federal court it is the practice not to make a record of the return of the indictment at the time thereof but subsequently the clerk makes the proper entry on the minute book and docket, from the indorsement upon the bill. United States *v.* Levally, 36 Fed. 687.

[b] **On appeal,** (1) the record must affirmatively show a due return (State *v.* Dixon, 97 Ind. 125; Cox *v.* State, 7 Tex. App. 495), (2) and this is a part of the record in every criminal case brought to the appellate court (Miller *v.* State, 40 Ark. 488-492; Ford *v.* State, 34 Ark. 649); (3) and when such entry does not appear, it is the practice to award certiorari to supply the omission, and if it appear there was no record entry the practice has been to reverse the judgment of conviction. Miller *v.* State, 40 Ark. 488.

[c] **Presumption as to Entries.**—In the absence of a bill of exceptions showing that it was proved on trial of a motion to quash, by the minutes of the court, that the entries of a due return in open court were not made, on appeal it will be presumed that the entries of the due return were made. Alderson *v.* State, 2 Tex. App. 10.

N. E. 964. But see Kelley *v.* People, 39 Ill. 157.

[a] The recitation of the mere fact that the indictment was presented by the grand jury is all that is required. State *v.* Freeze, 30 Mo. App. 347; State *v.* Guilford, 49 N. C. 83.

[b] **“Present” Indictment.**—A record stating “Come, now the grand jury for the term aforesaid, and present in open court the following indictment,” is sufficient. The objection that the word “present” used above is not equivalent to “return” is untenable. Reeves *v.* State, 84 Ind. 116.

[c] **“Report” on Indictment.**—A record reciting that the grand jury “reported” an indictment was a sufficient compliance with the code requiring the indictment to be “presented” by the foreman. Patterson *v.* Com., 86 Ky. 313, 5 S. W. 387.

[d] “While an absolute defect will not be cured, or a positive fact supplied by presumption, yet, when the difficulty arises from the inartificial use of language, and it is evident the statute has been complied with, liberality will be indulged in support of the record.” Nichols *v.* State, 46 Miss. 284. See State *v.* Gilmore, 9 W. Va. 641.

[e] **For illustrations of what has been held sufficient record of return, see the following cases:** **U. S.**—Breese *v.* United States, 203 Fed. 824, 122 C. C. A. 142. **Ala.**—Parnell *v.* State, 129 Ala. 6, 29 So. 860; McKee *v.* State, 82 Ala. 32, 2 So. 451; McCaler *v.* State, 49 Ala. 39. **Fla.**—Peoples *v.* State, 46 Fla. 101, 35 So. 223; Oliver *v.* State, 38 Fla. 46, 20 So. 803; Westcott *v.* State, 31 Fla. 458-469, 12 So. 846. **Ill.** Kelly *v.* People, 132 Ill. 363, 24 N. E. 56; Fitzpatrick *v.* People, 93 Ill. 269. See Hughes *v.* People, 116 Ill. 330-339, 6 N. E. 55. **Ind.**—Williams *v.* State, 168 Ind. 87-93, 79 N. E. 1079; Padgett *v.* State, 103 Ind. 550, 3 N. E. 377; Epps *v.* State, 102 Ind. 539, 1 N. E. 491; Heath *v.* State, 101 Ind. 512; Clare *v.* State, 68 Ind. 17; Beavers *v.* State, 58 Ind. 530; Willey *v.* State, 46 Ind. 363. **Ia.**—Wrocklege *v.* State, 1 Iowa 167; Dixon *v.* State, 4 Greene 381; Harri-man *v.* State, 2 Greene 270-278 (indorsement of return). **Kan.**—Millar *v.* State, 2 Kan. 174; State *v.* Jones, 2

64. People *v.* Dennis, 246 Ill. 559, 92

held that the omission of such entry is fatal⁶⁵ and cannot be supplied by the indorsement made upon the indictment.⁶⁶

In some jurisdictions, however, such an entry, though proper, is not indispensable,⁶⁷ and it has been held that under some circumstances

Kan. App. 1, 42 Pac. 392. **Ky.**—*Daniel v. Com.*, 154 Ky. 601, 157 S. W. 1127 (indorsement upon indictment); *Hendrickson v. Com.*, 146 Ky. 712, 143 S. W. 433 (indorsement on indictment); *Patterson v. Com.*, 86 Ky. 313, 5 S. W. 357; *Pearce v. Com.*, 10 Ky. L. Rep. 178, 8 S. W. 893. **Miss.**—*Cannon v. State*, 57 Miss. 147; *Lee v. State*, 45 Miss. 114; *Josephine v. State*, 39 Miss. 613-641-650; *Greeson v. State*, 5 How. 33-37. **Mo.**—*State v. Vincent*, 9 Mo. 662, 4 S. W. 430; *State v. Freeze*, 30 Mo. App. 347 (holding that an entry of presentation in open court and that the indictment was ordered filed without a statement that it was presented by the foreman of the grand jury is sufficient). **N. C.**—*State v. Ledford*, 133 N. C. 714, 45 S. E. 944; *State v. Gainus*, 86 N. C. 632; *State v. Lee*, 80 N. C. 483; *State v. Guilford*, 49 N. C. 83. **Pa.**—*Hopkins v. Com.*, 50 Pa. 9-16, 88 Am. Dec. 518. **Tenn.**—*Maples v. State*, 3 Heisk. 408, holding that a record reciting a return "into court" sufficiently shows the return to have been into open court. **Tex.**—*Hasley v. State*, 14 Tex. App. 217. **Va.**—*Hodges v. Com.*, 89 Va. 265, 15 S. E. 513.

65. **Ill.**—*Yundt v. People*, 65 Ill. 372; *Rainey v. People*, 8 Ill. 71. **Ind.**—*Jackson v. State*, 21 Ind. 79. **La.**—*State v. Pitts*, 39 La. Ann. 914, 3 So. 118. **Miss.**—*Pond v. State*, 47 Miss. 39. **Tenn.**—*Canupp v. State*, 97 Tenn. 635, 37 S. W. 547. **Va.**—*Simmons v. Com.*, 89 Va. 156, 15 S. E. 386.

[a] **Entry in Minutes of Judge Insufficient.**—The minutes of the judge being no part of the record, an entry upon the minutes showing a return of the indictment in open court is insufficient to cure an omission of such entry in the record. *Sattler v. People*, 59 Ill. 68.

[b] **Presumption of Innocence.** Where the record fails to show a return of the indictment by the grand jury, the presumption of innocence in favor of the accused will not permit the supposition that the indictment has been properly returned but not entered of record. *Adamson v. State*, 11 Ind. 304.

66. *Felker v. State*, 51 Ark. 489, 16 S. W. 663; *Holbrook v. State*, 34 Ark. 511, 36 Am. Rep. 17; *Chancellor v. State*, 33 Ark. 815; *McKenzie v. State*, 24 Ark. 636; *Adams v. State*, 11 Ind. 304. *Contra*, *State v. Jones*, 2 Kan. App. 1, 42 Pac. 392.

[a] **Indorsement and Minutes of Clerk Sufficient.**—The indorsement upon the indictment filed and an entry in the minutes of the clerk of the fact of a return by the grand jury are sufficient to show that the indictment has been duly returned by the grand jury. *Hogan v. State*, 30 Wis. 428, 11 Am. Rep. 575.

67. **Ala.**—*Williams v. State*, 150 Ala. 84, 43 So. 182; *Mose v. State*, 35 Ala. 421. See *McKee v. State*, 82 Ala. 32-38, 2 So. 451. **Ky.**—*Pence v. Com.*, 95 Ky. 618, 26 S. W. 810. **La.**—*State v. Mason*, 32 La. Ann. 1018.

[a] **In Florida** (1) there is no statute requiring a formal entry in the record of the return, and apparently none is necessary but the better practice is to make a formal entry of the return in the minutes (*Johnson v. State*, 24 Fla. 162-170, 4 So. 535; *Collins v. State*, 13 Fla. 651); (2) there should be however some evidence of a return in open court and this should appear either from the record or from the indorsements upon the indictment. *Goodson v. State*, 29 Fla. 511, 10 So. 738.

[b] **Georgia.**—The failure of the clerk to make an entry in the minutes of the due return of the indictment is an irregularity which is cured by the testimony of the bailiff and clerk. *Chelsey v. State*, 121 Ga. 340, 49 S. E. 258.

[c] **Iowa.**—In *State v. Glover*, 3 Greene 249-254, it was held that the omission to make a record that the indictment was presented in the presence of the grand jury, is fatal to the proceedings and that the action of the lower court in refusing to permit amendment was correct. Subsequent to this decision it was enacted that no indictment should be quashed if it could be ascertained therefrom, that the same was presented in some court having jurisdiction, etc. (Code, §2916).

it will be presumed that the indictment had been legally returned.⁶³ In other jurisdictions it is provided that an indorsement upon the

Under this state of the law it was held in *State v. Axt*, 6 Iowa 511, that the requirements of §2914 were directory merely, and not essential to the validity of the indictment. And see *State v. Jolly*, 7 Iowa 15.

68. Regularity Presumed.—See *People v. Lee*, 2 Utah 441-450, holding that even though the due presentation of an indictment in open court is jurisdictional, in the absence of a showing to the contrary it will be presumed to have been so presented. The court being of general criminal jurisdiction all intendments are in favor of the regularity of the proceedings. See also *People v. Blackwell*, 27 Cal. 65; *State v. McIntire*, 59 Iowa 267, 13 N. W. 287. But see *Bowen v. State*, 81 Ga. 482, 8 S. E. 736.

[a] The statute prohibiting any record entry of the return of the indictment when the defendant is still at large, it was held in *State v. Lord*, 118 Mo. 1, 23 S. W. 764, that from the fact of an indictment endorsed by the prosecuting attorney, the foreman of the grand jury and the clerk, being filed there is a prima facie presumption of a due return. See *State v. Bobbst*, 131 Mo. 328, 32 S. W. 1149.

[b] From an indorsement of "true bill" upon an indictment, signed by the foreman, and a recital in the indictment "the jurors on their oath, present," etc., the indictment will be presumed to have been properly presented. Proof to the contrary can be heard only on plea in abatement filed in apt time. *State v. Weaver*, 104 N. C. 758, 10 S. E. 486.

[c] *State v. Peloquin*, 106 Me. 358, 76 Atl. 888, holds that "independent of any record as to the precise date of such return, the presence of the indictment in court, for the arraignment and trial of the accused is sufficient evidence that it has been so returned at some time after the beginning of the term and prior to such arraignment," it being presumed the proceedings of the court have been regular.

[d] **Records Destroyed.**—Under statute requiring the clerk to record the indictment in a book, etc., it was held that where the records had been destroyed by fire, "there is a legal pre-

sumption arising from the fact that he recorded the indictment in question, that it had been found by a grand jury and returned into court." The indictment in this case was signed by prosecuting attorney, indorsed a true bill and indorsed filed in open court. *Miller v. State*, 40 Ark. 488.

[e] **Statement That Process Would Issue.**—It was held in *State v. Mason*, 32 La. Ann. 1018, that an entry upon the minutes of fact of an indictment indorsed "true bill," signed by the foreman and, that the court ordered the finding should be recorded and that process should issue, is sufficient to raise a presumption that the indictment was duly returned into open court, since the clerk enters on the minutes only transactions done in the court while in session. *State v. Onnmacht*, 10 La. Ann. 198.

[f] **Indorsement "Filed."**—In *State v. Crilly*, 69 Kan. 802, 77 Pac. 701, there was no record entry of the return but a copy of the indictment, showing an indorsement "true bill" by the foreman and an indorsement by the clerk "Presented in presence of the grand jury and filed," etc., was set out in full in the record. It was held that the indictment would be presumed to have been duly returned. But see *McKenzie v. State*, 24 Ark. 636.

[g] **Where the record fails to show the presence of a justice of the supreme court at the court house at the return of the indictment, it is presumed all acts were regularly done, and in such case the absence of the supreme justice being a necessary condition, it will be presumed that none were present.** *State v. Turner*, 72 N. J. L. 404, 60 Atl. 1112.

[h] **Presumption as to Number of Jurors at Return.**—Where the record asserts that the grand jury returned the indictment and there is nothing contradictory to the conclusion that twelve were present, it will not be presumed that less were present. *Letcher v. State*, 159 Ala. 59, 48 So. 805; *Russell v. State*, 33 Ala. 366-370.

[i] **Common Law Contrasted.**—From the finding and filing of the indictment it will be presumed to have been duly

indictment of its filing, dated, and signed by the clerk, is a sufficient showing of the return.⁶⁹

Postponement of Entry.—Where the accused is not in custody or has not been released on bail, it is frequently provided by statute,⁷⁰ or, in the absence of such a statute, it is sometimes the custom of the court⁷¹ to postpone the entry of the return to a term subsequent to the appearance of the defendant, until which time the only record is the endorsement on the indictment.⁷²

Partial Omission of Names.—If in recording the fact of the return of an indictment against several defendants the clerk omits some of them, the indictment is good as to those whose names are entered of record.⁷³

d. *Record of Filing.*—The record should show the indictment has

presented. Such was not the case at common law for at common law this must be shown affirmatively from the record. *State v. Beebe*, 17 Minn. 241.

69. **Ia.**—*State v. Jolly*, 7 Iowa 15; *State v. Axt*, 6 Iowa 511. **Ky.**—*Daniel v. Com.*, 154 Ky. 601, 157 S. W. 1127. **Miss.**—*Stanford v. State*, 76 Miss. 257, 24 So. 536; *Lea v. State*, 64 Miss. 294-300, 1 So. 244; *Holland v. State*, 60 Miss. 939-944; *Cooper v. State*, 59 Miss. 267; *Smith v. State*, 58 Miss. 867-871; *Fitzcox v. State*, 52 Miss. 923. **Mo.**—*State v. Grate*, 68 Mo. 22; *State v. Sharpe*, 119 Mo. App. 386, 95 S. W. 298.

[a] **Name of Court in Indorsement.** "It is not essential to name the court in the indorsement, although such would be the better and the truly correct practice." *State v. Jolly*, 7 Iowa 15.

[b] **An entry upon the minutes of the fact of its return is not required.** *Cook v. State*, 57 Miss. 654.

[c] **In New Jersey the indictment is complete without an indorsement by the clerk of the return, and it becomes effective when handed to the court.** *State v. Unsworth*, 85 N. J. L. 237, 88 Atl. 1097.

70. **Ala.**—*Shropshire v. State*, 12 Ark. 190-209. **Ia.**—*Herring v. State*, 1 Iowa 205; *Wrocklege v. State*, 1 Iowa 167 (in the absence of a statute). **Miss.**—*Cornwell v. State*, 53 Miss. 385; *Cachute v. State*, 50 Miss. 165-171. **Mo.** See Ann. St., 1906, §2519; *State v. Bell*, 159 Mo. 479-485, 60 S. W. 1102; *State v. Lord*, 118 Mo. 1, 23 S. W. 764; *State v. Corson*, 12 Mo. 404.

[a] **Substance of Entry Under Such Statute.**—Such a "statute intends the

indorsements upon the indictment and the date of its filing, as furnishing sufficient evidence to justify such an entry upon the minutes of the court at a subsequent term," and an entry not purporting to be such but to come from the breast of the clerk is insufficient. The minutes of the subsequent term should contain a "statement of the style of the case, and then an entry that the grand jury at the April term had returned into court, and through their foreman presented the bill of indictment, which, with its endorsements, is as follows, and that this entry was not made at the April term, because the defendant was not then in custody, or under bail or recognizance." *Cachute v. State*, 50 Miss. 165-171. See *State v. Pitts*, 58 Mo. 556.

[b] **Entry During Trial.**—Under such a statute, it is within the power of the court to cause an entry of the return of the indictment to be made during trial. *Cook v. State*, 57 Miss. 654.

[c] **In Texas the fact of presentment is entered upon the minutes, noting the style and file number, but omitting the name of the accused unless he is in custody or on bail.** *Lynn v. State*, 28 Tex. App. 515, 13 S. W. 867.

71. *State v. Beebe*, 17 Minn. 241; *People v. Lee*, 2 Utah 441-449.

72. *Herring v. State*, 1 Iowa 205; *Wrocklege v. State*, 1 Iowa 167.

73. **Tenn.**—*Blevins v. State*, Meigs 82. **Va.**—*Drake & Cochren's Case*, 6 Gratt. 665. **W. Va.**—*State v. Grove*, 61 W. Va. 697, 57 S. E. 296; *State v. Compton*, 13 W. Va. 852.

been filed in court,⁷⁴ by some appropriate endorsement or other entry.

e. *As to Court*.—The record of the court in which the indictment or presentment is made should show that the court was organized and sitting in the manner prescribed by law.⁷⁵ It has been held that the record should state the place at which the court convened,⁷⁶ and that it was in session at the time the indictment was returned.⁷⁷

f. *As to Offense*.—The record entry should in general terms state⁷⁸

74. *Conner v. State*, 18 Ind. 428. See *supra*, IV, A, 3, c.

[a] **The official certificate of the clerk** indorsed upon the indictment is all that the record need show regarding the filing of the indictment. *Cross v. State*, 117 Ala. 73, 23 So. 784. See also *State v. Rivers*, 58 Iowa 102, 12 N. W. 117, 43 Am. Rep. 112.

[b] **Illustration of sufficient entry of the filing of the indictment**: Ill. *Morton v. People*, 47 Ill. 468-476. Ia. *State v. Shepard*, 10 Iowa 126. Miss. *Lee v. State*, 45 Miss. 114.

[c] **It is immaterial** that the record does not show the indictment to have been filed where it had been treated as a valid indictment, and the defendant had been arraigned, saw it, heard it read, pleaded not guilty and had been convicted. *State v. Hamm*, 11 Mo. App. 585.

[d] **An indictment becomes a part of the record** when filed, without any action on the part of the court. *Stewart v. State*, 24 Ind. 142.

What constitutes filing in general see 8 STANDARD PROC. 980.

75. *Mulligan v. State*, 47 Miss. 304.

[a] **Names of Judges**.—(1) The record should show the name of the presiding judge (*Holton v. State*, 2 Fla. 476-505; *Mulligan v. State*, 47 Miss. 304. But see *Yates v. People*, 38 Ill. 527), (2) and the names of as many judges as are required to constitute the court. If more are present it is sufficient to say, "and others their fellows, etc." *Cruiser v. State*, 18 N. J. L. 206.

[b] **Court Identified by Name of Judge**.—In a county having two district courts, each entitled to a grand jury, an objection to the indictment on the ground it was not shown to have been returned into the proper court is not well taken where it is shown that the presiding judge of the court in which the indictment was returned was the judge of the proper

court. *Outley v. State* (Tex.), 99 S. W. 95.

76. *Mulligan v. State*, 47 Miss. 304; *Carpenter v. State*, 4 How. (Miss.) 163, 34 Am. Dec. 116; *Woodside v. State*, 2 How. (Miss.) 655; *Grandison v. State*, 2 Humph. (Tenn.) 451.

77. *State v. Cunningham*, 130 Mo. 507, 32 S. W. 970 (holding that a recitation in the record of the return of an indictment "into open court" shows that the court was then in session); *Cruiser v. State*, 18 N. J. L. 206.

[a] **Date of Commencement of Session**.—If the bill is found at an adjourned term, the record should show the date of the commencement of the original session. *Holton v. State*, 2 Fla. 476-505; *King v. Fisher*, 2 Str. (Eng.) 865.

78. *Goodwyn v. State*, 4 Smed. & M. (Miss.) 520-535; *State v. Geyer*, 44 W. Va. 649, 29 S. E. 1020.

[a] **Offense Described as "a Felony"**.—The entry need not describe the offense in any but general terms as "a felony" or "a misdemeanor." If the offense is a common-law offense a description of the character of the offense is generally added, but this ought not to be done if the offense is a statutory offense. If the description is not irreconcilably in conflict with the offense described in the indictment it will not be fatal, but it is otherwise if there is an irreconcilable conflict. *State v. Heaton*, 23 W. Va. 773; *State v. Fitzpatrick*, 8 W. Va. 707. But see *Holton v. State*, 2 Fla. 476, 505, holding a record which states the return of an indictment charging a felony cannot be held a record of an indictment charging murder. Copying an indictment for murder in the record will not cure the defect.

[b] If the character of the offense is indicated, the absence of the words "a felony" or "a misdemeanor" does not vitiate. *Crookham v. State*, 5 W. Va. 510.

the character of the offense charged, although in some jurisdictions this is not considered necessary.⁷⁹

g. *As to Witnesses Before Grand Jury.*—It is not necessary that the record should state that the witnesses before the grand jury were sworn;⁸⁰ or that the names of the witnesses⁸¹ or the evidence upon which the indictment is found⁸² be set out in the record.

h. *Identifying Indictment in Record.*—The record should identify the indictment by which defendant is charged, as the one returned by the grand jury;⁸³ but all that is necessary is that there should be such an identity between the record of the finding and the particular bill of indictment to which it is made to apply as to leave no room for mistake or doubt.⁸⁴

[c] It is not necessary that the word "unlawfully" be used in the record entry of the finding, although the indictment charges defendant with "unlawfully" selling intoxicating liquors to a minor. *State v. Gilmore*, 9 W. Va. 641.

[d] *Indorsement.*—It was held in *State v. De Hart*, 109 La. 570-578, 33 So. 605, that an indorsement of the name of the offense charged upon the back of the indictment is no part of the finding by the grand jury and an entry of such indorsement, which charges a crime not known to laws of the state although the crime charged in the body was an offense, in the minutes does not change the formal accusation, nor affect the validity of the proceedings had thereunder.

79. *Tellison v. State*, 35 Tex. Crim. 388, 33 S. W. 1082; *Steele v. State*, 19 Tex. App. 425; *Spear v. State*, 16 Tex. App. 98-113; *Hasley v. State*, 14 Tex. App. 217. But see *Denton v. State*, 3 Tex. App. 635, *contra*, decided before the revision.

[a] While it is unnecessary to state the offense charged in the record entry, such statement when correctly made will not vitiate the entry. *Steele v. State*, 19 Tex. App. 425.

80. *D. C.*—*United States v. Murphy*, *MacArthur & M.* 375, 48 Am. Rep. 754. *Miss.*—*King v. State*, 5 How. 730. *Tenn.* *Gilman v. State*, 1 Humph. 59, holding the record need not show the witnesses were sworn in open court.

81. *McKinney v. People*, 7 Ill. 540-551, 43 Am. Dec. 65; *Gardner v. People*, 4 Ill. 83; *State v. Harwood*, 60 N. C. 226; *State v. Roberts*, 19 N. C. 540.

82. *State v. Roberts*, 19 N. C. 540.

83. *Bodkin v. State*, 20 Ind. 281;

Springer v. State, 19 Ind. 180; *Lea v. State*, 64 Miss. 294, 1 So. 244; *Cornwell v. State*, 53 Miss. 385; *Hague v. State*, 34 Miss. 616; *Laura v. State*, 26 Miss. 174.

[a] *Presumption as to Identity.*—In regard to matters required by law to appear in the record, no presumption will be indulged in either to contradict the record or supply the defect. *Laura v. State*, 29 Miss. 174.

84. *Cherry v. State*, 6 Fla. 679.

[a] The indorsement "filed" by the clerk sufficiently identifies the bill with the minute entry. *State v. Harp*, 133 La. 1007, 63 So. 500.

[b] The record in *Engeman v. State*, 54 N. J. L. 247, 23 Atl. 676, states "that by the grand inquest it (the indictment) is presented in manner and form following, to-wit, the bills herewith presented are true bills," then follows the indictment. Held that the record sufficiently identifies the indictment as one returned by the grand jury, the interpolation "to-wit the bills herewith presented are true bills," does not destroy the force of the entry.

[c] The entry in the record of the finding of an indictment against B. S. Compton is sufficient *prima facie* to identify the indictment against Benjamin S. Compton. *State v. Compton*, 13 W. Va. 852.

[d] *Identification by Number.*—When the accused is not in custody or on bail, the indictment is sufficiently identified in the record by its number and date of filing. *Fitzpatrick v. State*, 37 Ark. 238. But see *Shropshire v. State*, 12 Ark. 190, 209; *Willie v. State*, 46 Ind. 363.

[e] "That the number on the in-

i. *Copy of Indictment in Record.*—It is not necessary that the whole presentment,⁸⁵ or indictment⁸⁶ with the action of the jury thereon should be spread upon the minutes of the court, or upon the record, but such no doubt, is the better practice,⁸⁷ and is sometimes provided for by statute.⁸⁸

An error of the clerk in copying the title of the indictment will not vitiate it or the proceedings.⁸⁹

j. *Amendment of Record.*—The record may be amended to supply clerical omissions.⁹⁰ The court at any time during the term may cause

dictment and the number of the cause, were different, is immaterial." *Vandynne v. State*, 130 Ind. 26, 29 N. E. 392; *Mergentheim v. State*, 107 Ind. 567, 8 N. E. 568.

(f) An entry upon the minutes of the return of indictments numbers 779, 780, 781, etc., followed by a recital, "which said indictment with the indorsements thereon, is in words and figures following, to-wit:" without giving any numbers, is insufficient to identify the indictment as one of those returned. The indictment set out cannot be presumed to be one of those returned. *Speed v. State*, 52 Miss. 176.

85. *Nunn v. State*, 1 Ga. 243 (holding that the indorsement on the presentment itself of the "file in the office, or the signatures of the body, or of the foreman, in the name of himself and his fellows, aided by the testimony of the solicitor and clerk would be sufficient"); *Com. v. Tiernan*, 4 Gratt. (Va.) 545.

86. *Mo.*—*State v. Clark*, 18 Mo. 432. *Pa.*—*Hopkins v. Com.*, 50 Pa. 9-16, 88 Am. Dec. 518. *Tenn.*—*Glasgow v. State*, 9 Baxt. 485.

[a] The recordation of the indictment is not necessary when the trial is had upon the original indictment. The statute requiring recording is merely to obviate the difficulty consequent upon the loss of the original and the failure to record does not affect the validity of the indictment. *Porter v. State*, 17 Ind. 415; *Reed v. State*, 8 Ind. 200.

[b] *Copy in Transcript on Change of Venue.*—Upon a change of venue, the statute requiring the clerk to make up the transcript with the original papers to be delivered to the clerk of the county to which the change has been granted, it is not necessary to

copy the indictment into the transcript. *Powers v. State*, 87 Ind. 144.

87. *Nunn v. State*, 1 Ga. 243.

88. *Burns' Ann. St. (Ind.)*, 1914, §1984.

[a] **A failure of the clerk to record** an indictment actually returned is not ground for reversal. *Williams v. State*, 168 Ind. 87-93, 79 N. E. 1079; *Ransbottom v. State*, 144 Ind. 250, 43 N. E. 218; *Heath v. State*, 101 Ind. 512.

[b] **Recording in Court Where Found.**—It is necessary that the indictment should be recorded in the court where found only, and it is not necessary to record it in the court to which the venue was changed. If necessary it will be presumed to have been recorded in the former court. *Reed v. State*, 8 Ind. 200.

[c] **Clerk May Record Out of Term.** If an indictment is returned into court upon the last day of the term, the clerk may record it at a later day. The statute providing for the recordation and providing that before the last day of the term the clerk shall compare the indictment with the record is directory so far as the time for filing is concerned. *Courtney v. State*, 5 Ind. App. 356, 367, 32 N. E. 335.

[d] **Signature of Prosecuting Attorney.**—The record need not show that the indictment was signed by the prosecuting attorney. *M'Gregg v. State*, 4 Blackf. (Ind.) 101.

89. Where an indictment was found against A, et als., a record by the clerk of the return of an indictment against A only cannot vitiate the proceedings. *State v. Banks*, 40 La. Ann. 736, 5 So. 18.

90. *Ind.*—*State v. Pearce*, 14 Ind. 426. *Ky.*—*Pence v. Com.*, 95 Ky. 618, 26 S. W. 810. *Tenn.*—*State v. Willis*, 3 Head 157. *Tex.*—*Rhodes v. State*, 29 Tex. 188; *Moore v. State*, 46 Tex. Crim. 520, 81 S. W. 48.

its clerk to indorse the indictment "filed,"⁹¹ or returned,⁹² or to correct the indorsement on the indictment, or to supply omissions therein,⁹³ as of the date of such filing and return; and it may also cause its clerk to make a nunc pro tunc entry upon the minutes of the court or upon the record of the fact of the return⁹⁴ and filing of the indictment,⁹⁵ or of the organization of the grand jury,⁹⁶ or other matters necessary to make the records speak the truth.⁹⁷ The making

[a] Amendment may be made to correct the entry even at a subsequent term. See *People v. Lee*, 2 Utah 441-450. But see *Bowen v. State*, 81 Ga. 482, 8 S. E. 736, holding that an entry at a subsequent term of the return, without an order to make the entry nunc pro tunc, will not cure the omission to enter the return at the proper time.

[b] In *Cornwell v. State*, 53 Miss. 385, it was held that under a statute forbidding an entry of the return of the indictment unless defendant be in custody or on bail, it is permissible to make an original entry upon the record at a subsequent term, or if there is already an imperfect entry, it may be ignored as invalid and a new entry made. But if the defendant is in custody and an insufficient record had been made, an amendment at a subsequent term is improper.

91. *Ala.*—*Hicks v. State*, 123 Ala. 15, 26 So. 337; *Franklin v. State*, 28 Ala. 9. *Ark.*—*West v. State*, 71 Ark. 144, 71 S. W. 483; *State v. Gowen*, 12 Ark. 62. *Fla.*—*Ammons v. State*, 9 Fla. 530-541. *Ill.*—*Kirkham v. People*, 170 Ill. 9, 48 N. E. 465. *Ind.*—*Long v. State*, 56 Ind. 133. *Nev.*—*State v. Harris*, 12 Nev. 414. *Tex.*—*Cauthern v. State*, 65 S. W. 96; *Skinner v. State*, 64 Tex. Crim. 84, 141 S. W. 231; *Serviner v. State*, 44 Tex. Crim. 232, 70 S. W. 214; *Ripley v. State*, 29 Tex. App. 37, 14 S. W. 448.

92. *State v. Harris*, 12 Nev. 414.

93. *De Olles v. State*, 20 Tex. App. 145.

94. *Ala.*—*Franklin v. State*, 28 Ala. 9. *Ark.*—*West v. State*, 71 Ark. 144, 71 S. W. 483; *Holbrook v. State*, 34 Ark. 511-520, 36 Am. Rep. 17; *Green v. State*, 19 Ark. 178-189; *State v. Gowen*, 12 Ark. 62. See *Shinn v. State*, 93 Ark. 290, 124 S. W. 263; *Robinson v. State*, 33 Ark. 180. *Fla.*—*Johnson v. State*, 24 Fla. 162-172, 4 So. 535; *Collins v. State*, 13 Fla. 651. *Ga.*—*Keener v. State*, 97 Ga. 388, 24 S. E. 28. *Ill.*

Gore v. People, 162 Ill. 259, 44 N. E. 500. *Ind.*—*Waterman v. State*, 116 Ind. 51, 18 N. E. 63; *Long v. State*, 56 Ind. 133; *Bodkin v. State*, 20 Ind. 281. *La.*—*State v. Shields*, 33 La. Ann. 991; *State v. Mason*, 32 La. Ann. 1018; *State v. Onnmacht*, 10 La. Ann. 198. See *State v. Pullen*, 130 La. 249, 57 So. 906. *Mo.*—*State v. Clark*, 18 Mo. 432. *N. C.*—See *State v. Bordeaux*, 93 N. C. 560, holding an amendment to show return may be allowed after motion in arrest of judgment.

[a] **Not by Ex Parte Order.**—The amendment in this respect cannot be made by an ex parte order. *Felker v. State*, 54 Ark. 489, 16 S. W. 663. See *Halbrook v. State*, 34 Ark. 511, 520, 36 Am. Rep. 17; *Green v. State*, 19 Ark. 178-189.

[b] **Omission of Name.**—But where an indictment has been returned against two and the clerk in recording it omits the name of one, it is not permissible to amend the record nunc pro tunc by inserting the name of the omitted defendant. *Drake & Cochren's Case*, 6 Gratt. (Va.) 665. See also *Com. v. McKinney*, 8 Gratt. (Va.) 589.

95. *Price v. State*, 71 Ark. 180, 71 S. W. 948; *West v. State*, 71 Ark. 144, 71 S. W. 483; *State v. Bell*, 159 Mo. 479-485, 60 S. W. 1102.

96. *Fla.*—*Tervin v. State*, 37 Fla. 396-403, 20 So. 551, holding the requisite recording of the proceedings in drawing the grand jury could have been had after as well as before the finding of the indictment. *Mo.*—*State v. Clark*, 18 Mo. 432. *Tex.*—*De Olles v. State*, 20 Tex. App. 145-150.

[a] **Appointment of Foreman.**—The court may order an amendment showing the appointment of a foreman and the administration to him of the oath. *Com. v. Ferguson*, 8 Pa. Dist. 120.

97. *State v. Willis*, 3 Head (Tenn.) 157; *Tyson v. State*, 14 Tex. App. 388; *Townsend v. State*, 5 Tex. App. 574; *Denton v. State*, 3 Tex. App. 635. And see generally the title "**Records.**"

and entering of a formal order for this purpose, however, is not necessary.⁹⁸

B. OF INFORMATION.—1. Basis and Prerequisites.—a. *Leave of Court.*—At common law informations for offenses affecting the king, or the state were filed *ex officio* by the attorney general without the necessity of leave of court;⁹⁹ and for offenses against private individuals were filed as a matter of course until an early English statute provided that leave of court be first had and obtained.¹ And in the United States in some jurisdictions leave of court must first be obtained,² while in others leave to file is not necessary.³

[a] **An error in the date in the file mark** (1) may be corrected by amendment (Nelson *v.* State, 51 Tex. Crim. 349, 101 S. W. 1012; Boren *v.* State, 32 Tex. Crim. 637-644, 25 S. W. 775); (2) but it can be corrected only by the clerk of the court and in the court where the paper was originally filed. Kennedy *v.* State, 9 Tex. App. 399.

98. Keener *v.* State, 97 Ga. 388, 24 S. E. 28; Rhodes *v.* State, 29 Tex. 188 (holding "the proper course of amendment . . . would be by an order at the time when the amendment is made and not by erasing or altering an order entered upon the minutes at a previous term of the court").

99. **Mo.**—State *v.* Kyle, 166 Mo. 287-306, 65 S. W. 763. **N. H.**—State *v.* Dover, 9 N. H. 468. **Okla.**—Evans *v.* Willis, 22 Okla. 310, 97 Pac. 1047, 19 L. R. A. (N. S.) 1050. **Ore.**—State *v.* Guglielmo, 46 Ore. 250-257, 79 Pac. 577, 80 Pac. 103, 69 L. R. A. 466. **Eng.**—Rex *v.* Phillips, 4 Burr. 2089, 98 Eng. Reprint 90, *s. c.*, 3 Burr. 1564, 97 Eng. Reprint 983.

1. **Ala.**—State *v.* Moore, 19 Ala. 514. **La.**—State *v.* Anderson, 30 La. Ann. 557. **N. H.**—State *v.* Dover, 9 N. H. 468. **N. M.**—Territory *v.* Cutinola, 4 N. M. 305-311, 14 Pac. 809. **Ohio.**—Gates *v.* State, 30 Ohio St. 293. **Okla.**—Evans *v.* Willis, 22 Okla. 310, 97 Pac. 1047, 19 L. R. A. (N. S.) 1050. **Ore.**—State *v.* Guglielmo, 46 Ore. 250-255, 79 Pac. 577, 80 Pac. 103, 69 L. R. A. 466. **Va.**—Wilson *v.* Com., 87 Va. 94, 12 S. E. 108. **Eng.**—King *v.* Jolliffe, 4 Durnf. & E. 285.

See St. 4 & 5 Wm. & M., ch. 18.

[a] No information which is filed partly at the suit of the king and partly for the benefit of a subject "can be filed without previous leave of court, in which it is to be exhibited; because instead of being presented on

the finding of twelve men, it is merely the allegation of the officer." 1 Chitty Cr. Law 166.

2. United States *v.* Smith, 40 Fed. 755. See United States *v.* Maxwell, 3 Dill. 275, 26 Fed. Cas. No. 15,750; Walker *v.* People, 22 Colo. 415, 45 Pac. 388.

[a] **Presence of Defendant on Obtaining Leave of Court.**—It was held in State *v.* Little Whirlwind, 22 Mont. 425, 56 Pac. 820, that the presence of the defendant when leave of court is obtained is unnecessary.

[b] **In Pennsylvania** the constitution requires that leave of court be had before an information can be filed. United States *v.* Maxwell, 3 Dill. 275, 26 Fed. Cas. No. 15,750.

[c] **In Montana**, "it is only in cases where no examination and commitment have been had or made by a magistrate that it is necessary to apply in writing to the district court for leave to file the information. State *v.* Byrd, 41 Mont. 585, 111 Pac. 407; State *ex rel.* Donovan *v.* District Court, 26 Mont. 275, 67 Pac. 943; State *v.* Spotted Hawk, 22 Mont. 33-43, 55 Pac. 1026; State *v.* Bowser, 21 Mont. 133, 53 Pac. 179; State *v.* Brett, 16 Mont. 360, 40 Pac. 873.

[d] A record showing that the district attorney filed an information "with leave of court" sufficiently indicates that leave of court was first had and obtained. State *v.* Cox, 33 La. Ann. 1056.

3. **Ala.**—State *v.* Moore, 19 Ala. 514. **Ark.**—State *v.* Williams, 109 Ark. 465, 161 S. W. 159. **La.**—State *v.* Drummond, 132 La. 749, 61 So. 778; State *v.* Petrich, 122 La. 127, 47 So. 438. See State *v.* Robacker, 31 La. Ann. 651. **Mo.**—State *v.* Jones, 168 Mo. 398, 68 S. W. 566; State *v.* Kyle, 166 Mo. 287, 306, 65 S. W. 763. **Neb.**—Sharp

Discretion of Court.—Leave to file the information rests in the sound discretion of the court and is not granted as of course.⁴

Application for leave of court need not conform to technical rules of pleading,⁵ and it need not be verified.⁶

The order granting leave need not be in writing other than an entry in the minutes of the court by the clerk,⁷ and the omission by the clerk to enter the order does not invalidate the information or the proceedings thereunder.⁸

Revocation of Leave.—The court also has a right in the exercise of its discretion to revoke its leave already granted.⁹

Order To File.—In some states if the district attorney decides no information should be filed, he will make a statement to that effect to the court, giving his reasons therefor. If the court is dissatisfied therewith it may order an information to be filed.¹⁰

b. *Preliminary Examination.*¹¹—In the absence of constitutional or statutory provisions requiring it, no preliminary examination is necessary as a prerequisite to the filing of an information.¹² But by

v. State, 61 Neb. 187, 85 N. W. 38. **N. H.**—*State v. Dover*, 9 N. H. 468. **Ore.**—*State v. Guglielmo*, 46 Ore. 250-259-263, 79 Pac. 577, 80 Pac. 103, 69 L. R. A. 466. **Tex.**—*State v. Corbit*, 42 Tex. 88.

4. *State v. Martin*, 29 Mont. 273, 74 Pac. 725; *State ex rel. Donovan v. District Court*, 26 Mont. 275, 67 Pac. 943 (holding that the granting or refusing leave to file information is within the discretion of the court when no statement of the evidence upon which the state would rely for conviction is made); *State v. Brett*, 16 Mont. 360, 40 Pac. 873; *Reg. v. Wilkinson*, 41 U. C. Q. B. 1-29.

[a] It was held in *State ex rel. Hall v. Judge*, etc., 33 La. Ann. 1222, that the judge could not refuse his consent upon the ground that in his opinion the statute under which the charge is based is unconstitutional.

[b] Perhaps a judge could refuse his consent in a case where the prosecuting attorney attempts to file an information at the same term of court at which the grand jury ignored a bill based upon the same offense against the defendant. *State ex rel. Hall v. Judge*, etc., 33 La. Ann. 1222.

5. *State v. Shafer*, 26 Mont. 11, 66 Pac. 463; *State v. Spotted Hawk*, 22 Mont. 33-43, 55 Pac. 1026.

6. *State v. Shafer*, 26 Mont. 11, 66 Pac. 463.

7. *State v. Bowser*, 21 Mont. 133, 53 Pac. 179, at once, if the defendant is

under arrest or on bail, or after arrest, where he is at large.

8. *State v. Bowser*, 21 Mont. 133, 53 Pac. 179.

9. *State v. Cain*, 16 Mont. 561, 41 Pac. 709.

10. *State v. Montgomery*, 8 Kan. 351; *State v. Wright*, 15 S. D. 628, 91 N. W. 311; *State v. Donaldson*, 12 S. D. 259, 81 N. W. 299.

11. See generally the title "*Preliminary Examination.*"

12. **Cal.**—*People v. Vierra*, 67 Cal. 231, 7 Pac. 640. **Colo.**—*Noble v. People*, 23 Colo. 9, 45 Pac. 376; *Holt v. People*, 23 Colo. 1, 45 Pac. 374. **La.**—*State v. Anderson*, 30 La. Ann. 557. **Mo.**—*State v. Jeffries*, 210 Mo. 302-319, 109 S. W. 614. See *State v. Harvey*, 214 Mo. 403, 114 S. W. 19. **Mont.**—*State v. Spotted Hawk*, 22 Mont. 33-43, 55 Pac. 1026; *State v. Bowser*, 21 Mont. 133, 53 Pac. 179 (if leave of court is had, no preliminary examination and commitment is necessary, and vice versa); *State v. Brett*, 16 Mont. 360, 40 Pac. 873. **N. H.**—*State v. Dover*, 9 N. H. 468. **Ohio.**—*Eichenlaub v. State*, 36 Ohio St. 140, no preliminary examination is necessary to the filing of an information upon proper affidavit filed in the probate court. Compare *Gates v. State*, 3 Ohio St. 293. **Ore.**—*State v. Belding*, 43 Ore. 95, 71 Pac. 330.

[a] The requirement that the information shall be filed against the accused within the time prescribed when the defendant has been held to

virtue of the statutory and constitutional provisions of many states, a preliminary examination before an officer having authority to examine and commit, and a commitment or holding to bail for the offense charged,¹³ is a necessary prerequisite to the filing of an information in all cases,¹⁴ save where exceptions are provided for by

answer clearly implies that a person may be charged with the commission of a crime by the district attorney without having had a preliminary examination. *State v. Belding*, 43 Ore. 95, 71 Pac. 330.

[b] In *Colorado*, if the accused has had or waived a preliminary examination an information may be filed against him. But if no preliminary examination is had or waived it is necessary that the information be based upon the affidavit of any credible person who has knowledge of the offense and that leave of court be had. *Noble v. People*, 23 Colo. 9, 45 Pac. 376; *White v. People*, 8 Colo. App. 289, 45 Pac. 539.

13. **U. S.**—*United States v. Smith*, 40 Fed. 755. See *United States v. Farrington*, 5 Fed. 343. **Ariz.**—*Fertig v. State*, 14 Ariz. 540, 133 Pac. 99. **Cal.**—*People v. Siemsen*, 153 Cal. 387, 95 Pac. 863; *People v. McCurdy*, 68 Cal. 576, 10 Pac. 207; *People v. Vierra*, 67 Cal. 231, 7 Pac. 640; *People v. Lee Ah Chuck*, 66 Cal. 662, 6 Pac. 859; *Kalloch v. Superior Court*, 56 Cal. 229; *In re Sing*, 13 Cal. App. 736, 110 Pac. 693 (preliminary examination necessary precedent to information for misdemeanor in superior court under Juvenile Act). **Del.**—*State v. Moore*, 2 Penne. 299-318, 46 Atl. 669. **Idaho.**—*State v. McGreevey*, 17 Idaho 453, 463, 105 Pac. 1047; *State v. Farris*, 5 Idaho 666, 51 Pac. 772; *State v. Braithwaite*, 3 Idaho 119, 27 Pac. 731. **Kan.**—*State v. Jarrett*, 46 Kan. 754, 27 Pac. 146; *State v. Gleason*, 32 Kan. 245, 4 Pac. 363; *In re Donnelly*, 30 Kan. 191, 424, 1 Pac. 648, 778; *State v. Finley*, 6 Kan. 366; *State v. Barnett*, 3 Kan. 250, 87 Am. Dec. 471 (preliminary examination necessary only in felonies). **Mich.** *People v. Wright*, 89 Mich. 70, 50 N. W. 792; *People v. Bechtel*, 80 Mich. 623-632, 45 N. W. 582; *Swart v. Kimball*, 43 Mich. 443-451, 5 N. W. 635; *Stuart v. People*, 42 Mich. 255, 3 N. W. 863; *Sneed v. People*, 38 Mich. 248; *People v. Annis*, 13 Mich. 510. **Mont.** *State v. Spotted Hawk*, 22 Mont. 33-43,

55 Pac. 1026; *State v. Bowser*, 21 Mont. 133, 53 Pac. 179; *State v. Brett*, 16 Mont. 360, 40 Pac. 873 (if leave of court is not had a preliminary examination is necessary and vice versa). **Neb.**—*Latimer v. State*, 55 Neb. 609, 76 N. W. 207, 70 Am. St. Rep. 403; *State ex rel. Conroy v. Miller*, 43 Neb. 860, 62 N. W. 238; *Miller v. State*, 29 Neb. 437, 45 N. W. 451; *White v. State*, 28 Neb. 341-349, 44 N. W. 443; *Richards v. State*, 22 Neb. 145-150, 34 N. W. 346. **N. D.**—*State v. Winbauer*, 21 N. D. 161, 129 N. W. 97; *State v. Barnes*, 3 N. D. 131, 54 N. W. 541. But defendant has not a constitutional right to such examination. *State v. Gottlieb*, 21 N. D. 179, 129 N. W. 460; *State v. Rozum*, 8 N. D. 548, 80 N. W. 477. **Ohio.**—*Gates v. State*, 3 Ohio St. 293-295. **Okla.**—*Williams v. State*, 6 Okla. Crim. 373, 118 Pac. 1006; *Canard v. State*, 2 Okla. Crim. 505, 103 Pac. 737, 881, 139 Am. St. Rep. 949. *Compare Territory v. Stroud*, 6 Okla. 106, 50 Pac. 265. **S. D.**—*State v. Wright*, 15 S. D. 628, 91 N. W. 311; *State v. Donaldson*, 12 S. D. 259, 81 N. W. 299. **Utah.** *State ex rel. Barnes v. Second District Court*, 36 Utah 396-403, 104 Pac. 282. **Wash.**—*State v. Lewis*, 31 Wash. 515, 72 Pac. 121. **Wis.**—*Brown v. State*, 91 Wis. 245, 64 N. W. 749. See *State v. Leicham*, 41 Wis. 565-575. **Wyo.**—*State v. Sureties*, 4 Wyo. 347, 357, 34 Pac. 3.

[a] After signing the order of commitment, no further act on the part of the magistrate, such as the return of the commitment, depositions or other record, is necessary to authorize the filing of the information. **Cal.**—*People v. Tarbox*, 115 Cal. 57, 46 Pac. 896; *People v. Wickham*, 113 Cal. 283, 48 Pac. 123. *Compare People v. Wallace*, 94 Cal. 497, 29 Pac. 950; *People v. Sacramento Butchers' P. Assn.*, 12 Cal. App. 471-479, 107 Pac. 712. **Mich.** *People v. Evans*, 72 Mich. 367, 40 N. W. 473; *Turner v. People*, 33 Mich. 363. **Okla.**—*Williams v. State*, 6 Okla. Crim. 373, 118 Pac. 1006.

14. **Presumption as to Preliminary Examination.**—In the absence of proof

statute,¹⁵ as for example, where defendant is a fugitive from justice,¹⁶ or where he waives the preliminary examination,¹⁷ or where the offense

the supreme court is not authorized to presume that there was no preliminary examination. *State v. McKee*, 212 Mo. 138-149, 110 S. W. 729.

[a] In an action upon a recognizance, where the petition alleges the filing of an information by the proper officer, in the proper court, the continuance of the case, and an order of the court requiring defendant to give bail or be committed to the custody of the sheriff, it will be presumed the information was filed under circumstances warranting its filing. *Jennings v. State*, 13 Kan. 80, 90.

[b] **Presumption Information Filed After Examination.**—In the absence of evidence to the contrary, in support of the action of the trial court overruling a motion to set aside an information, it will be presumed that the information was not filed until a preliminary examination was had or has been waived. *State v. La Croix*, 8 S. D. 369, 66 N. W. 944.

[c] **Lost Files.**—(1) It is the fact of the preliminary examination or a waiver and not the presence of a record that is jurisdictional, and it is no objection that the files have been lost or misplaced. *State v. Wright*, 15 S. D. 628, 91 N. W. 311. (2) And it may be shown by parol testimony that there had been such examination. *People v. Coffman*, 59 Mich. 1, 26 N. W. 207.

15. **In Missouri**, a person not charged with a capital offense is not entitled as a matter of statutory right to a preliminary examination. *State v. Anderson*, 252 Mo. 83, 158 S. W. 817; *State v. Shenk*, 238 Mo. 429-444, 142 S. W. 263.

[a] **In Ohio** (1) an exception to the necessity for a preliminary examination probably exists in "an act to prevent adulteration of alcoholic liquors" (*Gates v. State*, 3 Ohio St. 293-295), (2) but no such exception exists under "an act to provide against the evils resulting from the sale of intoxicating liquors." *Miller v. State*, 3 Ohio St. 475, 489.

[b] **In Wyoming**, "the statute provides that an information may be filed without a preliminary examination whenever an offense shall be charged

against any person at any time within thirty days immediately preceding the first day of a regular term of court of the county wherein such offense is charged to have been committed." *Nicholson v. State*, 18 Wyo. 298-308, 106 Pac. 929; *Hollibaugh v. Hehn*, 13 Wyo. 269-275, 79 Pac. 1044.

[c] **In North Dakota.**—No preliminary examination is required in the exceptional cases provided for in §9791, Rev. Codes 1905; *State v. Winbauer*, 21 N. D. 161, 129 N. W. 97; *State v. Barnes*, 3 N. D. 131, 54 N. W. 541.

[d] When the offense is committed during the continuance of a term of the district court, no preliminary examination is necessary. *State v. Riley*, 26 N. D. 236, 144 N. W. 107.

[e] No preliminary examination is necessary before trial in criminal actions in the county courts and defendant is not entitled to it. *State v. Gottlieb*, 21 N. D. 179, 129 N. W. 460.

16. **Idaho.**—*State v. Clark*, 4 Idaho 7, 35 Pac. 710. **Kan.**—*State v. Woods*, 49 Kan. 237, 30 Pac. 520; *State v. Jarrett*, 46 Kan. 754, 27 Pac. 146; *In re Eddy*, 40 Kan. 592, 20 Pac. 283; *State v. Finley*, 6 Kan. 366; *State v. Barnett*, 3 Kan. 250, 87 Am. Dec. 471. **Mich.**—*People v. Kuhn*, 67 Mich. 463, 35 N. W. 88. **Neb.**—*Latimer v. State*, 55 Neb. 609, 76 N. W. 297, 70 Am. St. Rep. 403; *Hodgkins v. State*, 36 Neb. 160, 54 N. W. 86; *Miller v. State*, 29 Neb. 437, 45 N. W. 451; *Richards v. State*, 22 Neb. 145, 34 N. W. 346. **S. D.** *State v. Wright*, 15 S. D. 628, 91 N. W. 311; *State v. Donaldson*, 12 S. D. 259, 81 N. W. 299. **Wis.**—*State v. Leichman*, 41 Wis. 565-573. **Wyo.**—*State v. Sureties*, 4 Wyo. 347, 358, 34 Pac. 3.

17. **Ariz.**—*Fertig v. State*, 14 Ariz. 540, 133 Pac. 99. **Idaho.**—*In re Kautzson*, 10 Idaho 676, 79 Pac. 641; *State v. Farris*, 5 Idaho 696, 51 Pac. 712; *State v. Clark*, 4 Idaho 7, 35 Pac. 710. **Kan.**—*State v. Geer*, 48 Kan. 752, 30 Pac. 235; *State v. Jarrett*, 46 Kan. 754, 27 Pac. 146; *State v. Finley*, 6 Kan. 366. **Mich.**—*People v. Wright*, 89 Mich. 70-77, 50 N. W. 792; *Stewart v. People*, 42 Mich. 255, 3 N. W. 861; *Stead v. People*, 38 Mich. 248; *Washburn v. People*,

with which accused is charged does not amount to a felony.¹⁸

If defendant has been discharged upon the preliminary examination, no information can be filed thereon,¹⁹ for it is only after the magistrate has decided that an offense has been committed and that there is probable cause to believe the accused guilty thereof that an information may be filed,²⁰ but this does not preclude the finding of an indictment against the accused or the lodging of a new complaint.²¹

ple, 10 Mich. 372-383. **Mo.**—*State v. Green*, 229 Mo. 642-655, 129 S. W. 700; *Ex parte McLaughlin*, 210 Mo. 657-663, 109 S. W. 626. **Mont.**—*State v. Byrd*, 41 Mont. 585-590, 111 Pac. 407, in the absence of statute. **Neb.**—*Younger v. State*, 80 Neb. 201, 114 N. W. 170; *Latimer v. State*, 55 Neb. 609, 76 N. W. 207, 70 Am. St. Rep. 403; *Coffield v. State*, 44 Neb. 417, 62 N. W. 875. **Okla.**—*Williams v. State*, 6 Okla. Crim. 373, 118 Pac. 1006; *Canard v. State*, 2 Okla. Crim. 505, 103 Pac. 737, 881, 139 Am. St. Rep. 949. **S. D.**—*State v. Wright*, 15 S. D. 628, 91 N. W. 311; *State v. Donaldson*, 12 S. D. 259, 81 N. W. 299. **Wis.**—*Brown v. State*, 91 Wis. 245, 64 N. W. 749. **Wyo.**—*Hollibaugh v. Hehn*, 13 Wyo. 269, 79 Pac. 1044.

[a] **How Preliminary Examination Waived.**—The defendant may waive his right to a preliminary examination when called upon to plead to the information as well as when brought before the magistrate. If he raises no objections when called upon to plead, it is presumed he has had or waived a preliminary examination, or that he now waives it. **Cal.**—*People v. Bawden*, 90 Cal. 195, 27 Pac. 204; *Ex parte McConnell*, 83 Cal. 558, 23 Pac. 1119; *Ex parte Moon*, 65 Cal. 216, 3 Pac. 644. *Compare* *Kalloch v. Superior Court*, 56 Cal. 229. **Idaho.**—*State v. Clark*, 4 Idaho 7, 35 Pac. 710. **Kan.**—*Jennings v. State*, 13 Kan. 80. **Mich.**—*People v. Williams*, 93 Mich. 623, 53 N. W. 779; *People v. Jones*, 24 Mich. 215. **Mo.** *Ex parte McLaughlin*, 210 Mo. 657-663, 109 S. W. 626. **Mont.**—*State v. McCaffery*, 16 Mont. 33, 40 Pac. 63. **Neb.**—*Hodgkins v. State*, 36 Neb. 160, 54 N. W. 86; *Latimer v. State*, 55 Neb. 609, 76 N. W. 207, 70 Am. St. Rep. 403; *Coffield v. State*, 44 Neb. 417-421, 62 N. W. 875. **Okla.**—*McDaniel v. State*, 8 Okla. Crim. 209, 127 Pac. 358, 363.

See generally the title "**Preliminary Examination.**"

[a] By express statute, the accused not having taken objection in proper manner and having pleaded not guilty, is deemed to have waived the preliminary examination. *Nicholson v. State*, 18 Wyo. 298, 106 Pac. 929; *McGinnis v. State*, 16 Wyo. 72, 91 Pac. 936; *Hollibaugh v. Hehn*, 13 Wyo. 269, 79 Pac. 1044.

[b] In *State v. Clark*, 4 Idaho 7, 35 Pac. 710, it was decided that if the defendant does not move to quash the indictment before plea or trial he waives all defects or irregularities in the preliminary examination. If he makes a proper objection a substantial compliance with the statute is required.

18. *In re Donnelly*, 30 Kan. 191, 1 Pac. 648, 778. See *McDaniel v. State*, 8 Okla. Crim. 209, 127 Pac. 358; *Canard v. State*, 2 Okla. Crim. 505, 103 Pac. 737, 881, 139 Am. St. Rep. 949; *State v. Boulter*, 5 Wyo. 236, 39 Pac. 883.

[a] No preliminary examination is necessary or proper in misdemeanor cases. The case of *State v. Granville*, 26 Kan. 158, is founded upon an error in the compiled laws in which the word "felony" was erroneously printed "offense." *In re Donnelly*, 30 Kan. 191, 424, 1 Pac. 648, 778.

[b] An information may be filed without a preliminary examination in misdemeanor cases not cognizable before justices of the peace. *State v. Jarrett*, 46 Kan. 754, 27 Pac. 146; *In re Eddy*, 40 Kan. 592, 20 Pac. 283.

19. **Kan.**—*State v. Goetz*, 65 Kan. 125, 69 Pac. 187. **Mich.**—*Morrissey v. People*, 11 Mich. 327, 341. **N. Y.**—*People v. Dillon*, 197 N. Y. 254, 90 N. E. 820.

But see *State v. Pritchett*, 219 Mo. 696, 703, 119 S. W. 386.

20. *People v. Evans*, 72 Mich. 367-387, 40 N. W. 473.

21. See *infra*, VI.

c. *Coroner's Inquest*.—A prosecuting attorney cannot base an information upon a coroner's inquest.²²

d. *Consent of Accused*.—The consent of the accused has been required by statute as a prerequisite to a prosecution by information under certain circumstances.²³ But where the accused is by statute permitted to demand a prosecution by information, such a demand is not a prerequisite to the filing of an information.²⁴

2. *Filing*.—a. *Necessity of Filing*.—A prosecution upon an information cannot be sustained unless the information was filed.²⁵

b. *Who May File*.—At common law informations of the first class were filed by the attorney general, or, in case of a vacancy in that office, by the solicitor general,²⁶ although for special reasons the king might appoint any other person for this purpose.²⁷

Informations of the second class were filed by the coroner, usually called master of the crown office.²⁸ But under the modern criminal procedure in the United States the power to file informations is vested in the prosecuting attorney of the county,²⁹ and may be exercised by

22. *In re Sly*, 9 Idaho 779, 76 Pac. 766.

23. See *Cobb v. State*, 27 Ind. 133; *Smith v. State*, 19 Ind. 227.

24. *Heanly v. State*, 74 Ind. 99.

25. *Jackson v. State*, 4 Kan. 150; *Prewitt v. State* (Tex. Crim.), 34 S. W. 924.

[a] *Duty of Clerk To File*.—When an information is presented to the clerk by the prosecuting attorney, it is the duty of the clerk to file the same. The judge has no authority to direct the clerk not to file the information, and such order is a nullity. *State v. Quarles*, 13 Idaho 252, 89 Pac. 636.

[b] *In Indiana*, §1989, Ann. St., 1914, has dispensed with the information authorized by the earlier codes. The affidavit alone performs all the functions of the affidavit and information previously used. *Cole v. State*, 169 Ind. 393, 82 N. E. 796. For formal requisites of the affidavit, see *infra*, V, F.

26. *Ark*.—*State v. Williams*, 109 Ark. 465, 161 S. W. 159. *Ohio*.—*Gates v. State*, 3 Ohio St. 293. *Ore*.—*State v. Guglielmo*, 46 Ore. 250-260, 79 Pac. 577, 80 Pac. 103, 69 L. R. A. 466. *Eng*. *Rex v. Wilkes*, 4 Burr. 2527-2553, 2576, 98 Eng. Reprint 327, 341, 355; *Wilkes v. Rex*, 4 Brown Parl. Cas. 360-367, 2 Eng. Reprint 244-249; 1 Chit. Cr. Law 845.

27. *Rex v. Wilkes*, 4 Burr. 2527, 2554, 98 Eng. Reprint 327, 342; 1 Chit. Cr. Law 845.

28. *King v. Robinson*, 1 W. Bl. 541, 96 Eng. Reprint 313.

29. *Ark*.—*State v. Williams*, 109 Ark. 465, 161 S. W. 159. *Conn*.—*State v. Keena*, 64 Conn. 212, 29 Atl. 470. *Del*.—*State v. Moore*, 2 Penne. 299-318, 46 Atl. 669. *Fla*.—*Sims v. State*, 26 Fla. 97, 7 So. 374; *King v. State*, 17 Fla. 183. *Idaho*.—*State v. Quarles*, 13 Idaho 252, 89 Pac. 636. *Ill*.—*Gallagher v. People*, 120 Ill. 179, 11 N. E. 335. *Ind*.—*Hoover v. State*, 110 Ind. 349, 11 N. E. 434. *Kan*.—*State v. Brooks*, 33 Kan. 708, 7 Pac. 591; *State v. Nulf*, 15 Kan. 404. *Mo*.—*State v. Russell*, 88 Mo. 618; *State v. Anderson*, 84 Mo. 524; *State v. Thompson*, 81 Mo. 163-168; *State v. Kelm*, 79 Mo. 515; *State v. Sebecca*, 76 Mo. 55; *State v. Huddleston*, 75 Mo. 667. *Mont*.—*State v. Clancy*, 20 Mont. 498, 52 Pac. 267. *Neb*.—*Trimble v. State*, 61 Neb. 604, 85 N. W. 844; *Dinsmore v. State*, 61 Neb. 418, 85 N. W. 445; *Miller v. State*, 29 Neb. 437, 45 N. W. 451; *Richards v. State*, 22 Neb. 145, 34 N. W. 316. *Okla*.—*Evans v. Willis*, 22 Okla. 310-320, 97 Pac. 1047, 19 L. R. A. (N. S.) 1050. *Ore*.—*State v. Guglielmo*, 46 Ore. 250-257, 79 Pac. 577, 80 Pac. 103, 69 L. R. A. 466. *Tex*.—*Sims v. State* (Tex. Crim.), 162 S. W. 1154. *Utah*.—*Connors v. Pratt*, 38 Utah 258, 112 Pac. 399. *Wash*.—*State v. Riddell*, 33 Wash. 324, 74 Pac. 477.

[a] When an information is filed by the prosecuting attorney in his official capacity it is filed by authority of the

his assistant or deputy,³⁰ or a special assistant attorney,³¹ a de facto prosecuting attorney,³² or de facto assistant,³³ or by the governor's special counsel.³⁴

Under a statute providing that in the absence of the prosecuting attorney, the information shall be filed by a county attorney appointed to prosecute the case,³⁵ one who was not appointed in the manner prescribed by law³⁶ prior to the filing of the information³⁷ is not authorized to file an information, but in the absence of proof to the contrary, it will be presumed that the acting prosecuting attorney was legally appointed.³⁸

c. *Where Filed.*—The information must be filed in a court having jurisdiction of the offense charged.³⁹ It is not necessary that the

state. *Gragg v. State*, 3 Okla. Crim. 409, 106 Pac. 350.

[b] **Attorney General a Public Prosecutor.**—In Colorado, the statute provides that "All informations shall be filed . . . by the district attorney of the proper county." It was held in *People v. Gibson*, 53 Colo. 231, 125 Pac. 531, 1914B, Ann. Cas. 138, that the word "district attorney" must be construed to mean public prosecutor so that when the governor or the general assembly requires the attorney general to prosecute a criminal case, he becomes a public prosecutor and is authorized to file an information.

30. **La.**—*State v. Ryder*, 36 La. Ann. 294. **Mich.**—*People v. Trombley*, 62 Mich. 278, 28 N. W. 837. **Mo.** *State v. Hynes*, 39 Mo. App. 569. **Ore.** *State v. Guglielmo*, 46 Ore. 250-261, 79 Pac. 577, 80 Pac. 103, 69 L. R. A. 466.

Contra. *Richards v. State*, 22 Neb. 145, 34 N. W. 346.

[a] **Inquiry as to the existence of conditions authorizing the deputy to file an information is not permissible.** Such matters are left to the exclusive regulation of the prosecuting attorney. *State v. Hynes*, 39 Mo. App. 569.

[b] **An information in the St. Louis court of criminal correction** (1) in cases of a misdemeanor may be filed by the assistant prosecuting attorney (*State v. Weeks*, 88 Mo. App. 263; *State v. Daly*, 49 Mo. App. 184), (2) or "acting assistant prosecuting attorney." *State v. Ittner*, 100 Mo. App. 276, 73 S. W. 289.

31. *Lasley v. District of Columbia*, 14 App. Cas. (D. C.) 407-414.

[a] **Powers of Assistant Prosecuting Attorneys.**—The assistant attorney appointed and paid by the prosecuting

attorney can do all that the prosecuting attorney can do and file informations in any case in which he could. But the assistant attorney appointed with the consent of court and paid by the county is authorized to file informations for misdemeanors in the justice's court only. And where it does not appear to which class the assistant belongs, under the presumption of regularity of proceedings it will be presumed that he belonged to the class under which he has power to do as he did. *State v. Weeks*, 88 Mo. App. 263.

32. See *In re Humason*, 46 Fed. 388-391.

33. *People v. Turner*, 85 Cal. 432, 24 Pac. 857.

34. *Childs v. State*, 4 Okla. Crim. 474, 113 Pac. 545, 33 L. R. A. (N. S.) 563.

35. *Sims v. State* (Tex. Crim.), 162 S. W. 1154; *Daniels v. State* (Tex. Crim.), 77 S. W. 215.

36. **Kan.**—*State v. Brown*, 63 Kan. 262, 65 Pac. 213. **La.**—*State v. Boasberg*, 124 La. 289, 50 So. 162, holding that a district attorney cannot be refused on any other grounds than those provided by statute and that the appointment of another and the filing of an information by the appointee under such circumstances is a nullity. **Tex.**—*Moore v. State*, 56 Tex. Crim. 300, 119 S. W. 858.

37. *Sims v. State* (Tex. Crim.), 162 S. W. 1154.

38. *State v. Fitzporter*, 17 Mo. App. 271.

39. *State v. Corbit*, 42 Tex. 88. See *Bowen v. State*, 28 Tex. App. 498, 13 S. W. 787.

[a] **In Texas**, an information can be filed only in the county court. *Whitley v. State* (Tex. Crim.), 56 S. W. 69.

affidavit and information be filed in open court,⁴⁰ whether in term or in vacation, as it is only necessary that it be filed with the clerk.⁴¹

d. *When Filed.*⁴²—In the absence of statute prescribing the time for filing the information, it may be filed at any time before the offense is barred by the statute of limitations.⁴³ But it must be filed within the time limited by statute.⁴⁴ And in a number of states it is provided that the information must be filed within a specified time after examination and commitment.⁴⁵ It is not necessary that the information be filed before the arrest of the defendant,⁴⁶ but it should be filed before he is required to plead.⁴⁷ An information may be filed

40. *State v. Duggins*, 146 Ind. 427, 45 N. E. 603; *State v. Matthews*, 129 Ind. 281, 28 N. E. 703; *Stefani v. State*, 124 Ind. 3, 8, 23 N. E. 254; *State v. Drummond*, 132 La. 749, 61 So. 778; *State v. Jackson*, 45 La. Ann. 975, 13 So. 342.

41. *Ind.*—*Stefani v. State*, 124 Ind. 3-8, 23 N. E. 254. *La.*—*State v. Drummond*, 132 La. 749, 61 So. 778; *State v. Jackson*, 45 La. Ann. 975, 13 So. 342. *Mo.*—*State v. Derkum*, 27 Mo. App. 628.

42. As to the general rules relative to filing, see the title "**Filing**," 8 STANDARD PROC. 978.

As to whether the filing may be properly made on Sunday or a holiday, see the title "**Sunday and Holidays**."

43. *Roberson v. State*, 15 Tex. App. 317.

44. *People v. Ayhens*, 85 Cal. 86, 24 Pac. 635.

45. *State ex rel. Barnes v. Second District Court*, 36 Utah 396, 104 Pac. 282; *State v. Seright*, 48 Wash. 307, 93 Pac. 521.

[a] *In California*, §809 of the Penal Code provides that the information must be filed within thirty days after examination and the order of commitment. *Ex parte Fowler*, 5 Cal. App. 549, 555, 90 Pac. 958.

[b] *In Montana*, (1) the county attorney must file the information within thirty days after delivery of the complaint, warrant and testimony to the proper district court, or after leave of court (*State v. Lagoni*, 30 Mont. 472, 76 Pac. 1044), (2) independent of the time when the examination took place. *State v. Smith*, 12 Mont. 378-387, 30 Pac. 679.

[c] *In Nebraska* an information must be filed during the term at which defendant is held to answer. *Cerney v. State*, 62 Neb. 626, 87 N. W. 336;

Leisenberg v. State, 60 Neb. 628, 84 N. W. 6; *State ex rel. Conroy v. Miller*, 43 Neb. 860, 62 N. W. 238.

[d] *In New York* the statute requires that when the defendant is in custody the district attorney shall file the information not later than the day following the magistrate's return, and in all other cases within ten days thereafter. It was held in *People v. Spier*, 120 App. Div. 786, 105 N. Y. Supp. 741, that this was not a short statute of limitations and is for the direction of the district attorney but it does not prevent the filing of an information after that time.

[e] *In North Dakota*, statute requires the information to be filed "at the next regular term of the district court." It was held in *State v. Foster*, 14 N. D. 561, 105 N. W. 938, that "regular term" did not refer to each statutory term but it means a term in which the court is equipped with a jury.

[f] *Where the information and the order committing the defendant were filed on the same day*, it is presumed they were regularly filed, and thus the information was filed subsequent to the commitment. *People v. McCurdy*, 68 Cal. 576, 10 Pac. 207.

46. *Evans v. State*, 36 Tex. Crim. 32, 35 S. W. 169.

47. *State v. Hockaday*, 98 Mo. 590, 12 S. W. 246.

[a] "If the information was filed after announcement of ready for trial, and the parties had gone before the jury, it would be too late to file it. If it had been placed with the papers, however, prior to calling of the case, and the court's attention called to it, it would then be filed of the same date at which it was placed with the clerk." *Landreth v. State* (Tex. Crim.), 166 S. W. 503.

during the same term at which the complaint itself was made.⁴⁸

Filing in Vacation.—In the absence of a statute to the contrary an information may be filed in vacation,⁴⁹ but in some jurisdictions this is not permitted,⁵⁰ though it has been held sufficient to file it in term time while the court was not actually in session.⁵¹

e. **Endorsement and Entry.**—No order book entry of the filing of the affidavit and information need be made,⁵² although it may be proper practice.⁵³ The file mark of the clerk on the back of the information is sufficient *prima facie* to give the court jurisdiction,⁵⁴ and if the

48. *People v. Mason*, 63 Mich. 510, 30 N. W. 103; *People v. Haley*, 48 Mich. 495, 12 N. W. 671.

49. **Fla.**—*Johnson v. State*, 58 Fla. 68, 50 So. 529, by statute. **Kan.**—*In re Eddy*, 40 Kan. 592, 20 Pac. 283. See *State v. Babbitt*, 32 Kan. 253, 4 Pac. 769, by statute. **Mo.**—*State v. Kyle*, 166 Mo. 287-307, 65 S. W. 763. **Tex.** *State v. Corbit*, 42 Tex. 88.

[a] Where the statute (Mo. Rev. St., §3126) provided that "in vacation" meant an adjournment of court for more than one day, it was held in *State v. Derkum*, 27 Mo. App. 628, that an information which was filed in the interim during an adjournment of the court for more than one day was nevertheless filed in term time and that the definition of "in vacation" in §3126, Rev. St., was not applicable to §§1762 and 1769 and that "vacation" in these sections referred to the vacation between a term and the next term thereafter.

[b] In counties where the offices of probate judge and county judge are vested in one person, the filing of an information with the clerk or judge in the probate term is a filing during vacation. *Burns v. People*, 45 Ill. App. 70.

[c] §2, ch. 178 of Kan. Laws, 1887, providing that no examination is necessary in misdemeanor cases not cognizable before the justices of the peace does not prevent the filing of an information in cases of this nature in vacation. *In re Eddy*, 40 Kan. 592, 20 Pac. 283.

50. It was held in *Culbison v. Beemer*, 81 Neb. 824, 116 N. W. 862, upon authority of *In re Vogland*, 48 Neb. 37, 66 N. W. 1028, that an information filed in vacation is void and that such being the case the defect could not be waived.

[a] In Indiana informations charging felonies cannot be filed in vaca-

tion, but those charging misdemeanors may. *Masterson v. State*, 144 Ind. 240, 43 N. E. 138; *Hoover v. State*, 110 Ind. 349, 11 N. E. 434. But see *State v. Matthews*, 129 Ind. 281, 28 N. E. 703.

51. *Masterson v. State*, 144 Ind. 240, 43 N. E. 138; *Stefani v. State*, 124 Ind. 3, 23 N. E. 254; *State v. Corbit*, 42 Tex. 88; *Raspberry v. State*, 1 Tex. App. 664.

[a] But in Washington the court should be in session when the information is filed. *State v. Nelson*, 13 Wash. 523, 43 Pac. 637.

[b] **"Session" Equivalent to "Term."**—In statutes requiring the affidavit and information to be filed when the court is "in session," the word session "is used as meaning the same thing as the word 'term' when applied to the sitting of a court." *Stefani v. State*, 124 Ind. 3, 23 N. E. 254.

52. *State v. Duggins*, 146 Ind. 427, 45 N. E. 603; *State v. Derkum*, 27 Mo. App. 628.

53. *State v. Matthews*, 129 Ind. 281, 28 N. E. 703.

54. *State v. Matthews*, 129 Ind. 281, 28 N. E. 703. See also *State v. Brainerd*, 57 Vt. 369.

[a] A file mark, "Filed Aug. 15, 1905, R. L. Rogers, county clerk," is sufficient, (1) for the court takes judicial cognizance of the fact that Rogers was the county clerk of that county. *Franklin v. State* (Tex. Crim.), 92 S. W. 414. (2) It is not necessary to add the name of the county. *Bennett v. State*, 49 Tex. Crim. 294, 92 S. W. 415. (3) And in the absence of a contrary showing it will be presumed he was clerk of the proper county at the time of filing the information and complaint. *Bennett v. State*, 49 Tex. Crim. 294, 92 S. W. 415.

information does not bear a file mark the court may order it indorsed filed as of the date of such filing,⁵⁵ and the consent of the defendant is not necessary therefor.⁵⁶ And it has been held that the absence of the file mark will not vitiate the information or entitle the accused to his discharge.⁵⁷ Where the information and complaint are fastened together, one file mark placed on either is sufficient to show a filing of both papers.⁵⁸

f. *Effect of Jurisdiction of or Action by Grand Jury.*—In some states it is provided that an information may be filed only when the grand jury is not in session, either because it has not yet convened, or because of its discharge,⁵⁹ or adjournment.⁶⁰ But in the absence of statute to the contrary, an information may be filed while the grand jury is in session,⁶¹ or where the grand jury has ignored a bill or failed to find an indictment,⁶² or where the grand jury has found an indictment for the same offense,⁶³ or for a lesser degree of the same

55. *Johnson v. State*, 58 Fla. 68, 50 So. 529; *Hall v. State* (Tex. Crim.), 156 S. W. 644; *Brogdon v. State*, 63 Tex. Crim. 475, 140 S. W. 352; *Starbeck v. State*, 53 Tex. Crim. 192, 109 S. W. 162.

56. *Brogdon v. State*, 63 Tex. Crim. 473, 140 S. W. 353.

57. *State v. Hockaday*, 98 Mo. 590, 12 S. W. 246.

[a] If the information and affidavit were delivered to the clerk or other proper officer this is sufficient filing although the clerk failed to place his file mark upon it, and the absence of the file mark does not vitiate the information. **Mo.**—*State v. Coleman*, 186 Mo. 151, 84 S. W. 978, 69 L. R. A. 381; *State v. Plummer*, 55 Mo. App. 288. **Okla.**—*Bethel v. State*, 8 Okla. Crim. 61, 126 Pac. 698. **Tex.**—*State v. Elliott*, 41 Tex. 224; *Brogdon v. State*, 63 Tex. Crim. 473, 140 S. W. 353; *Brogdon v. State*, 63 Tex. Crim. 475, 140 S. W. 352; *Starbeck v. State*, 53 Tex. Crim. 192, 109 S. W. 162.

See 8 STANDARD PROC. 980.

58. *Wooten v. State*, 57 Tex. Crim. 89, 121 S. W. 703; *Goss v. State* (Tex. Crim.), 40 S. W. 263; *Schott v. State*, 7 Tex. App. 616; *Stinson v. State*, 5 Tex. App. 31.

59. *Dye v. State*, 130 Ind. 87, 29 N. E. 771 (holding that "after a nolle prosequi is entered and a prosecution ended, the accused may be prosecuted by information if the grand jury has been discharged and the court is in session"); *Kenegar v. State*, 120 Ind. 176, 21 N. E. 917; *State v. Strange*, 50 Wash. 321, 97 Pac. 233; *State v.*

Lewis, 31 Wash. 515, 72 Pac. 121; *State v. Nelson*, 13 Wash. 523, 43 Pac. 637.

[a] The grand jury not being in session at the filing of the information, the court had jurisdiction of the prosecution, regardless of any subsequent or intervening meeting of the grand jury. *Elder v. State*, 96 Ind. 162.

60. *Williams v. State*, 169 Ind. 384, 82 N. E. 790.

[a] "In Session."—Where statute provides that the prosecuting attorney may file an information . . . whenever the grand jury is not "in session or has been discharged," an information may be filed during an adjournment of the grand jury. "In session" means in actual session. *State v. Strange*, 50 Wash. 321, 97 Pac. 233.

61. *People v. Lewis*, 9 Cal. App. 279, 98 Pac. 1078; *State v. Cole*, 38 La. Ann. 843.

62. **Cal.**—*Ex parte Moan*, 65 Cal. 216, 3 Pac. 644. **La.**—*State v. Vincent*, 36 La. Ann. 770; *State v. Ross*, 14 La. Ann. 364, 367. **Vt.**—*State v. Whipple*, 57 Vt. 637.

But see *State v. Boswell*, 104 Ind. 541, 4 N. E. 675.

63. **U. S.**—*United States v. Nagle*, 17 Blatchf. 258, 27 Fed. Cas. No. 15,852. **Kan.**—*State v. McKinney*, 31 Kan. 570, 3 Pac. 356. **La.**—*State v. Stewart*, 47 La. Ann. 410, 419, 16 So. 945. **Mo.**—*State v. Schenk*, 238 Mo. 429, 442, 142 S. W. 263. **Neb.**—*State ex rel. Conroy v. Miller*, 43 Neb. 860-865, 62 N. W. 238; *Alderman v. State*, 24 Neb. 97, 38 N. W. 36. **Eng.**—*Reg. v. Mitchell*, 3 Cox C. C. 93, 119.

offense,⁶⁴ or for a different offense based upon the same acts.⁶⁵

V. PRELIMINARY COMPLAINT, AFFIDAVIT OR INFORMATION.—A. NECESSITY FOR.—No complaint or information is necessary as a prerequisite to the presentation of an indictment.⁶⁶ At common law⁶⁷ an affidavit or complaint is not necessary as a basis for informations of the first class,⁶⁸ but is a necessary prerequisite to the filing of informations of the second class.⁶⁹

By virtue of constitutional provision, common to many states, and statutes pursuant thereto providing that no warrant shall issue to seize any person without probable cause supported by oath or affirmation reduced to writing, it is necessary that an information be based upon oath, which is generally required to be in the form of an affidavit or sworn complaint.⁷⁰ Although it has been held that this requirement is *prima facie* complied with when an information is filed by the prosecuting attorney,⁷¹ it is generally required that a warrant of ar-

64. *State v. Roberts*, 166 Ind. 585, 77 N. E. 1093.

65. *State v. Schenk*, 238 Mo. 429, 442, 142 S. W. 263.

66. *United States v. Baumert*, 179 Fed. 735; *State v. Bullock*, 54 S. C. 300, 32 S. E. 424; *State v. Bowman*, 43 S. C. 108, 20 S. E. 1010. *Compare supra*, III, A, 3.

67. *State v. Smith*, 114 La. 322, 38 So. 204; *State v. Anderson*, 30 La. Ann. 557; *State v. Brown*, 181 Mo. 192-225, 79 S. W. 1111; *State v. White*, 55 Mo. App. 356.

68. *La.*—*State v. Smith*, 114 La. 322, 38 So. 204; *State v. Anderson*, 38 La. Ann. 557. *N. M.*—*Territory v. Cutinola*, 4 N. M. 305, 14 Pac. 809. *Vt.*—*State v. Stanley*, 82 Vt. 37, 71 Atl. 817, holding the right of the state's attorney to proceed against accused does not depend upon the existence of a complaint.

[a] **Distinction Between Informations of First and Second Class.**—Informations of the first class were those filed by the attorney general *ex officio* for misdemeanors affecting the king or against the public peace and good order; those of the second class were those filed by the master of the crown office. 1 Chit. Cr. Law 843; 4 Bl. Com. 308; Archb. Cr. Pl. & Pr. 69, 70.

69. *State v. Smith*, 114 La. 322, 38 So. 204; *State v. Anderson*, 30 La. Ann. 557; *State v. White*, 55 Mo. App. 356.

70. *U. S.*—*United States v. Baumert*, 179 Fed. 735; *United States v. Smith*, 40 Fed. 755; *United States v. Polite*, 35 Fed. 58; *United States v. Tureaud*,

20 Fed. 621; *United States v. Maxwell*, 3 Dill. 275, 26 Fed. Cas. No. 15,750. *Colo.*—*Lustig v. People*, 18 Colo. 217, 32 Pac. 275. *Ind.*—*Swiney v. State*, 119 Ind. 478, 21 N. E. 1102; *Cantwell v. State*, 27 Ind. 505. *Kan.*—*State v. Gleason*, 32 Kan. 245, 4 Pac. 363. *Neb.* *White v. State*, 28 Neb. 341, 44 N. W. 443. *N. Y.*—*People v. Zabor*, 44 Misc. 633, 90 N. Y. Supp. 412.

[a] In *Missouri*, it is necessary that the information be supported by the oath of a person in one of three ways, viz., by verification of the prosecuting attorney, or a verification of a person competent to testify, or the information must be based upon the affidavit of some person competent to testify, filed therewith. *State v. Decker*, 185 Mo. 182, 83 S. W. 1082; *State v. Hannigan*, 182 Mo. 15, 81 S. W. 406; *State v. Sheridan*, 182 Mo. 13, 81 S. W. 410; *State v. Brown*, 181 Mo. 192-224, 79 S. W. 1111; *State v. Schnettler*, 181 Mo. 173-184, 79 S. W. 1123; *State v. Bonner*, 178 Mo. 424, 77 S. W. 463; *State v. Bennett*, 102 Mo. 356-371, 14 S. W. 865, 10 L. R. A. 717. But see *State v. Pohl*, 170 Mo. 422, 70 S. W. 695, and *State v. Sweeney*, 56 Mo. App. 409, decided before the statute.

[b] It was stated in *United States v. Baumert*, 179 Fed. 735, that the United States attorney can file an information based upon the sworn facts testified to upon the preliminary examination even though taken before the commissioner of another district, or it may be based upon affidavits taken before proper officials.

71. The probable cause required be-

rest and subsequent proceedings be grounded upon the sworn affidavit of the complainant.⁷²

ing satisfied by the written information filed by him, and his official oath being sufficient affidavit. *People v. Viskniski*, 255 Ill. 384, 99 N. E. 621; *Long v. People*, 135 Ill. 435, 25 N. E. 851, 10 L. R. A. 48 (by statute); *State v. Shafer*, 26 Mont. 11, 66 Pac. 463; *State v. Clancy*, 20 Mont. 498, 52 Pac. 267.

[a] It was held in *Hammond v. State*, 3 Wash. 171, 28 Pac. 334, if the information itself recites sufficient facts to bring the case within subd. 4 of §1 of act of January 29, 1890, no affidavit is required as a basis for the information.

[b] In *Missouri*, (1) if the information is not based upon the knowledge, information or belief of the prosecuting attorney, it must be based upon a complaint verified by the oath of a person having knowledge of the offense, deposited with the justice of the peace or filed with the information. *State v. Lewis*, 70 Mo. App. 40; *State v. Harris*, 30 Mo. App. 82; *State v. Shaw*, 26 Mo. App. 383. (2) The prosecuting attorney may ignore an affidavit filed by a private person and file an information upon his own knowledge or belief. *State v. Hocker*, 68 Mo. App. 415.

72. **U. S.**—*United States v. Baumert*, 179 Fed. 735. **Ariz.**—*Fertig v. State*, 14 Ariz. 540, 133 Pac. 99. **Colo.**—An affidavit is essential if the information is not based on a preliminary examination. *Ausmus v. People*, 47 Colo. 167, 107 Pac. 204; *Bergdahl v. People*, 27 Colo. 302, 61 Pac. 228; *Noble v. People*, 23 Colo. 9, 45 Pac. 376; *Brown v. People*, 20 Colo. 161, 36 Pac. 1040. **Conn.**—*Tracy v. Williams*, 4 Conn. 107, 10 Am. Dec. 102. **Ill.**—See *Long v. People*, 135 Ill. 435, 25 N. E. 851, 10 L. R. A. 48; *Housh v. People*, 75 Ill. 487; *Gallagher v. People*, 29 Ill. App. 397. **Ind.**—*Carpenter v. State*, 14 Ind. 109; *Baramore v. State*, 4 Ind. 524. **Mass.** *Com. v. Taber*, 155 Mass. 5, 28 N. E. 1056. **Mich.**—*People v. McLean*, 68 Mich. 480, 36 N. W. 231; *Swart v. Kimball*, 43 Mich. 443, 451, 5 N. W. 635; *Turner v. People*, 33 Mich. 363; *People v. Lynch*, 29 Mich. 274. **Minn.** *State v. Richardson*, 34 Minn. 115, 24 N. W. 354. **Mo.**—*State v. Flannery*, 173 S. W. 1053. **Neb.**—*White v. State*,

28 Neb. 341, 44 N. W. 443. **N. D.** *State v. Gottlieb*, 21 N. D. 179-186, 129 N. W. 460, while no statute authorizes a complaint, the statutes must be construed with reference to §18 of the constitution. **Ohio.**—*Weisbrodt v. State*, 50 Ohio St. 192, 33 N. E. 603; *Eichenlaub v. State*, 36 Ohio St. 140; *Schmeltz v. State*, 8 Ohio C. C. 82. **Tex.**—*Murphy v. State* (Tex. Crim.), 164 S. W. 1; *Compton v. State*, 71 Tex. Crim. 7, 158 S. W. 515; *Mendez v. State*, 56 Tex. Crim. 65, 118 S. W. 1031; *Johnson v. State*, 47 Tex. Crim. 580, 85 S. W. 274; *Domingues v. State*, 37 Tex. Crim. 425, 35 S. W. 973; *Collins v. State*, 5 Tex. App. 37; *Dishough v. State*, 4 Tex. App. 158; *Hoerr v. State*, 4 Tex. App. 75; *Thornberry v. State*, 3 Tex. App. 36. **Utah.**—*State v. Sheffield*, 146 Pac. 306. **Va.**—*Wilson v. Com.*, 87 Va. 94, 12 S. E. 108, information may be based upon the complaint or indictment, or presentment.

[a] An information may be based on affidavits filed without any view to criminal proceedings. *King v. Jolliffe*, 4 Durnf. & E. (Eng.) 285-290.

[b] If an information containing inconsistent counts be based upon one affidavit which is made to cover the entire information, it is tantamount to a failure to base the information upon an affidavit. It does not cure the defect to abandon the inconsistent counts at the beginning of the trial, because the affidavit must be tested as to the matters to which it applied when made. *State v. Weyland*, 126 Mo. App. 723, 105 S. W. 660.

[c] An information verified upon the information and belief of the prosecuting attorney does not of itself constitute "probable cause supported by affidavit," within the meaning of the constitution. *State v. Gleason*, 32 Kan. 245, 4 Pac. 363; *State v. Boulter*, 5 Wyo. 236, 39 Pac. 883.

[d] In *Texas*, (1) the statute requiring an affidavit as a prerequisite to the filing of the information is applicable to informations filed in the county court. *Turner v. State*, 3 Tex. App. 551. (2) But an information cannot be based upon an affidavit charging a felony. *Kinley v. State*, 29 Tex.

The magistrate is without jurisdiction to issue a warrant or even a subpoena for the examination of witnesses unless there be filed a good and sufficient preliminary complaint.⁷³ The subsequent filing will not cure an absence of such affidavit or a defective affidavit,⁷⁴ but it has been held that the absence of an affidavit is a mere irregularity which may be waived by failure to make proper objection.⁷⁵

B. BY WHOM MADE.—In the absence of statutory provisions limiting it, a complaint may be made by any one competent to make oath to it.⁷⁶ Statutes frequently require the oath or affidavit to be made by a person competent to testify as a witness,⁷⁷ or by a credible

App. 532, 16 S. W. 339; *Davis v. State*, 2 Tex. App. 184.

[e] **If the arrest be made without a warrant**, and the examination is to be proceeded with immediately, doubtless a written information may be waived by the defendant. But if the examination is to be adjourned and the prisoner is to be committed pending the examination, or if the examination be entered upon by consent without a formal information in writing, and without adjournment, if the defendant be committed pending an adjournment of the examination, or to await the action of the grand jury, a proper information in writing must be filed with the magistrate. *People ex rel. Farley v. Crane*, 94 App. Div. 397, 88 N. Y. Supp. 343."

73. *United States v. Collins*, 79 Fed. 65; *People ex rel. Brown v. Tighe*, 146 App. Div. 491, 131 N. Y. Supp. 693. See, however, *In re Sing*, 13 Cal. App. 736, 110 Pac. 693, holding a complaint need not be verified, but such complaint would not support a warrant of arrest.

[a] A complaint on oath is necessary to give the magistrate jurisdiction to give defendant a preliminary examination. *White v. State*, 28 Neb. 341, 44 N. W. 443.

74. *United States v. Tureaud*, 20 Fed. 621; *Moore v. State* (Tex. Crim.), 105 S. W. 817; *Paschal v. State*, 9 Tex. App. 205. See *infra*, XIV.

75. *Curl v. People*, 53 Colo. 578, 127 Pac. 951, 1914 B. Ann. Cas. 171; *State v. Brown*, 181 Mo. 192-232, 79 S. W. 1111.

76. **U. S.**—*United States v. Skinner*, 1 Brun. 446, 27 Fed. Cas. No. 16,309, any individual. **Cal.**—*People v. Currie*, 16 Cal. App. 731, 117 Pac. 941, holding the statute does not prescribe who shall make the complaint. **Mass.**—*Com.*

v. Gay, 153 Mass. 211, 26 N. E. 571, 852; *Com. v. Carroll*, 145 Mass. 403, 14 N. E. 618. **Mich.**—*Turner v. People*, 33 Mich. 363. **Pa.**—*Com. v. Barr*, 25 Pa. Super. 609. **Vt.**—*State Treasurer v. Rice*, 11 Vt. 339, any individual.

[a] "Those only are disqualified from becoming prosecutors who either from religious scruples or infidelity, which renders them incapable of taking an oath, or from infamy which presumes them unworthy of credit and are generally incompetent to become witnesses: 1 Chitty Criminal Law 2. To these classes may be added idiots, lunatics and children too young to understand the sanctity of an oath." *Com. v. Barr*, 25 Pa. Super. 609; *Com. v. Geary*, 9 Pa. Co. Ct. 60.

77. **Ind.**—*Blake v. State*, 18 Ind. App. 280, 47 N. E. 942, competent and reputable person. **Mich.**—*People v. Stickle*, 156 Mich. 557, 121 N. W. 497; *People v. Quantstrom*, 93 Mich. 254, 53 N. W. 165, 17 L. R. A. 723. **Mo.**—*State v. Downing*, 22 Mo. App. 504.

[a] **Husband and Wife.**—(1) A wife cannot make a complaint against her husband for an indecent assault upon the person of his daughter. *People v. Westbrook*, 94 Mich. 629, 54 N. W. 486. (2) But she may complain of an abandonment of herself and children in violation of Act No. 144, Pub. Acts, 1907 (*People v. Stickle*, 156 Mich. 557, 121 N. W. 497), (3) or of an assault upon her by the husband. *People v. Sebring*, 66 Mich. 705, 33 N. W. 808; *Goodwin v. State*, 114 Wis. 318, 90 N. W. 170.

[b] A husband (1) may institute criminal proceedings to punish his wife's paramour (*Com. v. Barr*, 25 Pa. Super. 609; *Com. v. Vance*, 29 Pa. Co. Ct. 257), (2) and vice versa. *Com. v. Snyder*, 1 Leh. Co. L. Jnr. 20.

[c] **Presumption as to Affiant.**—In

person.⁷⁸ The right to make complaints charging certain specified crimes, is sometimes, by statute, restricted to the persons therein enumerated.⁷⁹

Officers as Complainants.—The complaint need not be made by an officer.⁸⁰ And it has been held that, except in extraordinary cases when the facts are within the knowledge of the prosecuting attorney or his assistant, he cannot make a complaint.⁸¹ Statutes sometimes

the absence of proof, it will be presumed that the complainant is a person authorized to make a complaint. *Burk v. State*, 44 Tex. Crim. 541, 72 S. W. 585.

[d] Persons convicted of felony, having been made competent witnesses, may make a criminal complaint. *People v. Stokes*, 24 N. Y. Supp. 727.

78. U. S.—*United States v. Maxwell*, 3 Dill. 275, 26 Fed. Cas. No. 15,750. **La.**—*State v. Touchet*, 46 La. Ann. 827, 15 So. 390, credible witnesses. **Tex.**—*Wooten v. State*, 57 Tex. Crim. 89, 121 S. W. 703; *Johnson v. State*, 47 Tex. Crim. 580, 85 S. W. 274; *Dodson v. State*, 35 Tex. Crim. 571, 34 S. W. 754; *Dishonogh v. State*, 4 Tex. App. 158; *Thornberry v. State*, 3 Tex. App. 36.

[a] Definition of "Credible Person."—A credible person within the meaning of the statute means "a competent as well as a credible witness." *Thomas v. State*, 14 Tex. App. 70.

[b] An infamous person is incompetent to make an affidavit. *Perez v. State*, 10 Tex. App. 327.

[c] The husband of the accused (1) not being competent to testify against his wife except in the prosecution of offenses committed by one against the other, is not a competent person to make an affidavit upon which to base an information against his wife. *Thomas v. State*, 14 Tex. App. 70. In a case in which the husband is charged with rape upon his step-daughter, the offense is an offense against the wife in the nature of adultery and as a consequence she is a competent witness against him and is competent to sign and file a complaint against him. *Harris v. State*, 80 Neb. 195, 114 N. W. 168.

[d] Conviction of a felony, (1) renders a person infamous and incompetent to make an affidavit. *Perez v. State*, 10 Tex. App. 327. (2) A pardon will restore his competency. *Rivers v. State*, 10 Tex. App. 177.

[e] Impeachment of the affiant (1) when he testifies as a witness does not invalidate the affidavit. The requirement that the affiant be a "credible person" has no reference to his credibility as a witness. *Jones v. State*, 58 Tex. Crim. 313, 125 S. W. 914. (2) The fact that the affidavit upon which the information is based is not that of a credible witness is not ground for quashing the information. *Rector v. State* (Tex. Crim.), 90 S. W. 41. (3) But if it can be shown as a fact that the affidavit is not that of a credible person, the affidavit would not be good. *Dodson v. State*, 35 Tex. Crim. 571, 34 S. W. 754.

79. United States v. Gariboso, 25 Phil. Isl. 171, seduction.

For proper complaint in adultery cases, see 1 STANDARD PROC. 596; in bigamy cases, see 4 STANDARD PROC. 91. And see the title "**Seduction.**"

[a] The crimes of adultery, estupro and injuria (1) committed against persons other than public officials, by virtue of Act No. 1773, shall be instituted only upon the complaint of the aggrieved person, or of the parents, grandparents or guardian of such person (*United States v. Cruz*, 20 Phil. Isl. 363; *United States v. Ortiz*, 19 Phil. Isl. 174; *United States v. De la Cruz*, 17 Phil. Isl. 139), (2) in the order in which they are named therein. *United States v. Narvas*, 14 Phil. Isl. 410.

80. Lindley v. State (Tex. Crim.), 44 S. W. 165.

81. Kan.—See *State v. Gleason*, 32 Kan. 245, 4 Pac. 363. **Mo.**—*State v. Lewis*, 70 Mo. App. 40; *State v. White*, 55 Mo. App. 356; *State v. Harris*, 30 Mo. App. 82. **Tex.**—*Flournoy v. State*, 51 Tex. Crim. 29, 100 S. W. 151; *Patillo v. State*, 3 Tex. App. 442; *Daniels v. State*, 2 Tex. App. 353.

[a] A person acting at the instance of the county attorney but who was not an assistant nor a de facto county attorney is not within the rule ex-

require certain designated officers to inquire into crimes and to file complaint therefor,⁸² but such statutes are not exclusive.⁸³

Knowledge of Affiant.—In many jurisdictions it is necessary that the affiant be a person having actual knowledge of the commission of the offense,⁸⁴ and a complaint upon information and belief is not sufficient,⁸⁵ but in other jurisdictions it is not necessary that the

pressed in the text; he may make a complaint. *Flournoy v. State*, 51 Tex. Crim. 29, 100 S. W. 151.

[b] **District Attorney May.**—There is nothing in the California statutes prohibiting a district attorney from swearing to a complaint. *People v. Currie*, 16 Cal. App. 731, 117 Pac. 941.

82. A Connecticut statute (§1878) provides (1) that the grand jurors shall diligently inquire after and make due complaint of all crimes and misdemeanors. The statute providing that in those cases in which one moiety of the fine goes to the informer and the other to the state the proper informing officers may make complaint impliedly limits their powers so that in other cases in which a moiety is given to the informer, the informing officer is not authorized to present a complaint. *Allen v. Gray*, 11 Conn. 95. (2) Quære, whether a seasonable objection that a de facto grand juror filed the complaint would avail accused. *Smith v. State*, 19 Conn. 493.

[c] **In Vermont**, see State Treasurer *v. Rice*, 11 Vt. 339.

83. *Com. v. Gay*, 153 Mass. 211, 26 N. E. 571, 852; *Com. v. Gagle*, 147 Mass. 576, 18 N. E. 417; *People v. Stickle*, 156 Mich. 557, 121 N. W. 497 (Act No. 144, Pub. Acts, 1907, regarding abandonment of family by husband, does not confer exclusive right to make complaint upon the superintendent of the poor, or county agent).

[a] An affidavit of a person giving the description of his office is valid whether or not the statute creating such office is constitutional. The affidavit is that of the individual, the added words are mere descriptio personae. *Com. v. Wilson*, 9 Del. Co. Ct. (Pa.) 357.

84. Colo.—*Wickham v. People*, 41 Colo. 345, 93 Pac. 478. **Mo.**—See *State v. Flannery*, 173 S. W. 1053. **N. Y.** *Alber v. Harris*, 126 App. Div. 504, 110 N. Y. Supp. 645. **Tenn.**—See *State v. Good*, 9 Lea 240.

85. U. S.—*United States v. Baumert*,

179 Fed. 735; *United States v. Sapinkow*, 90 Fed. 654 (no grounds of belief were stated); *United States v. Collins*, 79 Fed. 65; *United States v. Polite*, 35 Fed. 58; *United States v. Tureaud*, 20 Fed. 621; *In re Rule of Court*, 3 Woods 502, 20 Fed. Cas. No. 12,126. **Cal.**—*Ex parte Spears*, 88 Cal. 640, 26 Pac. 608, 22 Am. St. Rep. 341. **Kan.**—*State v. Gleason*, 32 Kan. 245, 4 Pac. 363; *Garnett v. Guynn*, 7 Kan. App. 414, 53 Pac. 275. **Mass.**—See *Com. v. Certain Lottery Tickets*, 5 Cush. 369; *Com. v. Phillips*, 16 Pick. 211. **Mich.**—*Swart v. Kimball*, 43 Mich. 443. **Mo.**—*State v. Simpson*, 136 Mo. App. 664, 118 S. W. 1187; *State v. White*, 55 Mo. App. 356; *State v. Davidson*, 46 Mo. App. 9; *State v. Harris*, 30 Mo. App. 82; *State v. Downing*, 22 Mo. App. 504. **N. D.**—*State v. McLain*, 13 N. D. 368, 102 N. W. 407; *State ex rel. Register v. McGahey*, 12 N. D. 535, 97 N. W. 865. **Okl.**—*Miller v. United States*, 8 Okla. 315, 57 Pac. 836.

Waiver of objections to defective verification, see *infra*, XV, A, 7, e.

[a] "A complaint in writing charging a criminal offense, although upon information and belief only as to the person suspected of having committed it, is sufficient to authorize an investigation before a magistrate by the examination of witnesses . . . But, before a warrant can lawfully issue for the arrest of the offender, the magistrate must have some evidence of his guilt. Facts and circumstances stated on information and belief only, without giving any sufficient grounds on which to base the belief, are insufficient to confer jurisdiction as to the person." *Blodgett v. Race*, 18 Hun (N. Y.) 132. See *People ex rel. Livingston v. Wyatt*, 113 App. Div. 111, 99 N. Y. Supp. 114. *Compare People ex rel. Levy v. Preston*, 44 Misc. 267, 18 N. Y. Crim. 475, 89 N. Y. Supp. 889, holding such a document does not confer jurisdiction on the magistrate to hold an examination.

[b] "A verification of a criminal

affiant have actual knowledge of the facts, but the complaint may be made upon information and belief.⁸⁶ It has been held that an affidavit

complaint on information and belief is sufficient for every purpose, except merely the issuing of a warrant for the arrest of the defendant." *Cameron v. Territory*, 16 Okla. 634, 86 Pac. 68; *In re Cummings*, 11 Okla. 286, 66 Pac. 332. *Compare United States v. Collins*, 79 Fed. 65.

[c] Although it is provided by statute that an information may be filed by a county attorney upon information and belief, (1) it was held in *State v. Gleason*, 32 Kan. 245, 4 Pac. 363, that the constitution and bill of rights require a complaint setting forth the allegations as true. (2) Consequently a complaint filed under the statute is insufficient. *State v. Babbitt*, 32 Kan. 253, 4 Pac. 367.

[d] Although the original complaint was upon information and belief, the warrant having recited that upon examination on oath of the present defendants before him, it appeared to the justice that the offense had been committed, etc., it must be presumed there was a proper legal showing. *Haskins v. Ralston*, 69 Mich. 63, 37 N. W. 45, 13 Am. St. Rep. 376.

[e] The perfect allegations in the information will not cure the defect existing because the affidavit is based on information and belief. *State v. Davidson*, 46 Mo. App. 9.

[f] A complaint stating the complainant "has probable cause to suspect, and does suspect," etc., is insufficient. *Blodgett v. Race*, 18 Hun (N. Y.) 132.

[g] The complaint should state that the affiant had "just and reasonable grounds to suspect" the defendant committed the offense with which he is charged. *Housh v. People*, 75 Ill. 487.

[h] Neither a police officer nor any other person can cause the arrest of one on a complaint on information and belief. *In re Blum*, 9 Misc. 571, 30 N. Y. Supp. 396.

[i] A complaint in positive terms, not on information and belief, is not subject to a motion to quash, and is sufficient basis for a warrant of arrest. *Ala.*—*Redd v. State*, 169 Ala. 6, 53 So. 908; *Harris v. State*, 159 Ala. 108, 48 So. 671; *Holman v. State*, 144

Ala. 95, 39 So. 646. *Fla.*—*Lee v. Van Pelt*, 57 Fla. 94, 48 So. 632. *Mich.* *People v. Hare*, 57 Mich. 505, 24 N. W. 843. *Okla.*—*Sayers v. State*, 10 Okla. Crim. 233, 135 Pac. 1073. *Tex.*—*Eason v. State* (Tex. Crim.), 154 S. W. 1196.

[j] Having made a positive allegation, any further averment of affiant's belief is unnecessary. *Com. v. Mallini*, 214 Pa. 50, 63 Atl. 414.

86. *Ga.*—*Thomas v. State*, 91 Ga. 204, 18 S. E. 305. See also *Compton v. State*, 152 Ala. 68, 44 So. 685, construing Georgia code. *Ind.*—*Toops v. State*, 92 Ind. 13; *Franklin v. State*, 85 Ind. 99; *Deveny v. State*, 47 Ind. 208; *State v. Buxton*, 31 Ind. 67; *State v. Ellison*, 14 Ind. 380. *Kan.*—*State v. King*, 71 Kan. 287, 80 Pac. 606. *Ky.* *Com. v. Teneyck*, 7 Ky. L. Rep. 216. *Me.*—*State v. Hobbs*, 39 Me. 212. *Miss.* *State v. Quintini*, 76 Miss. 498, 25 So. 365. *Nev.*—*Comp. Laws*, 1900, §4073; *Ex parte Buncel*, 25 Nev. 426, 62 Pac. 207. *N. Y.*—*People ex rel. Livingston v. Wyatt*, 186 N. Y. 383, 79 N. E. 330, 9 Ann. Cas. 972, 10 L. R. A. (N. S.) 159; *People ex rel. Brown v. Tighe*, 146 App. Div. 491, 131 N. Y. Supp. 693; *Tanzer v. Morgan*, 139 App. Div. 10, 123 N. Y. Supp. 497; *McKelvey v. Marsh*, 63 App. Div. 396, 71 N. Y. Supp. 541; *People v. Cramer*, 22 App. Div. 189, 47 N. Y. Supp. 1039; *People ex rel. Levy v. Preston*, 44 Misc. 267, 18 N. Y. Crim. 475, 89 N. Y. Supp. 889; *In re Blum*, 9 Misc. 571, 30 N. Y. Supp. 396; *People ex rel. Kingsley v. Pratt*, 22 Hun 300. *Pa.*—*Com. v. Green*, 185 Pa. 641, 40 Atl. 96; *Com. v. Barr*, 25 Pa. Super. 609; *Com. v. Campbell*, 22 Pa. Super. 98; *Com. v. Jossel*, 1 Leh. Co. L. Jur. 115. *Tex.* *Penal Code*, art. 257; *Fricks v. State*, 58 Tex. Crim. 100, 124 S. W. 922; *Anderson v. State*, 34 Tex. Crim. 96, 29 S. W. 384; *Staley v. State* (Tex. Crim.), 29 S. W. 272; *Clark v. State*, 23 Tex. App. 260, 5 S. W. 115; *Brown v. State*, 11 Tex. App. 451. *Wis.*—*Murphy v. State*, 124 Wis. 635, 646, 102 N. W. 1087.

[a] An affidavit stating the facts, "as affiant verily believed," is not objectionable. The use of the past tense is evidently a mistake of the draftsman. It also shows affiant spoke of

upon information and belief must state the source of deponent's information.⁸⁷

If the complaint is composed of several counts the counts defective because of the fact they are stated upon information and belief will not impair the sufficiency of the counts positively stated. An information cannot be attacked upon the ground that the affiant did not

his then present belief. *State v. Buxton*, 31 Ind. 67.

[b] In *Ex parte Blake*, 155 Cal. 586, 102 Pac. 269, upon authority of *Ex parte Dimmig*, 74 Cal. 164, 15 Pac. 619, it was held that the original information upon information and belief will be sufficient if followed by the depositions of the complainant or other witnesses stating facts tending to show defendant's guilt. A mere affidavit containing no evidence and followed by no depositions stating such facts would be insufficient.

[c] **Complaint on Suspicion.**—The statute authorizing justices on the preliminary hearing to commit all persons suspected to be guilty of a capital offense seems to authorize a complaint upon suspicion. *Com. v. Phillips*, 16 Pick. (Mass.) 211.

[d] But in Alabama, (1) a complaint stating the affiant has "cause to believe and does believe," etc., is insufficient. It must state he had probable cause to believe, or its equivalent. *Ross v. State*, 139 Ala. 111, 36 So. 718; *Sims v. State*, 137 Ala. 79, 34 So. 400; *Monroe v. State*, 137 Ala. 88, 34 So. 382; *Streater v. State*, 137 Ala. 93, 34 So. 395; *Johnson v. State*, 82 Ala. 29, 2 So. 446. (2) An affidavit that affiant "has cause to believe and does believe that in his opinion," etc., is insufficient. *Chappell v. State*, 156 Ala. 188, 47 So. 329. (3) Likewise the use of the words "good reason to believe," instead of "probable cause of believing," is not sufficient. *Bessemer v. Edge*, 162 Ala. 201, 50 So. 270.

[e] In Texas.—(1) A complaint stating that the complainant had "good reason to believe," etc., is insufficient. The code requires it go farther and state that the complainant "did believe" the said offense to have been committed. *Wright v. State*, 63 Tex. Crim. 429, 140 S. W. 1105; *Tompkins v. State* (Tex. Crim.), 77 S. W. 436; *Justice v. State*, 45 Tex. Crim. 462, 76 S. W. 437; *Smith v. State*, 45 Tex. Crim. 411, 76 S. W. 436 (in which court said

Brown v. State, 11 Tex. App. 451, carried the doctrine as far as the statute permitted); *Hall v. State*, 32 Tex. Crim. 591, 25 S. W. 292. (2) The omission of the word "good" before the phrase "reason to believe" will not invalidate the complaint. *Dodson v. State*, 35 Tex. Crim. 571, 34 S. W. 754.

[f] In extradition proceedings, it is not necessary that the complainant have personal knowledge of the facts. "He may with entire propriety make the complaint on information and belief, stating the sources of his information and the grounds of his belief, and annexing to the complaint a properly certified copy of any indictment or equivalent proceeding, which may have been found in the foreign country or a copy of the depositions of witnesses having actual knowledge of the facts, taken under the treaty and act of congress." *Rice v. Ames*, 180 U. S. 371, 21 Sup. Ct. 406, 45 L. ed. 577.

87. U. S.—*United States v. Sapinkow*, 90 Fed. 654. See *United States v. Tureaud*, 20 Fed. 621. N. Y.—*People ex rel. Livingston v. Wyatt*, 186 N. Y. 383, 79 N. E. 330, 10 L. R. A. (N. S.) 159, 9 Ann. Cas. 972; *People ex rel. Willett v. Quinn*, 150 App. Div. 813, 135 N. Y. Supp. 477; *People v. Gage*, 149 N. Y. Supp. 43. Pa.—*Compare Com. v. Jossel*, 1 Leh. Co. L. Jur. 115.

[a] A complaint on information received, (1) does not comply with the constitution unless it states the belief of the complainant in the information received or the character and source of the information. *Com. v. Lawyer*, 15 Pa. Dist. 474; *Com. v. Roland*, 10 Pa. Dist. 410. (2) Where the complaint states affiant does believe, etc., the name of the person who gave him this information need not be given. *Com. v. Story*, 15 Pa. Dist. 513. *Compare Com. v. Jossel*, 1 Leh. Co. L. Jur. 115.

88. *Rice v. Ames*, 180 U. S. 371, 21 Sup. Ct. 406, 45 L. ed. 577.

have personal knowledge of the offense charged, the affidavit itself being in compliance with the statute,⁸⁹ but it may perhaps be shown that the affiant was not a competent witness,⁹⁰ or that his signature is a forgery.⁹¹

C. BEFORE WHOM MADE.—The affidavit or complaint must be sworn to before a proper officer⁹² who is ordinarily any person authorized to take and subscribe oaths and affirmations in criminal proceedings.⁹³

A notary public is qualified to administer the oath,⁹⁴ although at common law the notary was regarded as an officer of civil and commercial law and without power to administer oaths in criminal cases.⁹⁵ It has been variously provided or held that a justice of the peace,⁹⁶

89. **Colo.**—Wickham *v.* People, 41 Colo. 345, 93 Pac. 478; Overland C. M. Co. *v.* People, 32 Colo. 263, 75 Pac. 924, 105 Am. St. Rep. 74; Barr *v.* People, 30 Colo. 522, 71 Pac. 392; Bergdahl *v.* People, 27 Colo. 302, 61 Pac. 228; Holt *v.* People, 23 Colo. 1, 45 Pac. 374. **Fla.**—Lee *v.* Van Pelt, 57 Fla. 94, 48 So. 632. **Kan.**—State *v.* Johnson, 60 Kan. 860, 58 Pac. 559; Holton *v.* Bimrod, 61 Kan. 13, 58 Pac. 558; State *v.* Carey, 56 Kan. 84, 42 Pac. 371; Holton *v.* Bimrod, 8 Kan. App. 265, 55 Pac. 505; Holton *v.* Haist, 8 Kan. App. 856, 55 Pac. 468. **Mich.** Potter *v.* Barry Circuit Judge, 156 Mich. 183, 120 N. W. 586; People *v.* Haas, 79 Mich. 449, 454, 44 N. W. 928.

[a] The complaint in People *v.* Lynch, 29 Mich. 274, charging rape upon complainant's daughter, was positive in its terms, but the complainant derived his knowledge from his daughter. Whether or not it is permissible to inquire into the source of the defendant's knowledge, the showing made did not show the justice to be without jurisdiction, the complaint of the daughter being itself competent evidence of rape.

90. State *v.* Pitts, 70 Mo. App. 446.

91. State *v.* Pitts, 70 Mo. App. 446.

92. Mountjoy *v.* State, 78 Ind. 172; Hipes *v.* State, 73 Ind. 39; Buell *v.* State, 72 Ind. 523; Brooster *v.* State, 15 Ind. 190.

[a] **Before County Attorney of Wrong County.**—A complaint which is made before a county attorney cannot be used as the basis of an information by the county attorney of another county. Thomas *v.* State, 37 Tex. Crim. 142, 38 S. W. 1011.

93. **U. S.**—United States *v.* Baumert,

179 Fed. 735. **Cal.**—People *v.* Mullaley, 16 Cal. App. 44, 116 Pac. 88. **Ga.**—Shuler *v.* State, 125 Ga. 778, 54 S. E. 689. **Ind.**—Brooster *v.* State, 15 Ind. 190. **Tex.**—Johnson *v.* State, 47 Tex. Crim. 580, 85 S. W. 274.

94. **Cal.**—People *v.* Mullaley, 19 Cal. App. 44, 116 Pac. 88. **Colo.**—Walker *v.* People, 22 Colo. 415, 45 Pac. 388. **Ga.**—Mitchell *v.* State, 126 Ga. 84, 54 S. E. 931; Shuler *v.* State, 125 Ga. 778, 54 S. E. 689. **Ind.**—See Hawkins *v.* State, 136 Ind. 630, 36 N. E. 419. **Kan.** State *v.* McCarley, 74 Kan. 874, 84 Pac. 743. **N. Y.**—Compare People *v.* Nowak, 7 N. Y. Crim. 69, 5 N. Y. Supp. 239. **Vt.**—State *v.* Freeman, 59 Vt. 661, 10 Atl. 752.

[a] Whether an affidavit made before a notary public is sufficient basis for issuance of a warrant of arrest, quaere. Mitchell *v.* State, 126 Ga. 84, 54 S. E. 931.

[b] **De Facto Notary Public.**—Where an affidavit had been sworn to before a de facto notary public, the affidavit cannot be attacked collaterally by plea in abatement. McNulty *v.* State, 37 Ind. App. 612, 76 N. E. 547, 117 Am. St. Rep. 344.

95. See Richards *v.* State, 22 Neb. 145, 34 N. W. 346.

96. **Ala.**—Lauzaza *v.* State, 1 Ala. App. 205, 55 So. 444. **Cal.**—People *v.* Le Roy, 65 Cal. 613, 4 Pac. 649. **Ill.** Carrow *v.* People, 113 Ill. 550, 558. **Mass.**—Com. *v.* Taber, 155 Mass. 5, 28 N. E. 1056, justice of the peace commissioned to issue warrants in criminal cases. **Mo.**—State *v.* Flannery, 173 S. W. 1053. **N. Y.**—People *v.* Robertson, 3 Wheel. Crim. Cas. 180. **Tex.** State *v.* Elliott, 41 Tex. 224; Gentry *v.* State, 62 Tex. Crim. 497, 137 S. W.

a county judge,⁹⁷ and a county clerk⁹⁸ are proper officers for this purpose.

Where the prosecuting attorney is by statute made a proper officer to take criminal complaints,⁹⁹ it has been held that a deputy prosecuting attorney,¹ a de facto deputy prosecuting attorney,² and a prosecuting attorney pro tem³ may also take criminal complaints, but in the absence of statutory authority a city attorney is without authority.⁴

D. WHEN MADE.—The complaint may be made on the same day the offense was committed,⁵ and it must be sworn to before the filing of the information.⁶

E. DUTY OF MAGISTRATE TO TAKE COMPLAINT.—It is the duty of the magistrate in a proper case to take the affidavit of a competent person charging an offense.⁷

F. FORMAL REQUISITES OF THE COMPLAINT.—**1. In General.**—In the absence of special provisions in the statute requiring it, no particular form is essential.⁸ It is generally requisite that the affidavit

696; *Lindley v. State*, 57 Tex. Crim. 346, 123 S. W. 141; *Morris v. State*, 2 Tex. App. 502.

[a] **In Alabama**, the judge of the inferior court of Birmingham, having powers of justice of the peace, has authority to take a preliminary complaint. *Lauzaza v. State*, 1 Ala. App. 205, 55 So. 444.

97. See *Carrow v. People*, 113 Ill. 550, 558; *Stapp v. State*, 53 Tex. Crim. 158, 109 S. W. 1093; *Morris v. State*, 2 Tex. App. 502.

98. **Ala.**—*Pruett v. State*, 141 Ala. 69, 37 So. 343, clerk of circuit court. **Cal.**—*People v. Mullaley*, 16 Cal. App. 44, 116 Pac. 88, every clerk of any court has authority. **Ga.**—*Wright v. Davis*, 120 Ga. 670, 48 S. E. 170, clerk of city court is authorized by statute to administer the oath. **Tex.**—*Sims v. State* (Tex. Crim.), 162 S. W. 1154; *Morris v. State*, 2 Tex. App. 502.

Compare Lloyd v. State, 70 Ala. 32.

[a] **The clerk of the police court**, by statute, is authorized to administer the oath in such case. *People v. Vasalo*, 120 Cal. 168, 52 Pac. 305.

[b] **Deputy Clerk Is Without Authority.**—When a judge of the superior court assumes to act as a committing magistrate he has no right to call in the clerk or other officer to administer the oaths. Consequently a complaint verified before a deputy clerk cannot be used as a deposition on the preliminary hearing, or as a basis of a warrant of arrest. *In re Sing*, 13 Cal. App. 736, 110 Pac. 693.

99. *Landers v. State*, 35 Tex. 357;

Williams v. State, 50 Tex. Crim. 269, 96 S. W. 47; *Johnson v. State*, 47 Tex. Crim. 580, 85 S. W. 274; *Morris v. State*, 2 Tex. App. 502.

1. *Dane v. State*, 36 Tex. Crim. 84, 35 S. W. 661.

2. *Dane v. State*, 36 Tex. Crim. 84, 35 S. W. 661.

3. *State v. Lackey*, 35 Tex. 357.

4. *Kirksey v. State*, 58 Tex. Crim. 188, 125 S. W. 15; *Johnson v. State*, 47 Tex. Crim. 580, 85 S. W. 274.

5. *Com. v. Flynn*, 3 Cush. (Mass.) 525.

6. See *Bradberry v. State* (Tex. Crim.), 152 S. W. 169; *Sprowles v. State* (Tex. Crim.), 143 S. W. 622; *Abbey v. State*, 55 Tex. Crim. 232, 115 S. W. 1191.

[a] **But if the information is verified by the prosecuting attorney**, it need not be based upon an affidavit made before the information is sworn to since he may have been informed by a reliable witness under oath, not in writing, of the commission of the offense, and he may have had them in mind at the time of the verification of the information. *State v. Druitt*, 42 Kan. 469, 22 Pac. 697.

7. **Effect of Coroner's Verdict.**—The fact that the coroner upon the verdict of the jury made an affidavit charging defendant with a lesser offense does not authorize the justice to refuse to take an affidavit of a competent person charging a greater offense. *State v. Elfer*, 115 La. 964, 40 So. 370.

8. *State v. Gupton*, 166 N. C. 257, 80 S. E. 989.

or sworn complaint be in writing,⁹ though in some states it may be oral.

2. Title of Court and Cause.—It is not necessary that the complaint or affidavit contain the name of the court and the title of the action,¹⁰ especially where the affidavit is taken before a notary public, in which case a title would be improper for the reason that usually there is no action pending at the taking of the affidavit.¹¹

[a] The affidavit provided for in §299 of the code as the basis of a warrant may be the basis of the accusation, but perhaps any other, although made after arrest if sufficiently specific, would suffice as a basis for the accusation. *Dickson v. State*, 62 Ga. 583.

[b] **A complaint is in the nature of a deposition only**, setting forth the facts stated by the informant, sufficiently showing the commission of the offense and its perpetration by the defendant, to justify the issuance of a warrant of arrest. *People v. Sacramento Butchers' P. Assn.*, 12 Cal. App. 471, 107 Pac. 712. See *People v. Lapique*, 10 Cal. App. 669, 103 Pac. 164.

[c] **Affidavit To Speak in First Person.**—The statute (L. O. L., §829) of Oregon requires that the affidavit shall be made to speak in the first person. *Smith v. McDuffee* (Ore.), 142 Pac. 558.

[d] **Forms of Affidavit.**—Cal.—Kerr's Pocket Penal Code (1909), Form No. 2, Complaint, §1426. Ga.—Code, pt. 2, §905. Mass.—Rev. Laws, ch. 218, §67. N. Y.—Code Crim. Proc., Forms, No. 1, et seq.

[e] In many states, the statute prescribes no form in which the complaint is to be made. Mich.—*Turner v. People*, 33 Mich. 363. N. Y.—*People v. Hicks*, 15 Barb. 153. Okla.—*Ex parte Flowers*, 2 Okla. Crim. 430, 101 Pac. 860. Vt.—*State v. Freeman*, 59 Vt. 661, 10 Atl. 752. Wash.—*State v. Newton*, 29 Wash. 373, 70 Pac. 31.

[f] **In Iowa** the code provides that the preliminary information "may be in the form required in criminal actions triable before a justice of the peace." Iowa Code, 1897, §5182.

For formal requisites of such an information, see *infra*, VIII, C.

9. Cal.—Penal Code, §806. Kan.—*State v. King*, 71 Kan. 287, 80 Pac. 606; *State v. Goetz*, 65 Kan. 125, 69 Pac. 187. Minn.—*State v. Richardson*, 34 Minn. 115, 24 N. W. 354. Mo.—Rev.

St., 1909, §5020; *State v. Flannery*, 173 S. W. 1053. N. Y.—*People ex rel. Livingston v. Wyatt*, 113 App. Div. 111, 99 N. Y. Supp. 114. Phil. Isl. Act No. 1773; *United States v. Ortiz*, 19 Phil. Isl. 174; *United States v. Narvas*, 14 Phil. Isl. 410. Tex.—Texas Penal Code, art. 257; *Johnson v. State*, 47 Tex. Crim. 580, 85 S. W. 274; *Morris v. State*, 2 Tex. App. 502. Utah.—Comp. Laws, 1907, §4604; *State v. Anderson*, 35 Utah 496, 101 Pac. 385. Vt.—See *State Treasurer v. Rice*, 11 Vt. 339.

Writing Unnecessary.—*People v. Bennett*, 107 Mich. 430, 65 N. W. 280; *People v. Kahler*, 93 Mich. 625, 53 N. W. 826; *People v. Bechtel*, 80 Mich. 623, 45 N. W. 582; *People v. Clement*, 72 Mich. 116, 40 N. W. 190. See *Turner v. People*, 33 Mich. 363; *State v. Killet*, 2 Bailey (S. C.) 289.

[b] The word complaint as used in the statutes in reference to criminal offenses sometimes means the formal written charge of crime to which the accused is to answer, and sometimes it means the oral charge which may be made to a proper magistrate to be by him reduced to writing. Pub. St., ch. 212, §15 (Rev. Laws, ch. 217, §22) of Massachusetts refers to the latter. *Hobbs v. Hill*, 157 Mass. 556, 32 N. E. 862.

[c] Although the filing of a written information in the form of a deposition (1) does not seem to be expressly required by the code (*People v. Hicks*, 15 Barb. (N. Y.) 153; *People v. Zabor*, 44 Misc. 633, 90 N. Y. Supp. 412), (2) it is necessarily required by implication from the provisions relating to arraignment and examination of the prisoner. *People ex rel. Farley v. Crane*, 94 App. Div. 397, 88 N. Y. Supp. 343.

10. See *Hall v. State*, 178 Ind. 448, 99 N. E. 732; *Hawkins v. State*, 136 Ind. 630, 36 N. E. 419.

11. *Hawkins v. State*, 136 Ind. 630, 36 N. E. 419.

3. Formal Beginning and Conclusion.—It is not necessary that the complaint should use the formal beginning set forth in the statute, especially if the words omitted are used at the beginning of the information.¹² Sometimes it is required that the complaint conclude with the words "against the peace and dignity of the state."¹³

G. STATEMENT OF OFFENSE.—The preliminary complaint¹⁴ must

12. *Sessions v. State* (Tex. Crim.), 98 S. W. 243; *Johnson v. State*, 31 Tex. Crim. 464, 20 S. W. 980; *Jefferson v. State*, 24 Tex. App. 535, 7 S. W. 244.

13. *Miller v. State*, 81 Miss. 162, 32 So. 951; *Love v. State* (Miss.), 8 So. 465.

14. **Cal.**—*People v. Howard*, 111 Cal. 655, 44 Pac. 342. **Colo.**—*Ausmus v. People*, 47 Colo. 167, 107 Pac. 204; *Noble v. People*, 23 Colo. 9, 45 Pac. 376. **Ill.**—*Glenn v. People*, 17 Ill. 105. **Mo.**—*Rev. St.*, 1909, §5020; *State v. Flannery*, 173 S. W. 1053 (charging the commission of a felony); *State v. Whitaker*, 75 Mo. App. 184; *State v. Sartin*, 66 Mo. App. 626. **N. Y.**—*People v. Hiley*, 33 Misc. 168, 68 N. Y. Supp. 361. **Pa.**—*Com. v. Nick*, 29 Pa. Co. Ct. 8. **Tex.**—*Robinson v. State*, 25 Tex. App. 111, 7 S. W. 531. **Vt.**—*State v. Freeman*, 59 Vt. 661, 10 Atl. 752.

[a] The omission of the word "unlawful" does not render the affidavit insufficient where the facts alleged show the acts of the defendant could not be lawful. *State v. Bailey*, 157 Ind. 324, 61 N. E. 730, 59 L. R. A. 435.

[b] In misdemeanors, no technical terms are essential. *Wilson v. State*, 80 Miss. 388, 31 So. 787.

[c] The affidavit should charge the nature of the offense and the circumstances attending its commission. *Fla. Gen. St.*, §3927.

[d] Illustrative cases in which the affidavits were held to sufficiently charge the offense: **Ala.**—*McDaniel v. Cain*, 159 Ala. 344, 48 So. 52; *Wilson v. State*, 113 Ala. 104, 21 So. 487 (gaming); *Field v. Ireland*, 21 Ala. 240, 245 (having stolen goods); *Ewing v. Sanford*, 19 Ala. 605 (larceny of a slave); *Wylsonne v. State*, 2 Ala. App. 188, 56 So. 63 (carrying concealed weapons). **Cal.**—*San Francisco v. Randall*, 54 Cal. 408 (embezzlement); *People v. Maguire*, 26 Cal. 635 (opening theater on Sabbath). **Fla.**—*Lee v. Van Pelt*, 57 Fla. 94, 48 So. 632, larceny. **Ga.**—*Taylor v. State*, 120 Ga. 484, 48

S. E. 158 (larceny); *Murphy v. State*, 119 Ga. 300, 46 S. E. 450; *Brown v. State*, 109 Ga. 570, 34 S. E. 1031; *Howell v. State*, 5 Ga. App. 186, 62 S. E. 1000 (stabbing); *Hunter v. State*, 4 Ga. App. 549, 61 S. E. 1130 (resisting officer). **Ill.**—*Myers v. People*, 67 Ill. 503. **Ind.**—*Hall v. State*, 178 Ind. 448, 99 N. E. 732; *Clark v. State*, 171 Ind. 104, 84 N. E. 984 (defrauding innkeeper); *State v. Bailey*, 157 Ind. 324, 61 N. E. 730, 59 L. R. A. 435 (neglect to send children to school); *State v. De Long*, 88 Ind. 312 (libel); *Rosenstein v. State*, 9 Ind. App. 290, 36 N. E. 652. **Ia.**—*State v. Perry*, 117 Iowa 463, 91 N. W. 765. **Kan.**—*State v. Reedy*, 44 Kan. 190, 24 Pac. 66, incest. **Mass.**—*Com. v. Connelly*, 163 Mass. 539, 40 N. E. 862 (falsely making of nomination paper); *Com. v. Flynn*, 3 Cush. 525 (arson). **Mich.**—*Pardee v. Smith*, 27 Mich. 33, keeping billiard table. **Miss.**—*Wilson v. State*, 80 Miss. 388, 31 So. 787 (intimidating witnesses); *State v. Quintini*, 76 Miss. 498, 25 So. 365 (assault and battery). **Mo.**—*State v. Flannery*, 173 S. W. 1053, manslaughter in the fourth degree. **N. Y.**—*People ex rel. Laird v. Hannah*, 92 Hun 476, 37 N. Y. Supp. 702 (fishing with nets); *In re O'Neill*, 15 N. Y. Crim. 391, 69 N. Y. Supp. 617 (abortion). **N. D.**—*State v. Barnes*, 3 N. D. 131, 54 N. W. 541, obtaining money under false pretenses. **Okl.**—*Sayers v. State*, 10 Okla. Crim. 233, 135 Pac. 1073, rape. **Pa.**—*Com. v. Dingman*, 26 Pa. Super. 615, larceny. **Tenn.**—*Fry v. Trippett*, 16 Lea 516, arson and conspiracy. **Tex.**—*Pittman v. State*, 14 Tex. App. 576 (larceny of a hog); *Arrington v. State*, 13 Tex. App. 551 (theft of cattle). **Utah.**—*State v. Sheffield*, 146 Pac. 306 (adultery); *State v. Anderson*, 35 Utah 496, 101 Pac. 385 (perjury).

[e] Illustrative cases in which the complaint was held insufficient: **U. S.**—*United States v. Strickland*, 25 Fed. 469, carrying on business of selling tobacco without license. **Ill.**—*Housh v.*

charge the commission of an offense by the defendant,¹⁵ naming it.¹⁶ The facts should be alleged in plain and concise language,¹⁷ directly and not by argument or inference.¹⁸ The ultimate facts only should be pleaded,¹⁹ but the affidavit should state all the essential elements constituting the offense.²⁰ A substantial statement of the offense, how-

People, 75 Ill. 487 (larceny); Glenn v. People, 17 Ill. 105 (negro coming into state). **N. Y.**—People v. Hiley, 33 Misc. 168, 68 N. Y. Supp. 361, assault and battery. **Tex.**—Wright v. State (Tex. Crim.), 55 S. W. 48.

[f] Omission of prefix "un" before the word lawfully, upon timely objection, might perhaps be fatal. People ex rel. Baker v. Beatty, 39 Hun 476, 4 N. Y. Crim. 287.

15. **Idaho.**—State v. Yturaspe, 22 Idaho 360, 125 Pac. 802. **Ill.**—Housh v. People, 75 Ill. 487. **N. Y.**—People ex rel. Livingston v. Wyatt, 113 App. Div. 111, 99 N. Y. Supp. 114. **Tex.** Penal Code, art. 257.

[a] An affidavit charging several defendants jointly with an offense may be a basis for an information charging any one of them. State v. Hunter, 181 Mo. 316-339, 80 S. W. 955.

16. **Tex.** Penal Code, art. 257; Utah Comp. Laws, 1907, §4610.

[a] But even though the complaint charged the commission of an offense not known to the law, if it charged all the acts necessary to constitute a crime it is sufficient. United States v. Green, 136 Fed. 618.

[b] Where an affidavit designated the offense according to the statutory caption, the fact that an indictment similar to the affidavit would not have been good against demurrer, does not render the affidavit void. McDaniel v. Cain, 159 Ala. 344, 48 So. 52.

17. **Ind.**—Hawkins v. State, 136 Ind. 630, 36 N. E. 419. **Miss.**—Wilson v. State, 80 Miss. 388, 31 So. 787. **Mo.** Rev. St., §4329. **N. Y.**—People ex rel. Sampson v. Dunning, 113 App. Div. 35, 20 N. Y. Crim. 143, 98 N. Y. Supp. 1067. **Porto Rico.**—See People v. Olivieri, 13 Porto Rico 280.

18. Harkness v. State, 95 Miss. 506, 48 So. 294; Wilson v. State, 80 Miss. 388, 31 So. 787; People ex rel. Sampson v. Dunning, 113 App. Div. 35, 20 N. Y. Crim. 143, 98 N. Y. Supp. 1067; In re Blum, 9 Misc. 571, 30 N. Y. Supp. 396.

A statement in language which is

not concise or which is not without repetition but which is otherwise sufficient will not invalidate the complaint. State v. Pay (Utah), 146 Pac. 300.

19. **Colo.**—Ausmus v. People, 47 Colo. 167, 107 Pac. 204. **Ky.**—Com. v. Teneyck, 7 Ky. L. Rep. 216. **Pa.**—Com. v. Mallini, 214 Pa. 50, 63 Atl. 414.

20. **Cal.**—Ex parte Peterson, 119 Cal. 578, 51 Pac. 859; People v. Howard, 111 Cal. 655, 44 Pac. 342 (perjury). **Mo.** State v. Santhuff, 131 Mo. App. 620, 110 S. W. 624; State v. Cornell, 45 Mo. App. 94. **Pa.**—Com. v. Dingman, 26 Pa. Super. 615. **Porto Rico.**—People v. Rivera, 17 Porto Rico 1063. **Tex.** Suddeth v. State (Tex. Crim.), 100 S. W. 155. **Utah.**—See Comp. Laws, 1907, §4610; State v. Pay, 146 Pac. 300.

[a] Where no written complaint is required, the fact that one unnecessarily made is insufficient to authorize a warrant will not invalidate the proceedings for the reason it will be presumed that there was a valid oral complaint made. People v. Bennett, 107 Mich. 430, 65 N. W. 280.

[b] The complaint should state, as particularly as possible, the nature of the offense and the circumstances attending its commission. People v. Guilarte, 11 Porto Rico 334; People v. Ruiz, 10 Porto Rico 529.

[c] **Premeditation.**—A complaint charging an act to have been done wilfully and feloniously necessarily charges premeditation by implication. People v. Del Moral, 16 Porto Rico 621.

[d] **In New York,** facts enough must be stated to show that the complainant is acting in good faith, and that he has reasonable grounds to believe that a crime has been committed by the person designated therein. People ex rel. Livingston v. Wyatt, 186 N. Y. 383, 79 N. E. 330, 9 Ann. Cas. 972, 10 L. R. A. (N. S.) 159; People ex rel. Willett v. Quinn, 150 App. Div. 813, 135 N. Y. Supp. 477.

[e] Where the affidavit and information are filed together it is suffi-

ever, is sufficient.²¹ And in some jurisdictions it is not necessary to state the facts constituting the offense, merely naming the offense is sufficient.²²

A charge in the language of the statute defining the offense is generally sufficient to meet the requirements of good criminal pleading.²³ If, however, the statute does not prescribe with definiteness the elements of the offense, an affidavit following the language of the statute would be insufficient.²⁴ It is not necessary²⁵ that the offense be charged in

cient if the affidavit refers to the information containing all the necessary allegations. *Ausmus v. People*, 47 Colo. 167, 107 Pac. 204.

21. **U. S.**—*United States v. Strickland*, 25 Fed. 469. **Kan.**—*State v. Spaulding*, 24 Kan. 4, *quoted in State v. Jarrett*, 46 Kan. 754, 27 Pac. 146. **Me.**—*State v. Carson*, 10 Me. 473. **Mich.**—*Haskins v. Ralston*, 69 Mich. 63, 69, 37 N. W. 45, 13 Am. St. Rep. 376. **Mo.**—*State v. Flannery*, 173 S. W. 1053. **Tex.**—*Brown v. State*, 11 Tex. App. 451. **Wis.**—*Gordon v. State*, 158 Wis. 32, 147 N. W. 998; *Butler v. State*, 102 Wis. 364, 78 N. W. 590; *State ex rel. De Puy v. Evans*, 88 Wis. 255, 60 N. W. 433.

[a] The means or agency (1) used in the commission of the offense need not be alleged. *Ausmus v. People*, 47 Colo. 167, 107 Pac. 204. (2) "We know of no rule that requires a specific statement as to the character of the weapon used, especially where the affiant did not know what kind of an instrument it was." *Shelton v. State*, 50 Tex. Crim. 627, 100 S. W. 955. Compare *Wright v. State* (Tex. Crim.), 55 S. W. 48, holding it to be necessary that an affidavit charging the disturbing of an election state the means used. See *Brown v. State*, 109 Ga. 570, 34 S. E. 1031; *Dickson v. State*, 62 Ga. 583.

[b] That the weapon was deadly need not be alleged in a complaint charging assault with intent to murder. *Sasser v. McDaniel*, 73 Ga. 547, 551. See also *People v. Albino*, 17 Porto Rico 456.

22. **Ga.**—*Brown v. State*, 109 Ga. 570, 34 S. E. 1031; *McAlpin v. Purse*, 86 Ga. 271, 12 S. E. 412; *Dickson v. State*, 62 Ga. 583. **Mont.**—Rev. Codes, §9032. **N. Y.**—*People ex rel. Sampson v. Dunning*, 113 App. Div. 35, 20 N. Y. Crim. 143, 98 N. Y. Supp. 1067. See *People v. Polhamus*, 8 App. Div. 113,

11 N. Y. Crim. 372, 40 N. Y. Supp. 491.

[a] Charging a Misdemeanor.—An affidavit charging that defendant did "commit the offense of misdemeanor" is sufficient. The particular misdemeanor need not be specified. *Surrels v. State*, 113 Ga. 715, 39 S. E. 299; *Williams v. State*, 107 Ga. 693, 33 S. E. 641.

[b] A charge of the crime of a misdemeanor by the violation of the liquor tax law is too indefinite and is insufficient. *People ex rel. Sandman v. Tuthill*, 79 App. Div. 24, 79 N. Y. Supp. 905.

[c] The grade of the offense, whether a felony or misdemeanor need not be stated. *Dickson v. State*, 62 Ga. 583.

23. **Ala.**—*Fitzpatrick v. State*, 169 Ala. 1, 53 So. 1021; *Miles v. State*, 94 Ala. 106, 11 So. 403. **Ind.**—*Clark v. State*, 171 Ind. 104, 80 N. E. 984; *Blake v. State*, 18 Ind. App. 280, 47 N. E. 942; *Ross v. State*, 9 Ind. App. 35, 36 N. E. 167. **Mass.**—*Com. v. Connelly*, 163 Mass. 539, 40 N. E. 862. **Okla.**—*Sayers v. State*, 10 Okla. Crim. 233, 135 Pac. 1073. **Pa.**—*Luck v. Com.*, 10 Pa. Dist. 500. **Porto Rico.**—*People v. Fontana*, 16 Porto Rico 626. **Tex.**—*Pittman v. State*, 14 Tex. App. 576.

24. *Miles v. State*, 94 Ala. 106, 11 So. 403; *Harkness v. State*, 95 Miss. 506, 48 So. 294.

[a] Where the terms of the statute are qualified by implication the simple following of a statute is insufficient. The charge must be laid according to the true construction of the act. Thus under a statute prohibiting the use of an eight-gauge gun, the complaint must state the particular use intended to be prohibited, namely, killing of game. *Ex parte Peterson*, 119 Cal. 578, 51 Pac. 859.

25. *State v. Morse*, 55 Mo. App. 332.

the exact language of the statute; it is sufficient if words of equivalent import be used.

The formality and definiteness requisite in an information or indictment is not essential,²⁶ but, in some jurisdictions, the same certainty requisite in an indictment or information is necessary in the affidavit.²⁷ The general rule of criminal pleading that the offense must be charged with sufficient certainty to apprise the defendant of the nature of the charge against him applies to preliminary complaints.²⁸

See *Ex parte Flowers*, 2 Okla. Crim. 430, 101 Pac. 860.

[a] It is only necessary to follow the language of the statute as near as may be. *People v. Maguire*, 26 Cal. 635.

26. **Ala.**—*McDaniel v. Cain*, 159 Ala. 344, 48 So. 52; *McGee v. State*, 115 Ala. 135, 22 So. 113. **Cal.**—*People v. Howard*, 111 Cal. 655, 44 Pac. 342. **Ga.** *Williams v. Fears*, 110 Ga. 584, 35 S. E. 699, 50 L. R. A. 685. **Ind.** *Woodsmall v. State*, 181 Ind. 613, nice exactness not essential. **Kan.**—*State v. White*, 76 Kan. 654, 92 Pac. 829, 14 L. R. A. (N. S.) 556; *State v. Moon*, 71 Kan. 349, 80 Pac. 597; *State v. Baker*, 57 Kan. 541, 46 Pac. 947; *State v. Spaulding*, 24 Kan. 4, *quoted in State v. Jarrett*, 46 Kan. 754, 27 Pac. 146. **Me.**—*State v. Corson*, 10 Me. 473. **Mass.** *Com. v. Flynn*, 3 Cush. 525. **Mich.** *People v. Pichette*, 111 Mich. 461, 69 N. W. 739 (complaint need be little more than a verbal information of the offense); *People v. Kahler*, 93 Mich. 625, 53 N. W. 826. **Mo.**—*State v. Flannery*, 173 S. W. 1053; *State v. Santhuff*, 131 Mo. App. 620, 110 S. W. 624; *State v. Morse*, 55 Mo. App. 332; *State v. Cornell*, 45 Mo. App. 94. **N. Y.**—*People ex rel. Sandman v. Tuthill*, 79 App. Div. 24, 79 N. Y. Supp. 905; *People v. Olmsted*, 74 Hun 323, 26 N. Y. Supp. 818; *People v. Payne*, 71 Misc. 72, 129 N. Y. Supp. 1007; *People v. Hiley*, 33 Misc. 163, 68 N. Y. Supp. 361; *In re O'Neill*, 15 N. Y. Crim. 391, 69 N. Y. Supp. 617. **N. C.**—*State v. Gupton*, 166 N. C. 257, 80 S. E. 989. **N. D.**—*State v. Stevens*, 19 N. D. 249, 123 N. W. 888; *State v. Barnes*, 3 N. D. 131, 54 N. W. 541. **Pa.**—*Com. v. Dingman*, 26 Pa. Super. 615. **Porto Rico.**—*People v. Campos*, 17 Porto Rico 1144; *People v. Aranda*, 12 Porto Rico 302; *People v. Torrellas*, 10 Porto Rico 514. **S. D.** *Smith v. Jones*, 16 S. D. 337, 92 N. W. 1084. **Tex.**—*Jefferson v. State*, 24 Tex.

App. 535, 7 S. W. 244; *Bell v. State*, 18 Tex. App. 53, 51 Am. Rep. 293; *Pittman v. State*, 14 Tex. App. 576; *Arrington v. State*, 13 Tex. App. 551; *Cole v. State*, 11 Tex. App. 67. **Utah.** *State v. Pay*, 146 Pac. 369; *State v. Anderson*, 25 Utah 496, 101 Pac. 385. **Wash.**—*State v. Newton*, 29 Wash. 373, 70 Pac. 31.

[a] No formal or detailed charge or description of the offense is necessary in the complaint before the magistrate. All that is required is a general description or designation of the offense so that the defendant may be given a fair opportunity to know the general character and outline of the offense for which he is to have an examination. *State v. McGreevey*, 17 Idaho 453, 464, 105 Pac. 1047.

[b] An information by the prosecuting Attorney, taking the place of a preliminary complaint, is tested by the same rules. *State v. Stevens*, 19 N. D. 249, 123 N. W. 888.

27. *Vandever v. State*, 1 Marv. (Del.) 209, 40 Atl. 1105; *Strader v. State*, 92 Ind. 376; *State v. Beebe*, 63 Ind. 171. See *Brunson v. State*, 97 Ind. 95.

[a] The statute of Indiana does not contemplate that the affidavit state less than is required in the information. *Burroughs v. State*, 72 Ind. 331.

[b] Under a statute providing that the selling of intoxicating liquors to a habitual drunkard after a notice "by any citizen of the township or ward wherein such person resides" is a crime, an affidavit charging notice to have been given by the wife of R. — a citizen, is fatally defective in failing to charge she was a citizen. *Engle v. State*, 97 Ind. 122.

28. **Ala.**—*McGee v. State*, 115 Ala. 135, 22 So. 113; *Rhodes v. King*, 52 Ala. 272; *Crosby v. Hawthorn*, 25 Ala. 221. **Kan.**—*State v. Reedy*, 41 Kan. 193, 24 Pac. 66. **Miss.**—*Wilson v. State*, 80 Miss. 388, 31 So. 787. **Mo.**—*State*

Defective Spelling and Rhetoric.—Neither incorrect spelling,²⁹ improper punctuation,³⁰ or bad grammar will vitiate the preliminary affidavit or complaint,³¹ unless by reason thereof it is rendered uncertain or fails to charge an offense.³²

Second Complaint.—No more is required in a second complaint for a new warrant of arrest than is required in the original.³³

1. Averment of Time.—The time the offense was committed should be alleged.³⁴ It is only necessary to allege the date as distinctly as it is within the power of the affiant;³⁵ the precise date need not be alleged.³⁶ It is not necessary to allege that the offense occurred prior

v. Flannery, 173 S. W. 1053. **N. Y.** *People v. Olmsted*, 74 Hun 323, 26 N. Y. Supp. 818. **N. D.**—*State v. Barnes*, 3 N. D. 131, 54 N. W. 541. **Porto Rico.**—*People v. Campos*, 17 Porto Rico 1144; *People v. Del Moral*, 16 Porto Rico 621; *People v. Guilarte*, 11 Porto Rico 334; *People v. Torrellas*, 10 Porto Rico 514.

[a] The offense must be charged with sufficient definiteness so that the magistrate may know that some particular offense is charged. *People ex rel. Sandman v. Tuthill*, 79 App. Div. 24, 79 N. Y. Supp. 905.

29. *Hampton v. State*, 133 Ala. 180, 32 So. 230, *peurson* for person, and *pestol* for pistol.

30. *Fuller v. State*, 117 Ala. 200, 23 So. 73.

31. The use of the pronoun "her" for the pronoun "them" does not affect the validity of the affidavit. *Dickson v. State*, 62 Ga. 583.

[a] The complaint charged that defendant "did on or about ——— day of ———, ———, and before the making of this complaint, then and there did," etc. It was held the use of the word "did" twice did not render the complaint meaningless or uncertain. *Johnson v. State*, 71 Tex. Crim. 610, 174 S. W. 1047.

32. An affidavit charging that the defendant, "did then and there, unlawfully, feloniously and forcibly make a violent assault upon her, the said Addie Young, then and there, unlawfully and feloniously did ravish and carnally know," was held insufficient for the reason the last clause was not connected with the preceding by a conjunction and is consequently fatally uncertain and incomplete. *Strader v. State*, 92 Ind. 376.

[a] **Use of Word "Did."**—But the omission of the auxiliary "did" be-

fore the verb, charging the offense renders the complaint insufficient. *Barfield v. State*, 39 Tex. Crim. 342, 45 S. W. 1015.

33. *State v. Holm*, 37 Minn. 405, 34 N. W. 748.

34. *People v. Olmsted*, 74 Hun 323, 26 N. Y. Supp. 818.

[a] Omission of the date will not render the complaint void so as to authorize a civil action for damages against the complainant. *Roberts v. Brown*, 43 Tex. Civ. App. 206, 94 S. W. 388.

[b] The omission of the phrase "the year of our Lord," after the date is not a fatal defect. *Com. v. Sullivan*, 14 Gray (Mass.) 97; *Com. v. Doran*, 14 Gray (Mass.) 37.

[c] **Time sufficiently charged**, see *State v. Bishop*, 7 Conn. 181.

[d] **"Then and There."**—The time having once been stated, the charge that defendant did "then and there" commit a designated offense, by reference sufficiently alleges the date of the offense. *Strickland v. State*, 7 Tex. App. 34.

[e] **Spelling out the numbers** in the date is not necessary. *Rawson v. State*, 19 Conn. 292.

[f] **All offenses involving continuous action** and which may be continued from day to day, may be charged in the complaint, as committed from day to day. *State v. Bosworth*, 54 Conn. 1, 4 Atl. 248.

35. Tex. Penal Code, art. 257; *Scott v. State* (Tex. Crim.), 56 S. W. 61; *Williams v. State*, 17 Tex. App. 521.

36. *People v. Polhamus*, 8 App. Div. 133, 11 N. Y. Crim. 372, 40 N. Y. Supp. 491.

[a] **Alleging the offense to have been committed "on or about"** a particular date is sufficiently specific. *Rawson v. State*, 19 Conn. 292.

to the making and filing of the complaint,³⁷ but the date alleged must not be an impossible one,³⁸ or one barred by the statute of limitations.³⁹

2. Averment of Place. — a. *Place of Commission of Crime.* — The complaint must allege with certainty the place in which the offense was committed,⁴⁰ but having once been charged it is not necessary to repeat the averment to every material allegation.⁴¹

The county having been stated in the caption, a charge that the offense was "then and there committed," by reference sufficiently

[b] An allegation that the larceny was committed in February, 1904, is not subject to motion to quash. *State v. White*, 76 Kan. 654, 92 Pac. 829, 14 L. R. A. (N. S.) 556.

37. *Scott v. State* (Tex. Crim.), 56 S. W. 61; *Williams v. State*, 17 Tex. App. 521.

[a] The offense having been committed on the same day the complaint was filed, the complaint need not state that offense was heretofore committed. *Williams v. State*, 17 Tex. App. 521.

38. *Watson v. State* (Tex. Crim.), 45 S. W. 718 (future date); *Womack v. State*, 31 Tex. Crim. 41, 19 S. W. 605 (future date); *Jennings v. State*, 30 Tex. App. 428, 18 S. W. 90 (future date); *Hefner v. State*, 16 Tex. App. 573 (date charged is "one thousand eight hundred eight four"); *Lanham v. State*, 9 Tex. App. 232 (future date).

39. *Collins v. State*, 5 Tex. App. 37. But see *State v. White*, 76 Kan. 654, 92 Pac. 829, 14 L. R. A. (N. S.) 556, and *infra*, IX.

[a] A complaint which alleges the offense to have been committed at such a time that it would be barred is insufficient to sustain a judgment of conviction, unless the statute contains an exception preventing its operation. In such case, judgment will not be arrested for the reason that the proof may have shown defendant to be within the exception. If it alleges the offense to have been committed at a time barred and also at a later time not barred by the statute, the complaint is sufficient. *State v. Hobbs*, 39 Me. 212; *Smith v. Jones*, 16 S. D. 337, 92 N. W. 1084.

40. U. S.—*United States v. Baumert*, 179 Fed. 735. Ind.—*State v. Beebe*, 83 Ind. 171; *Rice v. State*, 15 Ind. App. 427, 44 N. E. 319. Ia.—*State v. Perry*, 117 Iowa 463, 91 N. W. 765. Mont. See Rev. Code, §9032. N. Y.—*People v. Olmsted*, 74 Hun 323, 26 N. Y. Supp.

818. Tex.—*Wright v. State* (Tex. Crim.), 55 S. W. 48; *Smith v. State*, 3 Tex. App. 549. Utah.—Comp. Laws, 1907, §4610.

[a] **Illustrative cases in which the place of the commission of the crime is sufficiently charged.** Conn.—*State v. Bishop*, 7 Conn. 181. Ia.—*State v. Perry*, 117 Iowa 463, 91 N. W. 765. Mass.—*Com. v. Quin*, 5 Gray 478. Porto Rico.—*People v. Masso*, 18 Porto Rico 523; *People v. Birrier*, 18 Porto Rico 260.

[b] **Although better practice requires that the complaint specify the exact place in which the crime was committed, yet it will be sufficient if it can be understood therefrom that the offense was committed within the jurisdiction of the court.** *People v. Aranda*, 12 Porto Rico 302.

[c] **Although the complaint fails to charge the place in which the crime is committed, yet in the absence of objection, it having charged the residence of the defendant, the court will presume the offense was committed at the place named.** *People v. Ayala*, 13 Porto Rico 46.

[d] The place of the commission of the offense must be stated as definitely as can be done by the affiant. Tex. Penal Code, art. 257.

41. *Thayer v. State*, 11 Ind. 287.

[a] An affidavit which in its caption shows the venue, and in the body of which it is stated the offense was committed "at said county," sufficiently charges the locus of the crime. *Rivers v. State*, 144 Ind. 16, 42 N. E. 1021; *Hawkins v. State*, 136 Ind. 630, 36 N. E. 419.

[b] The proper venue having been stated in the caption, it is not necessary that it be stated in the margin. *Com. v. Quin*, 5 Gray (Mass.) 478; *People v. Kahler*, 93 Mich. 625, 53 N. W. 826.

charges the crime to have been in the county named.⁴²

b. *Place of Making Complaint.* — It is not required that the place where the complaint was made be alleged.⁴³

c. *Averment of Jurisdictional Facts.* — Where a prosecution by affidavit and information is permitted in certain specified cases only, facts bringing the case within such provision should be alleged in the absence of a statute to the contrary.⁴⁴

d. *Name and Description of Person and Property Injured.* — The name of the person against whom the offense is committed, if known,⁴⁵ or if the offense be against property, a description of such property⁴⁶ should be alleged.⁴⁷

e. *Negating Exceptions.* — An affidavit must negative the circumstances by which under the statute defining the crime there is no liability,⁴⁸ in accordance with the general rule and its limitations elsewhere discussed.⁴⁹

f. *Separate Counts.* — In those cases in which it is proper to charge the offense in separate counts in the information, as, for example, the charge in separate counts of different means by which the offense was committed, it is proper to do the same in the affidavit or complaint, but like each count of an indictment or information, each count must be sufficient within itself.⁵⁰ Less formality, however,

42. *Strickland v. State*, 7 Tex. App. 34.

43. If the name of the justice of the peace, appearing in the affidavit, is one who is a commissioned justice of the peace, it is immaterial that it does not appear on the face of the affidavit where it was executed. It will be presumed to have been executed within the state. *Abrams v. State*, 121 Ga. 170, 48 S. E. 965.

44. See *State v. Frain*, 82 Ind. 532; *State v. Henderson*, 74 Ind. 23; *Burroughs v. State*, 72 Ind. 334; *Lindsey v. State*, 72 Ind. 40; *Davis v. State*, 69 Ind. 130.

[a] *Grand Jury Not in Session.* Where prosecution by complaint, and information is permissible when the grand jury is not in session, the averment, "And affiant further says that there is no grand jury in session at this term of said Warren circuit court, and that the defendant is now in the jail of said county on said charge," is sufficient. *Sturm v. State*, 74 Ind. 278.

45. Mont. Rev. Codes, §9032. But see *Montgomery v. State*, 7 Ohio St. 107.

[a] Alleging the killing of "Olin Connell" instead of "Olin McConnell," is without prejudice. *State v. Flannery* (Mo.), 173 S. W. 1053.

[b] An information charging the unlawful selling of intoxicating liquors need not state the names of the persons to whom the sale is made. *People v. Polhamus*, 8 App. Div. 133, 11 N. Y. Crim. 372, 40 N. Y. Supp. 491. See the titles "Intoxicating Liquors;" "Larceny."

46. Mont. Rev. Codes, §9032.

47. In a complaint charging burglary, the ownership of the building, where the building is otherwise so described that the defendant cannot be misled as to the property referred to, need not be alleged. *People v. Price*, 143 Cal. 351, 77 Pac. 73.

48. *State v. Cuppy*, 50 Ind. 291; *People v. Haas*, 79 Mich. 449, 44 N. W. 928. Compare *Eason v. State* (Tex. Crim.), 154 S. W. 1196. But see *Com. v. Campbell*, 22 Pa. Super. 98.

[a] If the language of the statute defining the offense is so entirely separable from the exception that the elements constituting the offense can be accurately defined without referring to the exception, a negation of the exception is not required. *Smith v. Jones*, 16 S. D. 337, 92 N. W. 1084.

49. See *infra*, IX.

50. *Diehl v. State*, 157 Ind. 549, 62 N. E. 51.

being required in the preliminary proceedings, the different offenses need not be charged in separate counts.⁵¹

g. *Identifying Statute Violated.*—It is not necessary that the complaint give the date of or otherwise describe the statute alleged to have been violated.⁵²

h. *Effect of Insufficiency of Complaint.*—Where the information is based on the complaint alone, the insufficiency of the latter vitiates the information,⁵³ and the defect cannot be cured by filing a new complaint or affidavit.⁵⁴ But where the information is based, not on the complaint, but on the preliminary examination or commitment, after the latter proceedings the insufficiency of the complaint becomes wholly immaterial.⁵⁵

H. NAME OF ACCUSED.—The person accused of crime must be named⁵⁶ or definitely described⁵⁷ in the charging part of the complaint.⁵⁸ In some jurisdictions⁵⁹ it is not permissible to describe the

51. *State v. Miller*, 74 Kan. 667, 87 Pac. 723. See *State v. Spaulding*, 24 Kan. 4; *Sothman v. State*, 66 Neb. 302, 92 N. W. 303.

52. *Com. v. Keefe*, 7 Gray (Mass.) 332.

[a] The insertion of the wrong chapter number of the statute violated does not render the complaint insufficient in view of the fact that the date of the passage of the act was stated. *People v. Payne*, 71 Misc. 72, 129 N. Y. Supp. 1007.

[b] An error in the statement of the particular statute violated is not material; such an allegation being unnecessary it may be disregarded as being surplusage. *State ex rel. Bassetti v. Judge*, 44 La. Ann. 1093, 11 So. 872.

53. *Engle v. State*, 97 Ind. 122; *Brunson v. State*, 97 Ind. 95; *Strader v. State*, 92 Ind. 376; *State v. Beebe*, 83 Ind. 171; *State v. Cuppy*, 50 Ind. 291; *State v. Gartrell*, 14 Ind. 280; *State v. Downs*, 7 Ind. 237; *Jennings v. State*, 30 Tex. App. 428, 18 S. W. 90; *Paschal v. State*, 9 Tex. App. 205; *Smith v. State*, 3 Tex. App. 549; *Morris v. State*, 2 Tex. App. 502.

54. *Jennings v. State*, 7 Tex. App. 350.

55. Cal.—*People v. Lee Look*, 143 Cal. 216, 76 Pac. 1028; *People v. Cole*, 127 Cal. 545, 59 Pac. 984; *People v. Wheeler*, 73 Cal. 252, 14 Pac. 796; *People v. Velarde*, 59 Cal. 457. Mo.—*State v. Flannery*, 173 S. W. 1053. Utah.—*State v. Anderson*, 35 Utah 496, 101 Pac. 385. Wash.—*State v. Newton*, 29 Wash. 373, 70 Pac. 31.

56. Mo.—Rev. St., 1909, §5020; *State v. Flannery*, 173 S. W. 1053. Tex. Penal Code, art. 257; *Alford v. State*, 8 Tex. App. 545. Utah.—Comp. Laws, 1907, §4610.

[a] The addition of "Jr." to the name of the defendant in the criminal charge is not misleading. *San Francisco v. Randall*, 54 Cal. 408.

[b] The signature of J. M. shows him to be the complainant although from the tenor of the instrument it appears as though he were accusing himself. *Bell v. State*, 18 Tex. App. 53, 51 Am. Rep. 293.

57. Tex. Penal Code, art. 257; *Alford v. State*, 8 Tex. App. 545.

[a] A complaint charging "Bill (or W. H.) Gaines" with a violation of the law is not subject to the objection that it is in the alternative. *Gaines v. State*, 46 Tex. Crim. 212, 78 S. W. 1076.

58. In a complaint charging M. with having committed the crime of larceny, the words "State of Nebraska v. M. and W.," placed in the upper left hand corner of the paper upon which such complaint is written is not sufficient to make such complaint a joint one against M. & W. *White v. State*, 28 Neb. 341, 44 N. W. 443.

59. *Alford v. State*, 8 Tex. App. 545.

[a] The code of New York provides that if the defendant's name be unknown, he may be designated by any name. It was held in *People ex rel. Sampson v. Dunning*, 113 App. Div. 35, 20 N. Y. Crim. 143, 98 N. Y. Supp.

accused by a fictitious name, but this is permitted in others.⁶⁰

I. NAMES OF WITNESSES.—In some jurisdictions the statute requires the setting out of the names of the witnesses and their abodes,⁶¹ but this requirement is merely directory.⁶²

J. AS TO OFFICER.—It is proper to recite the official character of the officer taking the complaint.⁶³

K. AS TO AFFIANT.—Although it is usual to state, in the body of the complaint, the name of the affiant,⁶⁴ this is not required, it being sufficient if the name appears at the conclusion.⁶⁵ Nor is it necessary that it be stated that the affiant is a person competent to make the affidavit.⁶⁶

L. SIGNATURE.—Although the complaint should be signed⁶⁷ or subscribed⁶⁸ by the affiant, it has been held that the signature of the

1067, that to designate is to point out by such a description as to enable the magistrate to know who is intended. Consequently to describe the defendant as John Doe or Richard Roe is insufficient, at least in a case where the complainant knew the defendant or could better describe him.

Compare concurring opinion in *People ex rel. Livingston v. Wyatt*, 186 N. Y. 383, 79 N. E. 330, 9 Ann. Cas. 972, 10 L. R. A. (N. S.) 159.

60. *Cal.*—*People v. Wheeler*, 73 Cal. 252, 14 Pac. 796. *Idaho.*—*State v. Yturaspe*, 22 Idaho 360, 125 Pac. 802. *Kan.*—*State v. King*, 71 Kan. 287, 80 Pac. 606.

61. *Fla. Gen. St.*, 1906, §3927; *Hawkins v. State*, 136 Ind. 630, 36 N. E. 419. For present law, see *Burns' Ann. St. (Ind.)*, 1914, §1990.

62. *State v. Bunnell*, 81 Ind. 315.

[a] A statement of the names of the witnesses and their places of abode is not essential to the jurisdiction of the justice. *Lee v. Van Pelt*, 57 Fla. 94, 48 So. 632.

63. *Pruett v. State*, 141 Ala. 69, 37 So. 343, holding the affidavit should have stated that the clerk of the circuit court was also ex officio clerk of the county court, but this omission would not invalidate it.

64. An erroneous recital of the name of the affiant is not prejudicial. *Reeves v. State*, 116 Ala. 481, 23 So. 28; *People v. George*, 121 Cal. 492, 53 Pac. 1098.

65. *Beller v. State*, 90 Ind. 448; *Dunn v. State (Tex. Crim.)*, 158 S. W. 300; *Schnair v. State (Tex. Crim.)*, 84 S. W. 592; *Taul v. State (Tex. Crim.)*,

61 S. W. 394; *Malz v. State*, 36 Tex. Crim. 447, 34 S. W. 267, 37 S. W. 748; *Upton v. State*, 33 Tex. Crim. 231, 26 S. W. 197.

[a] **Name in Body Different From Signature.**—Where the name in the body of the complaint differs from that signed at the bottom, the name in the body not being an essential part of the complaint will be treated as surplusage or it may be amended. *Malz v. State*, 36 Tex. Crim. 447, 34 S. W. 267, 37 S. W. 748.

66. *Ind.*—*Blake v. State*, 18 Ind. App. 280, 47 N. E. 942. *Mich.*—*People v. Payment*, 109 Mich. 553, 67 N. W. 689, 3 Det. Leg. N. 210; *People v. Isham*, 109 Mich. 72, 67 N. W. 819. *Mo.* *State v. Downing*, 22 Mo. App. 504. *Tex.*—*Steinke v. State (Tex. Crim.)*, 86 S. W. 753; *Dodson v. State*, 35 Tex. Crim. 571, 34 S. W. 754.

67. *Tex. Penal Code*, art. 257; *Malz v. State*, 36 Tex. Crim. 447, 34 S. W. 267, 37 S. W. 748.

[a] Where the affiant Horace Wright was illiterate and the justice signed his name Horace White, the complaint was held to be good. *Abernathy v. State*, 52 Tex. Crim. 41, 105 S. W. 185.

[b] A complaint made by "Samuel W. Richardson, city marshal of C—," signed "S. W. Richardson," properly certified by the magistrate, sufficiently shows it was signed and sworn to by the same person. *Com. v. Wallace*, 14 Gray (Mass.) 382.

[c] **A signature by mark** is sufficient signature. *Flowers v. State*, 1 Ala. App. 262, 56 So. 36; *People v. McDaniels*, 141 Cal. 113, 74 Pac. 773.

68. *Kan.*—*State v. King*, 71 Kan.

affiant is not necessary to its validity.⁶⁹ If the affiant signs the complaint by a fictitious name by which he is generally known or by which he can be identified his signature is sufficient.⁷⁰ A variance between affiant's name as stated in the body of the complaint and in the jurat is not prejudicial.⁷¹ The signature of the prosecuting attorney is not required.⁷²

Attestation.—Although it is customary to have the signature of the complainant, when made by mark, attested by a subscribing witness, it is not necessary that such should be done.⁷³

M. APPROVAL BY THE PROSECUTING ATTORNEY.—By statute it is sometimes required that the complaint be first approved by the prosecuting attorney.⁷⁴

N. VERIFICATION.—The preliminary complaint of a private citizen must be sworn to.⁷⁵ This fact is shown by the jurat which is an es-

287, 80 Pac. 606. **Mass.**—*Com. v. Barhight*, 9 Gray 113. **Mont.**—*Rev. Codes*, §9032. **Tex.**—*See Penal Code*, art. 257.

[a] A signature in the body of the complaint above the charge was held to be insufficient in *Com. v. Barhight*, 9 Gray (Mass.) 113.

69. **Ala.**—*Holman v. State*, 144 Ala. 95, 39 So. 646; *Flowers v. State*, 1 Ala. App. 262, 56 So. 36. **Mich.**—*People v. Clement*, 72 Mich. 116, 40 N. W. 190. **Miss.**—*Husbands v. State*, 62 So. 418.

70. "The object of the law is accomplished when an affidavit is actually made by a real person, and the name is not material, provided it is one by which the affiant is commonly known, or is a name which supplies the means of identifying him." Such an affidavit will be upheld unless it is shown the affiant was not commonly known by such name, or else shows the fictitious name was used for a corrupt purpose. *State v. Cooper*, 96 Ind. 331.

71. *Lay v. State*, 180 Ind. 1, 102 N. E. 274.

72. *People v. Aranda*, 12 Porto Rico 302.

73. *Com. v. Sullivan*, 14 Gray (Mass.) 97; *State v. Depoister*, 21 Nev. 107, 25 Pac. 1000.

[a] The signature of the justice to the jurat is sufficient attestation of a signature by mark. *People v. McDaniels*, 141 Cal. 113, 74 Pac. 773.

74. *See United States v. Sapinkow*, 90 Fed. 654.

[a] §1677, U. S. Comp. St., 1913, provides that "Warrants of arrest for violation of internal-revenue laws may be issued by the United States com-

missioners upon the sworn complaints of a . . . or private citizen, but no such warrant of arrest shall be issued upon the sworn complaint of a private citizen unless first approved in writing by a United States district attorney."

[b] The information being dispensed with in Indiana it is required by statute that the affidavit be indorsed by the district attorney "Approved by me," and that this indorsement be signed by him. *Burns' Ann. St.*, 1914, §1990.

[c] **Indorsement Added Before Trial.** Upon discovery before trial that the prosecuting attorney neglected to indorse his approval, the court may permit him to indorse it as required by the statute. *Cole v. State*, 169 Ind. 393, 82 N. E. 796.

75. **Ga.**—*See Wiggins v. State*, 14 Ga. App. 314, 80 S. E. 724. **Ind.**—*Lay v. State*, 180 Ind. 1, 102 N. E. 274; *Swiney v. State*, 119 Ind. 478, 21 N. E. 1102; *Cantwell v. State*, 27 Ind. 505. **Minn.**—*State v. Richardson*, 34 Minn. 115, 24 N. W. 354. **Miss.**—*Husbands v. State*, 62 So. 418. **Mo.**—*Rev. St.*, 1909, §5020; *State v. Flannery*, 173 S. W. 1053. **Mont.**—*Rev. Codes*, §9032. **Neb.**—*Richards v. State*, 22 Neb. 145, 34 N. W. 346; *Lewis v. State*, 15 Neb. 89, 17 N. W. 366. **N. Y.**—*People ex rel. Livingston v. Wyatt*, 186 N. Y. 383, 79 N. E. 330, 9 Ann. Cas. 972, 10 L. R. A. (N. S.) 159. **Tex.**—*Scott v. State*, 9 Tex. App. 434; *Dishough v. State*, 4 Tex. App. 158. **Vt.**—*State v. Freeman*, 59 Vt. 661, 10 Atl. 752.

Compare In re Sing, 13 Cal. App. 736, 110 Pac. 693 (holding the complaint initiating criminal proceedings

sential part of the affidavit,⁷⁶ and can be placed there only by the officer administering the oath.⁷⁷ If the jurat appears in the body of the complaint, instead of at its usual place, the complaint will be sufficient.⁷⁸ If the complaint be oral and reduced to writing by the magistrate, a written verification need not be appended to it.⁷⁹

Where Sworn.—It is not required that the complaint be sworn to in open court.⁸⁰

Description of Affiant.—The jurat need not show that the affiant is a person competent under the statute to make a complaint.⁸¹

Date.—The jurat should be dated.⁸²

need not be verified); *State v. Killet*, 2 Bailey (S. C.) 289.

[a] Where the preliminary information, properly sworn to, charging the defendant in general terms with keeping a disorderly house, states it is based upon facts in the affidavit annexed, and the paper annexed is not verified, the information is insufficient to support the warrant and commitment. *People ex rel. Wilson v. Warden of City Prison*, 151 App. Div. 108, 135 N. Y. Supp. 841.

Verification upon information and belief, see *supra*, V. B.

[b] **Requirement Implied.**—Where criminal proceedings originate upon complaint, it is implied that the complaint must be on oath or affirmation. *Campbell v. Thompson*, 16 Me. 117.

76. *United States v. Baumert*, 179 Fed. 735; *Montgomery v. State*, 60 Tex. Crim. 303, 131 S. W. 1087; *Carroll v. State*, 56 Tex. Crim. 78, 118 S. W. 1031; *Jennings v. State*, 30 Tex. App. 428, 18 S. W. 90; *Neiman v. State*, 29 Tex. App. 360, 16 S. W. 253; *Robertson v. State*, 25 Tex. App. 529, 8 S. W. 659; *Scott v. State*, 9 Tex. App. 434; *Lanham v. State*, 9 Tex. App. 232. Compare *Fry v. Trippett*, 16 Lea (Tenn.) 516.

[a] **The jurat is sufficient to show** that complainant was sworn without the allegation to this effect at the commencement of the complaint. *Lay v. State*, 180 Ind. 1, 102 N. E. 274.

[b] **Amendment.**—(1) The affixing of a jurat to a complaint after trial does not validate it. *Scott v. State*, 9 Tex. App. 434. (2) This complaint would have been sufficient if, prior to the trial, the court, after notice to defendant, authorized an amendment of the complaint. But an amendment without permission of court and notice to the defendant will not cure the

omission. *Montgomery v. State*, 60 Tex. Crim. 303, 131 S. W. 1087; *Skaggs v. State*, 56 Tex. Crim. 79, 119 S. W. 106.

[c] **In the federal courts** if the affidavit be taken before a notary public, it must have a certificate attached showing that the person certifying it was at the time a notary public and authorized by the laws of the state or district to take and certify oaths or affirmations, and that same is taken and subscribed as required by the laws of the state or district. If taken before a state judge or a justice of the peace there must be a like certificate and so of commissioners outside the district where the affidavit is to be used. *United States v. Baumert*, 179 Fed. 735.

[d] **Form of Jurat.**—(1) A jurat stating "Subscribed and sworn to this 3rd day of September, 1872. A. S. Burr, J. P." is sufficient. *Hosea v. State*, 47 Ind. 180. (2) Likewise the jurat, "Received and sworn to," etc. *Com. v. Sullivan*, 14 Gray (Mass.) 97; *State v. Freeman*, 59 Vt. 661, 10 Atl. 752 (taken and sworn before me).

[e] **The omission of the words "before me"** will not vitiate an affidavit to be used before the officer administering it. In the Matter of Teachout, 15 Mich. 346.

77. *Neiman v. State*, 29 Tex. App. 360, 16 S. W. 253.

78. *Ex parte Padilla*, 11 Porto Rico 292.

79. *Murphy v. State*, 124 Wis. 635, 102 N. W. 1087.

80. *Hamilton v. State*, 153 Ala. 63, 44 So. 968.

81. *Burk v. State*, 44 Tex. Crim. 541, 72 S. W. 585.

82. *Ross v. State*, 9 Ind. App. 35, 36 N. E. 167.

[a] **Where Jurat Omits Date, Com-**

Official Character of Officer.—It is necessary that the official character of the officer before whom the complaint is taken be stated,⁸³ but if the official character of the officer is stated in the body of the affidavit, it need not be repeated in the jurat.⁸⁴

Signature.—The officer administering the oath must sign the jurat.⁸⁵

Seal.—The seal of the officer before whom the affidavit is made should be attached to the jurat.⁸⁶

plaint Insufficient.—Since it is necessary that information be predicated on a complaint made prior to the information, where both the complaint and information were filed on the same day, a complaint failing to show it to have been sworn to prior to making of the information is insufficient. *Bradberry v. State* (Tex. Crim.), 152 S. W. 169. But see *Ross v. State*, 9 Ind. App. 35, 36 N. E. 167, omission not fatal.

[b] **Abbreviations** (1) of the month and of the state are objectionable. *State v. Quintini*, 76 Miss. 498, 25 So. 365. (2) But it is uniform practice to state the year in figures. *Com. v. Keefe*, 7 Gray (Mass.) 332.

83. *Com. v. Taber*, 155 Mass. 5, 28 N. E. 1056 (holding the description "justice of the peace authorized to issue warrants as aforesaid" by reference to the caption sufficiently designates the official character of the magistrate); *Micau v. State* (Tex. App.), 19 S. W. 762; *Robertson v. State*, 25 Tex. App. 529, 8 S. W. 659.

[a] "It was unnecessary for the word 'Clerk,' or the words 'Clerk of the circuit court,' or these with the words 'ex officio clerk of the county court' added, or other descriptive words to follow the name of the officer as subscribed to the jurat of the affidavit." *Pruett v. State*, 141 Ala. 69, 37 So. 343.

[b] The affidavit showed it was taken before "W. K. M. clerk." The record showed the information was filed in the office of the clerk of the circuit court and that W. K. M. was such clerk. It was held this was sufficient to show the authority of W. K. M. to administer the oath, etc. *State v. Downing*, 22 Mo. App. 504.

[c] A motion to quash an affidavit, purporting to have been made before A. B. without designating his office, having been overruled, it must be presumed that the court below was fully advised that he was a person author-

ized to administer oaths. *Brooster v. State*, 15 Ind. 190.

[d] The letters "J. P." are a sufficient indication of the official character of the officer. *Abrams v. State*, 121 Ga. 170, 48 S. E. 965; *Hawkins v. State*, 136 Ind. 630, 36 N. E. 419. *Contra*, *Neiman v. State*, 29 Tex. App. 360, 16 S. W. 253, but his official character would be sufficiently shown by the letters and figures "J. P. Prec. No. —, W. C."

[e] **Precinct Number Omitted.**—A jurat by a justice of the peace in which his precinct number was omitted was held sufficient in *Gentry v. State*, 62 Tex. Crim. 497, 137 S. W. 696, especially when the number was stated in the indorsement.

84. *Smith v. State*, 24 Ind. App. 417, 56 N. E. 924.

85. *Morris v. State*, 2 Tex. App. 502.

[a] But where the justice testifies that he swore the complaining witness to the complaint, his failure to sign the jurat does not invalidate it. *People v. Lane*, 124 Mich. 271, 82 N. W. 896, 7 Det. Leg. N. 206.

[b] **Jurat Signed by Mechanical Means.**—Though the practice of signing the jurat by means of a rubber stamp is not one to be commended, in the absence of any showing as to that fact, by way of affidavit or in the bill of exceptions, the appellate court will not take judicial knowledge of that fact. *Rosenstein v. State*, 9 Ind. App. 290, 36 N. E. 652.

86. **Notary's Seal.**—As a consequence of the statutory provision declaring the official acts of a notary void unless attested by his seal, an affidavit purporting to have been sworn to before a notary, which is not attested by his seal is insufficient. But if the court presume the notary had a seal, then it seems that if the seal is attached to the jurat before the ruling on the motion to quash, the affidavit,

O. FILING.—If no affidavit or complaint has been filed the court is without jurisdiction.⁸⁷ It should be filed in the manner and with the court or officer prescribed by law.⁸⁸ But if filed in the wrong court, it may be refiled in the proper place.⁸⁹ In some states it may be filed prior to, or with the information.⁹⁰ The requirement that the affidavit

by virtue of the doctrine of relation will be valid. *Miller v. State*, 122 Ind. 355, 24 N. E. 156.

[a] **Absence of Mayor's Seal.**—In *Qualter v. State*, 120 Ind. 92, 22 N. E. 100, the record affirmatively showing that the affidavit had been sworn to, it was held that the omission of the mayor to attach his seal to the jurat was not of sufficient materiality to warrant a reversal.

[b] **The seal of the court** (1) need not be attached to the jurat of an affidavit sworn to before its clerk to be used only in that court. *Mountjoy v. State*, 78 Ind. 172. (2) The court ex officio takes notice of its officers and their signatures and the appellate court presumes the lower court noticed that J. S. H. was its clerk, and that the signature attesting the affidavit was his. *Hipes v. State*, 73 Ind. 39; *Buell v. State*, 72 Ind. 523. See *Beller v. State*, 90 Ind. 448; *Mountjoy v. State*, 78 Ind. 172. (3) Moreover, such a defect presented for the first time in arrest of judgment will not warrant a reversal. *Rosenstein v. State*, 9 Ind. App. 290, 36 N. E. 652.

87. *Ross v. State* (Tex. Crim.), 106 S. W. 340. See *supra*, V, A.

[a] **Complaint Lost.**—If the complaint has been filed but is afterwards lost the court still retains its jurisdiction. *Ross v. State* (Tex. Crim.), 106 S. W. 340. See *infra*, VII.

[b] **But in Michigan**, "the complaint is not required to be in writing or signed by the party, or filed with the justice. The justice may reduce it to writing if he sees fit, and ordinarily this is the best practice." *People v. Clement*, 72 Mich. 116, 40 N. W. 190.

88. **It Need Not Be Filed in Open Court.**—*State v. Duggins*, 146 Ind. 427, 45 N. E. 603.

[a] **In Missouri**, it is required by statute that the affidavit be filed with the justice or delivered to the prosecuting attorney. In the latter case it is filed with the information. *State v. Sartin*, 66 Mo. App. 626.

[b] Under a statute requiring the person making the affidavit to file it with the clerk of court or deposit it with the prosecuting attorney, it was held in *State v. Daly*, 49 Mo. App. 184, that the affidavit may be properly lodged with the assistant prosecuting attorney of the St. Louis court of criminal correction.

[c] A complaint which has been filed in the justice's court, may be later filed in the county court, and then an information may be filed thereon. *Griffin v. State*, 54 Tex. Crim. 374, 112 S. W. 1066; *Mitchell v. State*, 46 Tex. Crim. 258, 79 S. W. 26; *Marrow v. State*, 37 Tex. Crim. 330, 39 S. W. 944.

89. Where the defendant moved to strike out a complaint because it was not filed in the county court, the court properly ordered it to be filed. *Day v. State*, 21 Tex. App. 213, 17 S. W. 262.

90. **Colo.**—*White v. People*, 8 Colo. App. 289, 45 Pac. 539. **Ind.**—*State v. Lauderman*, 89 Ind. 600; *State v. De Long*, 88 Ind. 312. **Kan.**—*State v. Clark*, 34 Kan. 289, 8 Pac. 528. **Mo.** *State v. Schnettler*, 181 Mo. 173-185, 79 S. W. 1123; *State v. White*, 55 Mo. App. 356; *State v. Shaw*, 26 Mo. App. 383 (if the complaint is deposited with the prosecuting attorney, when the information is filed it must be accompanied by the complaint). **Tex.**—*Germany v. State*, 62 Tex. Crim. 276, 137 S. W. 130, 1913 C, Ann. Cas. 477; *Johnson v. State*, 47 Tex. Crim. 580, 85 S. W. 274; *Jennings v. State*, 30 Tex. App. 428, 18 S. W. 90; *Wilson v. State*, 27 Tex. App. 47, 10 S. W. 749, 11 Am. St. Rep. 180; *Johnson v. State*, 17 Tex. App. 230. Compare *Sprowles v. State* (Tex. Crim.), 143 S. W. 622, stating it is requisite that a complaint be filed before the information. See *Thornberry v. State*, 3 Tex. App. 36.

[a] Where there are two complaints in the case, one filed prior to and the other subsequent to the information, the latter has no standing in the case and should have been stricken from the

be filed by the affiant is directory.⁹¹ It is not necessary that the complaint bear a file mark,⁹² for if the information to which the complaint is attached bears the file mark of the court, both will be deemed to have been filed.⁹³ And the failure to endorse the file mark on a complaint may be cured by an order nunc pro tunc in the trial court, but not on appeal.⁹⁴ An order book entry of the filing of the complaint is not required.⁹⁵

VI. RECONSIDERATION AND RESUBMISSION OF AND SUCCESSIVE INDICTMENTS AND INFORMATIONS.—A. **RECONSIDERATION.**—The powers of a grand jury over a bill of indictment, save only in so far as they may act upon a resubmission thereof for the purposes of amendment,⁹⁶ or otherwise,⁹⁷ are ended when it is returned into and received by the court.⁹⁸

They cannot, in case the bill is returned “a true bill,” reconsider the matter and vote to withdraw the indictment.⁹⁹ Nor can a bill returned “not a true bill” be reconsidered by that jury,¹ though a

records. *Hardy v. State* (Tex. App.), 13 S. W. 1008.

[b] **Attaching the affidavit to the information** (1) is permissible (*Walker v. People*, 22 Colo. 415, 45 Pac. 388; *State v. Clark*, 34 Kan. 289, 8 Pac. 528 [attaching to information is not prejudicial]), (2) but not necessary. *White v. People*, 8 Colo. App. 289, 45 Pac. 539.

[c] **In Term Time or Vacation.**—(1) In Indiana the statute authorizes the filing of the affidavit and information for an offense amounting to a misdemeanor, at any time whether in term time or in vacation. *Hoover v. State*, 110 Ind. 349, 11 N. E. 434. (2) §1989, *Burns' Ann. St.*, 1914, providing that “all offenses . . . may be prosecuted . . . by affidavit filed in term time,” when considered in connection with the following section should be read, “by affidavit made in term time,” instead of “filed.” *Cole v. State*, 169 Ind. 393, 82 N. E. 796.

91. *State v. De Long*, 88 Ind. 312.

92. *People v. Hiltel*, 131 Cal. 577, 63 Pac. 919; *Goss v. State* (Tex. Crim.), 40 S. W. 263.

93. *Wright v. Davis*, 120 Ga. 670, 48 S. E. 170; *Stinson v. State*, 5 Tex. App. 31.

[a] The complaint not appearing to have been filed, and it nowhere appearing that the complaint was not attached to the information, the filing of the information will be attributed to both. *Steinke v. State* (Tex. Crim.), 86 S. W. 753; *Castleman v. State*, 39

Tex. Crim. 1, 43 S. W. 991, 44 S. W. 828; *Schott v. State*, 7 Tex. App. 616.

94. *Steinke v. State* (Tex. Crim.), 86 S. W. 753; *Shrader v. State* (Tex. App.), 17 S. W. 1101.

[a] **Presumption.**—Where a complaint was filed on the day of the trial by order of court, it will be presumed it was among the papers of the case and that it may have been attached to the information, for then the filing of the information would be sufficient filing of the complaint. *Castleman v. State*, 39 Tex. Crim. 1, 43 S. W. 991, 44 S. W. 828.

95. *State v. Duggins*, 146 Ind. 427, 45 N. E. 603.

96. As to resubmission for purpose of amendment, see *infra*, XII.

97. As to resubmission generally, see *infra*, VI, B.

98. *Fields v. State*, 121 Ala. 16, 25 So. 726. And see *State v. Brown*, 81 N. C. 568.

[a] Evidence that grand jury has reconsidered a bill, immaterial and palpably irrelevant. *Fields v. State*, 121 Ala. 16, 25 So. 726.

99. See *Fields v. State*, 121 Ala. 16, 25 So. 726.

1. *State v. Harris*, 91 N. C. 656; *State v. Brown*, 81 N. C. 568, *citing* 4 Bl. Com. 305. But see *People v. Sheriff*, 11 N. Y. Civ. Proc. 172, holding the jury has full control of every charge until its final discharge, and that during the same session it may reconsider its own actions.

new bill may be submitted, however.² This rule, however, does not preclude a reconsideration of their finding before any report to the court and while the matter is still before them.³

B. RESUBMISSION.—Under statutes in some states, the dismissal of a charge by the grand jury does not prevent the same from being again submitted to a grand jury, as often as the court may direct.⁴ So too, under some statutes, there may be a resubmission of the indictment to the same or another grand jury upon the sustaining of motions to set aside or to quash, or of demurrers thereto;⁵ or if the court be of the opinion the facts constitute a higher degree of offense.⁶

Even in the absence of statute, neither the mere finding, nor refusing to find, an indictment by one grand jury will affect the power of the same or another grand jury to indict.⁷

2. *State v. Harris*, 91 N. C. 656; *State v. Brown*, 81 N. C. 568; *State v. Branch*, 68 N. C. 186.

[a] In England a grand jury which ignores a bill cannot find another against the same person for the same offense at the same assizes or sessions, and if another bill is sent before them they should ignore it. *Reg. v. Humphreys*, 1 Car. & M. 601, 41 E. C. L. 327.

3. *United States v. Simmons*, 46 Fed. 65.

4. **Ark.**—Kirby's Dig., 1904, §2213; *Marshall v. State*, 84 Ark. 88, 104 S. W. 934. **Cal.**—Penal Code, §942. **Ia.** Code, 1897, §5273; *State v. Evans*, 111 Iowa 80, 82 N. W. 429; *State v. Collis*, 73 Iowa 542, 35 N. W. 625. **Ky.** *Sutton v. Com.*, 97 Ky. 308, 30 S. W. 661, under Crim. Code, §116. **Nev.** Rev. Laws, 1912, §7044; *Ex parte Job*, 17 Nev. 184, 30 Pac. 699. **N. Y.**—Code Crim. Proc., §270; *People v. Clements*, 5 N. Y. Crim. 288.

[a] But only to a different grand jury from one originally considering charge, under the statute in at least one of such states. *People v. Sheriff*, 11 N. Y. Civ. Proc. 172.

5. See the following: **Ala.**—Weston v. State, 63 Ala. 155, under §4819, Code, 1876. **Nev.**—*Ex parte Job*, 17 Nev. 184, 30 Pac. 699. **N. Y.**—*People v. Rosenthal*, 197 N. Y. 394, 401, 90 N. E. 991. **Ore.**—*Ex parte Jung Shing*, 145 Pac. 637, under §1483, Lord's Laws.

And see generally the statutes of the several states.

[a] The district attorney may, before the defendant is required to plead, under §42, Rev. St., resubmit the case to the same or another grand jury

where the indictment returned was defective. *People v. Bissert*, 71 App. Div. 118, 75 N. Y. Supp. 630.

As to resubmission for purpose of amendment, see *infra*, XIII.

6. Kirby's Dig., 1904, §2403; *Nash v. State*, 73 Ark. 399, 405, 84 S. W. 497; *Ex parte Johnson*, 71 Ark. 47, 70 S. W. 467.

[a] Though a statute provides that if during the trial the court is of the opinion that the facts proved constitute a higher grade of offense than that alleged, it may suspend the trial and resubmit the case to the grand jury, it is proper for the court *before trial*, if it is of such opinion, to resubmit the case to the grand jury. *Nash v. State*, 73 Ark. 399, 405, 84 S. W. 497; *Ex parte Johnson*, 71 Ark. 47, 70 S. W. 467.

7. **U. S.**—*United States v. Martin*, 50 Fed. 918, citing *Whart. Crim. Pl. & Pr.*, §446. **Ga.**—See *Christmas v. State*, 53 Ga. 81. **Mo.**—*State v. Green*, 111 Mo. 585, 20 S. W. 304.

[a] The court in *United States v. Martin*, 50 Fed. 918, said: "The doctrine in this state (meaning Virginia) and the other American states is that the ignoring of an indictment by one grand jury is no bar to a subsequent grand jury investigating the charge and finding an indictment for the same offense."

[b] It has been the practice on the presentation of a defective "true bill" for the prosecuting attorney to amend it and resubmit it to the grand jury, who again returns it a "true bill." The better practice is to submit a new bill, however. *State v. Brown*, 81 N. C. 568.

An order of court is essential to the resubmission of the cause,⁸ by express statutory provision in some states, where the charge has been dismissed by the grand jury,⁹ or where a demurrer has been inter-

8. "When a defendant has been once discharged on a return of 'ignoramus,' a new bill sent up without a fresh hearing, and *without leave of court*, should be promptly quashed in the absence of affirmative proof that the course taken was required to meet some grave emergency, or to provide for some urgent public need." Rowand v. Com., 82 Pa. 405.

[a] **Order Not To Be Granted Pro Forma.**—"While the court has power to permit the charges to be again submitted to the grand jury such power should be sparingly and discriminately used. It is a practice that ought not to be encouraged, nor granted pro forma. The court should act judicially, and permit such resubmission only when facts are presented which justify such action." People v. Neidhart, 35 Misc. 191, 71 N. Y. Supp. 591, 15 N. Y. Crim. 475.

[b] The application of the district attorney to resubmit the cause to the grand jury because he does not agree with the grand jury and is of the opinion they misunderstood the law and that they will, if the charge is again submitted, find an indictment, is not an appeal to the judicial discretion and cannot be granted. People v. Neidhart, 35 Misc. 191, 71 N. Y. Supp. 591, 15 N. Y. Crim. 475.

[c] **In the absence of allegations of irregularity, oversight, mistake or fraud** the court will not grant the motion of private counsel for the prosecution to send an indictment to a second grand jury after it has been ignored by the first. Com. v. Whitaker, 25 Pa. Co. Ct. 42; Com. v. Priestly, 24 Pa. Co. Ct. 543.

[d] **If an order of resubmission be uncertain**, it can be made certain, and must be presumed to have been so made by the subsequent direction of the court. *Ex parte Job*, 17 Nev. 184, 30 Pac. 699.

9. See the following; Ark.—Kirby's Dig., 1904, §2213; Marshall v. State, 84 Ark. 88, 104 S. W. 934. Cal.—Penal Code, §942. Ia.—Code, 1897, §5273; State v. Collis, 73 Iowa 542, 35 N. W. 625 (under §4290, Code, 1873). Ky. Sutton v. Com., 97 Ky. 308, 30 S. W.

661, under Crim. Code, §116. Nev. Rev. Laws, 1912, §7044; *Ex parte Job*, 17 Nev. 184, 30 Pac. 699. N. Y.—Crim. Code, §270; People v. Warren, 109 N. Y. 615, 15 N. E. 880. Okla.—Rea v. State, 3 Okla. Crim. 269, 105 Pac. 381, under §5351, Wilson's Rev. & Ann. St., 1903. And see generally the statutes.

[a] An order for a resubmission is only necessary, under some such statutes, when the charge against the person has been dismissed by a grand jury; and there can be no dismissal of a charge unless the grand jury considers it and takes some action upon it. People v. Sebring, 14 Misc. 31, 37, 35 N. Y. Supp. 237.

[b] No order of court necessary where a new charge is presented to the grand jury. People v. Warren, 109 N. Y. 615, 15 N. E. 880.

[c] Such statutes relate "merely to the matter of the *submission* of such causes to the grand jury. After they have been once dismissed, they can be resubmitted only by direction of the court; that is, the court can require the grand jury to again investigate the charge, only by directing it to be resubmitted. But the power of the grand jury in the premises is not dependent upon the order or direction of the court; its powers and duties are prescribed by other provisions of statute. . . . The general nature of the powers and duties imposed upon the grand jury by these provisions is in no manner qualified or limited by section 4290." State v. Collis, 73 Iowa 542, 35 N. W. 625, followed in Marshall v. State, 84 Ark. 88, 104 S. W. 934; State v. Reinhart, 26 Ore. 466, 38 Pac. 822, wherein the court said: "It is also claimed that the power of the grand jury is at an end when it returns an indictment into court, and that it cannot afterward return another indictment against the same defendant for the same offense, unless by order of the court the case is resubmitted to them. We can find no warrant in law for this contention. By their oaths grand jurors are bound to true presentment or indictment make of all crimes committed within their county that shall come to their knowl-

posed and sustained to the indictment as originally returned.¹⁰

edge (Hill's Code, §1236); and in discharge of this obligation they not only have the right, but it is their duty, to return a new indictment against a defendant, if, in their opinion, the former indictment, which is still pending and undisposed of, is defective or insufficient, unless some proceeding has been had on such indictment which amounts to a bar to further prosecution. This is said to be the better and more usual practice (*Perkins v. State*, 66 Ala. 457; *Stuart v. Commonwealth*, 28 Gratt. 950); and the power of the grand jury in this respect is not dependent upon the order of the court resubmitting the cause to them. *State v. Collis*, 73 Iowa 542, 35 N. W. 625."

[d] The rule announced in *State v. Reinhart*, 26 Ore. 466, 38 Pac. 822, is held decisive of the question presented in *Ex parte Jung Shing* (Ore.), 145 Pac. 637, wherein because of the constitutional amendment abolishing the death penalty, first degree murder was left without a penalty. As a consequence an indictment charging first degree murder was ordered to be resubmitted. It was held that irrespective of the validity of such order, an indictment found charging murder in the second degree is valid because if the order is to be treated as a dismissal a prosecution for the lesser offense was not barred, or if the order is not to be so treated, a second indictment may be found pending the first.

10. *Com. v. Swanger*, 108 Ky. 579, 57 S. W. 10 (holding §170 of the Criminal Code providing for order of court for resubmission of cause upon sustaining of demurrer on designated grounds is not mandatory upon the court, which may refuse such order): *People v. Rosenthal*, 197 N. Y. 394, 401, 90 N. E. 991. See *People v. Clements*, 5 N. Y. Crim. 288.

[a] "By the express command of the statute a judgment sustaining a demurrer is a bar to a further prosecution for the same offense unless such an order is made." *People v. Rosenthal*, 197 N. Y. 394, 401, 90 N. E. 991.

[b] Pending the demurrer, or after submission of the case to the jury and before verdict, the grand jury has no power to investigate the same charge or find a second indictment without a

court order. *People v. Bissert*, 71 App. Div. 118, 75 N. Y. Supp. 630.

[c] In Alabama, on sustaining a demurrer to an indictment, if the defendant will not consent to an amendment, the court may order another indictment to be preferred at the same or at a subsequent term. Code, 1907, §7156; *Cunningham v. State*, 117 Ala. 59, 23 So. 693.

[d] In Kentucky, unless the demurrer is sustained because it appears the offense was not committed within the jurisdiction of the court, or the indictment improperly charges more than one offense, or contains matters constituting a legal defense, the commonwealth is entitled to have the cause submitted to another grand jury. *Com. v. Shelby*, 18 Ky. L. Rep. 781, 38 S. W. 490, under Crim. Code, §170.

[e] Granting of Order Discretionary.—(1) Although the resubmitting of the case after a demurrer is sustained rests in the discretion of the court (*Ex parte Williams*, 116 Cal. 512, 48 Pac. 499), (2) the refusal of the court to so submit to another grand jury, where the defendant has not been put in jeopardy, is not a bar to an investigation by another grand jury. *Com. v. Swanger*, 108 Ky. 579, 57 S. W. 10. See *State v. Peterson*, 61 Minn. 73, 77, 63 N. W. 171, 28 L. R. A. 324, holding that the dismissal of an indictment on the motion of the county attorney after the same has been attacked by demurrer is not equivalent to a decision of the court sustaining the demurrer, so as to prevent the case from being resubmitted to the same or another grand jury, without the order of the court.

[f] Order of Resubmission Determines Validity of Subsequent Indictment.—The right to find a new indictment and its validity does not depend upon the custody of the accused but depends solely upon the order resubmitting the charge to a new grand jury after the original indictment has been defeated upon demurrer. *People v. Carson*, 155 Cal. 164, 171, 99 Pac. 970; *People v. Bissert*, 117 App. Div. 118, 75 N. Y. Supp. 630.

[g] Order cannot be made until after the court has disposed of the

C. SUCCESSIVE INDICTMENTS AND INFORMATIONS. — 1. Indictments.

a. *In General*.—The general rule is that a new or subsequent indictment, against the same person, charging the same offense for which he has been previously indicted, may be found by the same or another grand jury¹¹ to replace a defective indictment¹² or one

demurrer. *People v. Bissert*, 71 App. Div. 118, 75 N. Y. Supp. 630.

[h] **The operative effect of the order is exhausted** on the submission to the jury and the subsequent finding of another indictment is without authority. *People v. Clements*, 5 N. Y. Crim. 288.

11. **U. S.**—*Thompson v. United States*, 202 Fed. 401, 120 C. C. A. 575; *United States v. Herbert*, 5 Cranch C. C. 87, 26 Fed. Cas. No. 15,354. **Ala.** Bell *v. State*, 115 Ala. 25, 37, 22 So. 526; *White v. State*, 86 Ala. 69, 74, 5 So. 674; *Perkins v. State*, 66 Ala. 457, 461. **Ark.**—*Hudspeth v. State*, 50 Ark. 534, 9 S. W. 1. **Colo.**—*Mason v. People*, 2 Colo. 373. **Conn.**—*State v. Keena*, 64 Conn. 212, 29 Atl. 470. See *Hendee v. Taylor*, 29 Conn. 448, 456. **D. C.**—*United States v. Neverson*, 1 Mackey 152, 164. **Fla.**—*Knight v. State*, 42 Fla. 546, 28 So. 759; *Smith v. State*, 42 Fla. 236, 27 So. 868; *Eldridge v. State*, 27 Fla. 162, 9 So. 448. **Ga.**—*Pride v. State*, 125 Ga. 750, 54 S. E. 688; *Irwin v. State*, 117 Ga. 706, 45 S. E. 48; *Doyal v. State*, 70 Ga. 134; *Brown v. State*, 13 Ga. App. 437, 79 S. E. 231; *Gray v. State*, 6 Ga. App. 428, 65 S. E. 191. **Ill.**—*Gannon v. People*, 127 Ill. 507, 523, 21 N. E. 525, 11 Am. St. Rep. 147. **Ind.**—See *Hardin v. State*, 22 Ind. 347; *Dutton v. State*, 5 Ind. 533. **Kan.**—*State v. McKinney*, 31 Kan. 570, 3 Pac. 356; *State v. Curtis*, 29 Kan. 384, 387. **La.**—See *State v. Michel*, 111 La. 434, 35 So. 629. **Mass.**—*Com. v. Dunham*, Thach. Cr. Cas. 513. **Minn.**—*State v. Gut*, 13 Minn. 341. **Mo.**—*State v. Anderson*, 96 Mo. 241, 9 S. W. 636; *State v. Arnold*, 2 S. W. 269; *State v. Eaton*, 75 Mo. 586 (*overruling State v. Smith*, 71 Mo. 45); *State v. Webb*, 74 Mo. 333. **Neb.**—*Alderman v. State*, 24 Neb. 97, 100, 38 N. W. 36. **Nev.**—*State v. Lambert*, 9 Nev. 321. **N. Y.**—*People v. Rosenthal*, 197 N. Y. 394, 401, 90 N. E. 991; *People v. Bissert*, 71 App. Div. 118, 75 N. Y. Supp. 630. **N. C.**—*State v. Lee*, 114 N. C. 844, 19 S. E. 375; *State v. Hastings*, 86 N. C. 596; *State*

v. Dixon, 78 N. C. 558. **Ohio.**—*Whiting v. State*, 48 Ohio St. 220, 230, 27 N. E. 96; *O'Meara v. State*, 17 Ohio St. 515. **Okla.**—*Reed v. Territory*, 1 Okla. Crim. 481, 98 Pac. 583. **Ore.**—*Ex parte Jung Shing*, 145 Pac. 637; *State v. Reinhart*, 26 Ore. 466-473, 38 Pac. 822. **Pa.** *Com. v. Clemmer*, 190 Pa. 202, 220, 42 Atl. 675; *Rosenberger v. Com.*, 118 Pa. 77, 84, 11 Atl. 782; *Com. v. Ramsey*, 42 Pa. Super. 25, 35. **S. D.**—*State v. Security Bank*, 2 S. D. 538, 51 N. W. 337. **Tex.**—*Ex parte Jones*, 60 Tex. Crim. 29, 129 S. W. 632; *Bonner v. State*, 29 Tex. App. 223, 229, 15 S. W. 821; *Bailey v. State*, 11 Tex. App. 140; *Cock v. State*, 8 Tex. App. 659, 664. **Va.**—*Hatcher v. Com.*, 106 Va. 827, 55 S. E. 677; *Stuart v. Com.*, 28 Gratt. 950, 966. **Can.**—*Reg. v. Mitchell*, 3 Cox C. C. 93; *Ex parte Wyman*, 34 N. Bruns. 608; *Queen v. Marshall*, 31 N. Bruns. 390; *Swan & Jefferys*, Foster Crown Law 104.

[a] **New Indictment After Change of Venue.**—As to whether a second indictment may be found after a change of venue under the first, see 4 STANDARD PROC. 999.

12. **U. S.**—*Thompson v. United States*, 202 Fed. 401, 404, 120 C. C. A. 575. **Cal.**—See *Terrill v. Superior Court*, 127 Cal. xviii, 60 Pac. 38, 516. But see amendment to §1008 of the California Penal Code changing "submitted to another grand jury" to "submitted to the same or another grand jury," and thus changing the rule laid down in *Terrill v. Superior Court*, 127 Cal. xviii, 60 Pac. 38, 516. **Fla.** *Mercer v. State*, 40 Fla. 216, 221, 24 So. 154, 74 Am. St. Rep. 135. **Ill.** *Gannon v. People*, 127 Ill. 507, 523, 21 N. E. 525, 11 Am. St. Rep. 147. **Ia.** *State v. Evans*, 111 Iowa 89, 82 N. W. 429. **Ky.**—*Com. v. Shelby*, 18 Ky. L. Rep. 781, 38 S. W. 490. **Mass.**—*Com. v. Drew*, 3 Cush. 279, 282; *Com. v. Dunham*, Thach. Cr. Cas. 513. **Neb.** *Bartley v. State*, 53 Neb. 310, 322, 75 N. W. 744; *Alderman v. State*, 24 Neb. 97, 38 N. W. 36. **N. Y.**—*People v. Bissert*, 71 App. Div. 118, 124, 75 N. Y.

which was irregularly found,¹³ has been dismissed or set aside,¹⁴ quashed,¹⁵ nolle prossed,¹⁶ suspended,¹⁷ mislaid, lost or stolen,¹⁸ or because the jury disagree upon the trial on the former indictment,¹⁹ or judgment has been arrested thereon.²⁰

This is true, unless prevented by some obstacle, such as former jeopardy²¹ or a statute.²²

b. *Re-examination of Evidence.*—Where the grand jury finding the first indictment also finds a subsequent indictment for the purpose merely of correcting any defects or informalities in the first,²³ a re-

Supp. 630; *People v. Van Horne*, 8 Barb. 158. **N. C.**—*State v. Lee*, 114 N. C. 844, 19 S. E. 375; *State v. Miller*, 100 N. C. 543, 5 S. E. 925. **Ohio.**—*Whiting v. State*, 48 Ohio St. 220, 230, 27 N. E. 96; *Smith v. State*, 4 Ohio Dec. (Reprint) 48, Cleve. Law Rec. 63. **Ore.** *State v. Reinhart*, 26 Ore. 466, 473, 38 Pac. 822. **Utah.**—*State ex rel. Barnes v. Second Dist. Court*, 36 Utah 396, 405, 104 Pac. 282; *State v. Crook*, 16 Utah 212, 218, 51 Pac. 1091. **Can.** *Queen v. Dowey*, 1 Prince Edw. Is. 291; *Reg. v. Magrath*, 26 U. C. Q. B. 385.

[a] **To Avoid Amendment.**—A subsequent indictment may be found so as to avoid amending the first indictment. *Cunningham v. State*, 117 Ala. 59, 64, 23 So. 693. See *Gannon v. People*, 127 Ill. 507, 523, 21 N. E. 525, 11 Am. St. Rep. 147.

[b] An immaterial amendment may be made to an indictment, as inserting in it the date of the commencement of a term at which it was found, and after it was returned by the grand jury, but a material defect can only be remedied by a new indictment. *Smith v. State*, 4 Ohio Dec. (Reprint) 48, Cleve. Law Rec. 63. See *infra*, XII.

13. **Ark.**—See *Renfro v. State*, 84 Ark. 16, 104 S. W. 542. **Cal.**—*People v. Carson*, 155 Cal. 164, 99 Pac. 970. **N. Y.**—*People v. Scannell*, 36 Misc. 40, 72 N. Y. Supp. 449. **Pa.**—See *Brown v. Com.*, 76 Pa. 319.

[a] Finding a second indictment on the testimony on which the first was based, without retaking the testimony, is an irregularity merely, and not ground for reversal of a judgment of conviction, though between the finding of the first and second indictments a member of the grand jury which found the first indictment had been excused, and another juror substituted. *McCarthy v. State*, 90 Ark. 384, 119 S. W. 647.

[b] **Invalid Action of Grand Jury**

Will Not Defeat Later Valid Indictment.—The fact that a grand jury made a presentment of one of those offenses of which a justice of the peace has original exclusive jurisdiction—if exercised within six months after its commission—before the period when the concurrent jurisdiction of the superior court arose, will not defeat the jurisdiction acquired by the latter on an indictment preferred after the expiration of the six months. *State v. Cooper*, 104 N. C. 890, 10 S. E. 510.

14. **Ky.**—*Com. v. Smith*, 140 Ky. 580, 131 S. W. 391; *Wilson v. Com.*, 3 Bush 105. **Minn.**—*State v. Peterson*, 61 Minn. 73, 78, 63 N. W. 171, 28 L. R. A. 324. **N. Y.**—*People v. Scannell*, 36 Misc. 40, 72 N. Y. Supp. 449. 15. *Jennings v. Com.*, 13 Ky. L. Rep. 79, 16 S. W. 348; *State v. Vinso*, 171 Mo. 576, 71 S. W. 1034.

16. **Ga.**—*Jones v. State*, 115 Ga. 814, 42 S. E. 271; *Williams v. State*, 57 Ga. 478. **Mo.**—*State v. Goddard*, 162 Mo. 198, 222, 62 S. W. 697. **N. C.**—*State v. McNeill*, 10 N. C. 183. **Tenn.** *Zachary v. State*, 7 Baxt. 1, 3. **Can.** *Queen v. Marshall*, 31 N. Bruns. 390, 395.

17. *State v. Vincent*, 91 Mo. 662, 4 S. W. 430.

18. See *infra*, VII.

19. *People v. McCormack*, 68 Misc. 430, 125 N. Y. Supp. 68.

20. *State v. Thomas*, 8 Rich. L. (S. C.) 295.

21. *Ex parte Jung Shing* (Ore.), 145 Pac. 637.

As to whether dismissal under habeas corpus is a bar to further proceedings against the prisoner, see 10 STANDARD PROC. 950.

22. *Ex parte Jung Shing* (Ore.), 145 Pac. 637.

23. **Fla.**—*Mercer v. State*, 40 Fla. 216, 223, 24 So. 154, 74 Am. St. Rep. 135. **Ia.**—*State v. Clapper*, 59 Iowa

examination of the witnesses and testimony is not necessary, though the contrary has also been held.²⁴

An indictment which has been quashed or nolle prossed is not legal evidence upon which another grand jury can find a second indictment against the defendant.²⁵

c. *Time for Finding.*—The subsequent indictment may be found before the first is dismissed or nolle prossed,²⁶ or even after arraignment and issue joined on the first.²⁷

Indeed, it has been held it may be found at any time before entering on the trial;²⁸ and even after trial and verdict, in case of a mistrial,²⁹ or a new trial being granted at the instance of the accused.³⁰

279, 13 N. W. 294. **Ky.**—McIntire v. Com., 26 Ky. L. Rep. 469, 4 S. W. 1. **Mass.**—Com. v. Clune, 162 Mass. 206, 213, 38 N. E. 435; Com. v. Woods, 10 Gray 477. **Minn.**—State v. Peterson, 61 Minn. 73, 78, 63 N. W. 171, 28 L. R. A. 324. **Ohio.**—Whiting v. State, 48 Ohio St. 220, 27 N. E. 96.

See 2 Bishop New Cr. Proc., §870.

[a] In Com. v. Clune, 162 Mass. 206, 38 N. E. 435, it was held that it was not necessary for the grand jury to examine witnesses anew before finding the second indictment, and the fact that some of the grand jurors who found the original indictment were absent when the second indictment was found, and that others were present when the second indictment was found who were absent on the former occasion, did not render the indictment invalid.

24. State v. Miller, 100 N. C. 543, 5 S. E. 925; State v. Harris, 91 N. C. 656.

[a] Where a defendant has been once discharged on a return of "ignoramus," a new bill sent up without a fresh hearing, and without the leave of the court, should be promptly quashed in the absence of affirmative proof that the course taken was required to meet some grave emergency, or to provide for some urgent public need. Rowand v. Com., 82 Pa. 405, 409.

25. Sparrenberger v. State, 53 Ala. 481, 25 Am. Rep. 643; State v. Grady, 12 Mo. App. 361.

26. **Ill.**—Gannon v. People, 127 Ill. 507, 523, 21 N. E. 525, 11 Am. St. Rep. 147. **Ohio.**—Whiting v. State, 48 Ohio St. 220, 230, 27 N. E. 96. **Tex.**—Cock v. State, 8 Tex. App. 659, 664. **Can.** Queen v. Marshall, 31 N. Bruns. 390, 395.

[a] The second indictment may be

found pending the decision of a demurrer to the first. People v. Bissert, 71 App. Div. 118, 124, 75 N. Y. Supp. 630.

[b] "The practice is to prefer a new bill against the same defendant, before an application to quash is made on the part of the prosecution." State v. Curtis, 29 Kan. 384.

27. **Ala.**—Bell v. State, 115 Ala. 25, 37, 22 So. 526. **D. C.**—United States v. Neverson, 1 Mackey 152, 164. **Ga.** Pride v. State, 125 Ga. 750, 54 S. E. 688; Irwin v. State, 117 Ga. 706, 45 S. E. 48; Doyal v. State, 70 Ga. 134; Gray v. State, 6 Ga. App. 428, 63 S. E. 191. **Mo.**—State v. Vinso, 171 Mo. 576, 585, 71 S. W. 1034. **Can.**—Queen v. Marshall, 31 N. Bruns. 390; Swan & Jefferys, Foster Crown Law 104.

28. State v. Hastings, 86 N. C. 596; State v. Dixon, 78 N. C. 558.

29. Gannon v. People, 127 Ill. 507, 522, 21 N. E. 525, 11 Am. St. Rep. 147.

[a] In Gibson's Case, 2 Va. Cas. 111, it was held that the discharge of a jury, after they have rendered a verdict against a prisoner, but which verdict is adjudged to be a nullity, because it was not duly perfected, and therefore set aside as insufficient, is no bar to a prosecution under the same or a new indictment.

30. **Ga.**—Pride v. State, 125 Ga. 750, 54 S. E. 688. **N. C.**—State v. Lee, 114 N. C. 844, 19 S. E. 375. **Tex.**—Bailey v. State, 11 Tex. App. 140. **Va.**—Stuart v. Com., 28 Gratt. 950, 967.

[a] In Stuart v. Com., 28 Gratt. (Va.) 950, the court said: "Having moved for a new trial, he (accused) is conclusively presumed to waive any objection to being put a second time in jeopardy for that offense. All the authorities concur upon this point. The

d. *Order of Court.*—While under statutes in some states, a cause cannot be resubmitted to a grand jury, without an order of court, upon a dismissal thereof, by the grand jury,³¹ or upon the sustaining of a demurrer to the indictment originally returned,³² such statutes do not prevent the same or another grand jury from subsequently returning a new indictment against the accused, without any order of court, provided the defendant has not been previously put in jeopardy.³³

Though the court orders a second information to be filed, an indictment may be found instead.³⁴

e. *Effect.*—At common law it was not necessary that any disposition be made of the first indictment before the accused could be placed on trial under a second indictment for the same offense;³⁵ and the prosecution may now, in the absence of a statute upon the subject, proceed upon either indictment at the election of the prosecution,³⁶

petitioner was therefore liable to be tried for any and every offense of which he had not been acquitted on the first indictment. It was a matter of no moment whether such trial took place on the first or on a new indictment. After the new trial granted, the commonwealth might have entered a nolle prosequi in the case, and have proceeded on a new indictment; or even while the first was pending, a second indictment for the same offense might have been found, because the mere finding of one indictment is no bar to another, even for the same offense. The accused cannot be tried on both, but the commonwealth may elect on which it will proceed; the better practice, however, being to withdraw the first, and proceed to trial on the second."

31. See *supra*, VI, B, notes 8 and 9.

32. See *supra*, VI, B, note 10.

33. **Ark.**—Marshall *v. State*, 84 Ark. 88, 104 S. W. 934. **Ia.**—*State v. Collis*, 73 Iowa 542, 35 N. W. 625. **Ky.**—*Com. v. Swanger*, 108 Ky. 579, 57 S. W. 10, holding refusal of court to submit a case to another grand jury, upon demurrer being sustained to indictment originally returned, where the defendant was not put in jeopardy, is not a bar to an investigation by another grand jury. **Minn.**—*State v. Peterson*, 61 Minn. 73, 77, 63 N. W. 171, 28 L. R. A. 324. **N. Y.**—*People v. Rosenthal*, 197 N. Y. 394, 401, 90 N. E. 991. **Ore.**—*State v. Reinhart*, 26 Ore. 466, 473, 38 Pac. 822.

34. In *People v. Whelan*, 117 Cal. 559, 49 Pac. 583, the court ordered a

new information to be filed but the district attorney procured an indictment instead and the court said: Whether the accused "was proceeded against by information or indictment could not be material to him, since both methods are equally competent, and each subserves precisely the same purpose."

35. **Mass.**—*Com. v. Drew*, 3 Cush. 279, 282. **Mo.**—*State v. Patterson*, 73 Mo. 695, 701. **Eng.**—*Sir William Withipole's Case*, Cro. Car. 134, 147, 79 Eng. Reprint 718.

36. **U. S.**—*United States v. Maloney*, 26 Fed. Cas. No. 15,713. **D. C.**—*United States v. Neverson*, 1 Mackey 152, 164. **Ga.**—*Pride v. State*, 125 Ga. 750, 54 S. E. 688; *Irwin v. State*, 117 Ga. 706, 45 S. E. 48; *Hurst v. State*, 11 Ga. App. 754, 76 S. E. 78; *Gray v. State*, 6 Ga. App. 428, 63 S. E. 191. **Kan.**—*State v. Curtis*, 29 Kan. 384. **La.**—*State v. Michel*, 111 La. 434, 35 So. 629. **Mass.**—*Com. v. Dunham*, Thach. Cr. Cas. 513. **Neb.**—*Bartley v. State*, 53 Neb. 310, 322, 73 N. W. 744; *Alderman v. State*, 24 Neb. 97, 38 N. W. 36. **Ohio.**—*O'Meara v. State*, 17 Ohio St. 515. **Pa.**—*Com. v. Clemmer*, 190 Pa. 202, 220, 42 Atl. 675; *Rosenberger v. Com.*, 118 Pa. 77, 84, 11 Atl. 782. **Tex.**—*Bailey v. State*, 11 Tex. App. 140. **Va.**—*Hatcher v. Com.*, 106 Va. 827, 55 S. E. 677; *Stuart v. Com.*, 28 Gratt. 950, 966. **Eng.**—*Swan & Jefferys*, *Foster Crown Law* 104.

[a] Even though two separate indictments charge the same offense by the same person at the same time but in different places, nevertheless the ac-

but not upon both.³⁷ Although the better practice is to withdraw, or enter a nolle pros. as to the first, when proceeding upon the second,³⁸ such course is not absolutely required.³⁹

Sometimes, by statute, on the finding of a second indictment against a person for the same offense, the first is deemed to be suspended,⁴⁰

cused is not entitled to a discharge on both indictments. *Haas v. Henkel*, 166 Fed. 621. And see *Bartley v. State*, 53 Neb. 310, 73 N. W. 744; *State v. Johnson*, 50 N. C. 221.

[b] No doubt if these inconsistent allegations as to place were charged in a single indictment the accused should be discharged as it would be impossible to state where he was triable, but the two indictments, considered separately, are not open to this objection, and, even if they are, considered together, mutually exclusive, it does not follow that the accused should be tried on neither, because there is nothing to show which states the facts correctly. *Haas v. Henkel*, 166 Fed. 621, 625.

37. **Ark.**—*McClellan v. State*, 32 Ark. 609. **Kan.**—*State v. McKinney*, 31 Kan. 570, 3 Pac. 356. **Tenn.**—*Clinton v. State*, 6 Baxt. 507. **Va.**—*Hatcher v. Com.*, 106 Va. 827, 55 S. E. 677.

But see *United States v. Herbert*, 5 Cranch C. C. 87, 26 Fed. Cas. No. 15,354, and *Withers v. Com.*, 5 Serg. & R. (Pa.) 59.

[a] It is an irregularity to try the two indictments together, even with the accused's consent. *McClellan v. State*, 32 Ark. 609, 612.

38. **U. S.**—*United States v. Miner*, 11 Blatchf. 511, 26 Fed. Cas. No. 15,780. **Kan.**—*State v. Curtis*, 29 Kan. 384, quoting 1 Whart. Cr. Law, §521. **Tex.**—*Cock v. State*, 8 Tex. App. 659, 664. **Va.**—*Hatcher v. Com.*, 106 Va. 827, 55 S. E. 677. **Can.**—*Queen v. Marshall*, 31 N. Bruns. 390. **Eng.**—*Sir William Withpole's Case*, Cro. Car. 134, 147, 79 Eng. Reprint 718; *Swan & Jefferys*, Foster Crown Law 104.

See the title "Nolle Prosequi."

[a] The prosecution having made the election on which to proceed to trial, the other will be dismissed. *Com. v. Dunham*, Thach. Cr. Cas. (Mass.) 513.

[b] When, for any cause, a second indictment is found against the same parties for the same offense, the rec-

ord should show that some disposition has been made of the first, by nolle prosequi or otherwise, and it should clearly appear in every such case upon which indictment the conviction was had. A party charged with crime can be required to answer only one indictment for the same offense. *Clinton v. State*, 6 Baxt. (Tenn.) 507. See also *Anderson v. State*, 3 Heisk. (Tenn.) 86, 96.

[c] **Presumption To Sustain Regularity.**—There being two indictments in the record, and it not appearing which of them the prisoner was tried upon, one being invalid, purporting to have been found at a time when no court was held, it was held that the conviction was upon the other. *Vincent v. State*, 3 Heisk. (Tenn.) 120.

39. *Cock v. State*, 8 Tex. App. 659, 664. See *Blyew v. Com.*, 91 Ky. 200, 15 S. W. 356, stating that although defendant was tried and convicted under the indictment in this case without an order of court having been made disposing of a former indictment against him for the same offense, his substantial rights were not prejudiced thereby and defendant having fled after the first indictment, it is to be assumed that that indictment was lost or mislaid during the long period (17 years) which elapsed before he was re-arrested.

Pendency of indictment as ground for plea in abatement, see 1 STANDARD PROC. 30, note 11.

40. Kirby's Dig., 1904, §2252; *Dobson v. State* (Ark.), 17 S. W. 3; *Hudspeth v. State*, 50 Ark. 534, 541, 9 S. W. 1; *Ball v. State*, 48 Ark. 94, 101, 2 S. W. 462; *State v. Mayer*, 209 Mo. 391, 397, 107 S. W. 1085; *State v. Anderson*, 96 Mo. 241, 9 S. W. 636; *State v. Vincent*, 91 Mo. 662, 4 S. W. 430; *State v. Eaton*, 75 Mo. 586; *State v. Cheek*, 63 Mo. 364.

[a] Even if the first indictment had not been formally quashed, its pendency does not affect the jurisdiction of the court to proceed on the second indictment. *State v. Vinso*, 171 Mo.

or superseded.⁴¹ But such second indictment does not ipso facto quash the former, even under such statutes;⁴² but it is revived and becomes operative upon the quashing of the second indictment,⁴³ or may be reinstated by order of the court.⁴⁴

The finding of a new indictment effects a continuation of the proceedings under the former indictment,⁴⁵ although upon this proposition the contrary has been held.⁴⁶

f. *Splitting and Consolidating Offenses.*—*Splitting.*—The general rule is that the offense cannot be split and the accused prosecuted as to each part.⁴⁷

576, 585, 71 S. W. 1034; *State v. Goddard*, 162 Mo. 198, 223, 62 S. W. 697; *State v. Anderson*, 96 Mo. 241, 9 S. W. 636; *State v. Vincent*, 91 Mo. 662, 4 S. W. 430; *State v. Eaton*, 75 Mo. 586.

41. *State v. Barkman*, 7 Ark. 387; *People v. Rosenthal*, 197 N. Y. 394, 400, 90 N. E. 991; *People v. Bransby*, 32 N. Y. 525, 536; *People v. Van Horne*, 8 Barb. (N. Y.) 158, 161; *People v. Fisher*, 14 Wend. (N. Y.) 9, 28 Am. Dec. 501; *People v. Mosier*, 73 App. Div. 5, 76 N. Y. Supp. 65; *People v. Bissert*, 71 App. Div. 118, 75 N. Y. Supp. 630.

[a] An indictment for forging a check on a bank in the name of A. B., is *not superseded* by an indictment subsequently found, charging the same party with personating A. B. and in such assumed character receiving a sum of money, although the money be alleged to have been received from the same individual alleged in the first indictment to have been defrauded by means of the check, and the amount thereof corresponds with the sum received by means of the check. *People v. Rynders*, 12 Wend. (N. Y.) 425.

42. **Ia.**—*Reddan v. State*, 4 Greene 137. **Mo.**—*State v. Melvin*, 166 Mo. 565, 572, 66 S. W. 534. But see *State v. Daugherty*, 106 Mo. 182, 186, 17 S. W. 303. **N. Y.**—*People v. Bransby*, 32 N. Y. 525, 536; *People v. Barry*, 10 Abb. Pr. 225; *People v. Monroe*, 20 Wend. 108.

43. *Reddan v. State*, 4 Greene (Ia.) 137; *State v. Melvin*, 166 Mo. 565, 572, 66 S. W. 534.

44. *People v. Mosier*, 73 App. Div. 5, 76 N. Y. Supp. 65.

[a] In *People v. Mosier*, 73 App. Div. 5, 76 N. Y. Supp. 65, a second indictment, regular in form, was presented against the accused for the same offense and an order was made

directing that the first indictment be superseded by the second but the jury had never voted upon or considered the second indictment. Held by the appellate court that the court had the right to make an order declaring the second indictment to be void and nugatory and to vacate the order superseding the first indictment and to reinstate the same.

45. *State v. Daugherty*, 106 Mo. 182, 17 S. W. 303.

[a] If the accused could not have been convicted under the last indictment without showing that it was a continuation of the prosecution under the former indictment for the offense was barred by the statute of limitation, counting from the return and filing of the last indictment, then it is indispensably necessary to have read to the jury the former indictment and order showing its dismissal and re-reference, in order to identify the last indictment under which the case was tried as the one returned in lieu of the first or dismissed indictment. *International Harv. Co. v. Com.*, 147 Ky. 557, 563, 144 S. W. 1070; *Hughes & Co. v. Com.*, 31 Ky. L. Rep. 179, 101 S. W. 1194.

46. *Hatcher v. Com.*, 106 Va. 827, 55 S. E. 677.

47. **Ala.**—*State v. Johnson*, 12 Ala. 840. **Ark.**—*State v. Clark*, 32 Ark. 231-236. **Cal.**—*People v. Burns*, 16 Cal. App. 416-421, 118 Pac. 454. **Ga.**—See *Roberts & Copenhaven v. State*, 14 Ga. 8. **Ind.**—*Laupher v. State*, 14 Ind. 327. **Ky.**—See *Fisher v. Com.*, 1 Bush 211. **Minn.**—See *State v. Moore*, 86 Minn. 422, 423, 90 N. W. 787. **Tenn.**—*Fontaine v. State*, 6 Baxt. 514.

See the titles "Intoxicating Liquors;" "Larceny."

[a] The accused cannot be indicted and punished for two offenses separately when the transaction out of which

Consolidation of Indictments.—Under proper circumstances the court may order two or more indictments to be consolidated into one before proceeding to trial,⁴⁸ although two persons are jointly charged in each indictment;⁴⁹ but the court cannot consolidate indictments setting out distinct felonies, not provable by the same evidence, and in no sense resulting from the same series of acts,⁵⁰ even though the defendants

they grew is identical. *State v. Johnson*, 12 Ala. 840.

[b] When two indictments against the same defendant are so diverse as to preclude the same evidence from sustaining both, and when each sets out an offense differing in all its elements from that charged in the other, they are not for the "same offense" or "matter" within the meaning of §2130 of Mansfield's Digest, although they both relate to the same act, or transaction. *State v. Hall*, 50 Ark. 28, 6 S. W. 20.

[c] In *State v. Clark*, 32 Ark. 231-236, the court said: "It seems to be the law in England, that if a man steal two pigs at the same time, he may be indicted for stealing one of them and if acquitted, indicted for stealing the other. But the Americans have not favored this splitting of an offense, and the harassing of the accused by several indictments for part of the same offense."

[d] **The decisive test** as to whether or not one offense has been split up and charged in separate indictments is whether the same testimony will support both charges. *State v. Johnson*, 12 Ala. 840.

48. U. S.—*Williams v. United States*, 168 U. S. 382, 390, 18 Sup. Ct. 92, 42 L. ed. 509; *Pointer v. United States*, 151 U. S. 396, 400, 14 Sup. Ct. 410, 38 L. ed. 209; *Turner v. United States*, 66 Fed. 280, 285, 13 C. C. A. 436; *United States v. Durkee*, 25 Fed. Cas. No. 15,008. See *Mutual Life Ins. Co. v. Hillmon*, 145 U. S. 285, 292, 12 Sup. Ct. 909, 36 L. ed. 706; *Logan v. United States*, 144 U. S. 263, 296, 12 Sup. Ct. 617, 36 L. ed. 429. **Colo.**—*Short v. People*, 27 Colo. 175, 181, 60 Pac. 350; *White v. People*, 8 Colo. App. 289, 296, 45 Pac. 539; *Cummins v. People*, 4 Colo. App. 71, 74, 34 Pac. 734; *Packer v. People*, 26 Colo. 306, 314, 57 Pac. 1087; *Chesnut v. People*, 21 Colo. 512, 519, 42 Pac. 656; *Parker v. People*, 13 Colo. 155, 160, 21 Pac. 1120. **N. M.**—*United*

States v. Folsom, 7 N. M. 532-545, 38 Pac. 70. **N. C.**—*State v. McNeill*, 93 N. C. 552, 555; *State v. Watts*, 82 N. C. 656, 657. **Pa.**—See *Withers v. Com.*, 5 Serg. & R. 59, 61.

In construing the Act of February 26, 1853, ch. 80, §1, reading: "Whenever there are or shall be several charges against any person or persons for the same act or transaction . . . the whole may be joined in one indictment in separate counts; and if two or more indictments shall be found in such cases, the court may order them consolidated," the court held that this did not authorize the consolidation of separate indictments against different persons even when the offense was joint and when they might have been jointly indicted in the first instance. *United States v. Durkee*, 25 Fed. Cas. No. 15,008.

Discretion of Court.—In *McElroy v. United States*, 164 U. S. 76-80, 17 Sup. Ct. 31, 41 L. ed. 355, the court said: "Under the third clause relating to several charges 'for two or more acts or transactions of the same class of crimes or offenses,' it is only when they 'may be properly joined' that the joinder is permitted, the statute thus leaving it for the court to determine whether in any given case a joinder of two or more offenses in one indictment against the same person 'is consistent with the settled principles of criminal law.'" See also *Williams v. United States*, 168 U. S. 382-390, 18 Sup. Ct. 92, 42 L. ed. 509; *Pointer v. United States*, 151 U. S. 396, 14 Sup. Ct. 410, 38 L. ed. 209; *Logan v. United States*, 144 U. S. 263-296, 12 Sup. Ct. 617, 36 L. ed. 429. See *Mutual Life Ins. Co. v. Hillmon*, 145 U. S. 285-292, 12 Sup. Ct. 909, 36 L. ed. 706.

49. Turner v. United States, 66 Fed. 280-285, 13 C. C. A. 436.

50. McElroy v. United States, 164 U. S. 76, 80, 17 Sup. Ct. 31, 41 L. ed. 355; *Cummins v. People*, 4 Colo. App. 71-74, 34 Pac. 734.

in all the indictments the same persons are named as defendants.⁵¹

2. Informations. — a. *In General.* — The pendency of one information merely does not prevent the filing of another one against the same person for the same offense;⁵² and where an information has been dismissed,⁵³ or quashed,⁵⁴ or a demurrer⁵⁵ to it has been sus-

51. *McElroy v. United States*, 164 U. S. 76, 80, 17 Sup. Ct. 31, 41 L. ed. 355.

[a] In *Cummins v. People*, 4 Colo. App. 71-74, 34 Pac. 734, the court said: "The acts done may result in the commission of several different statutory or common-law crimes, but wherever the felonies are separate and distinct, and not provable by the same evidence, and have been committed at different times, so that they can in no sense be deemed to result from the same series of acts, they may not be joined in one indictment; and consequently, if several indictments be found, the court is powerless to order the cases consolidated."

52. *Cal.*—*Kalloch v. Superior Court*, 56 Cal. 229, 237. *Conn.*—*State v. Keena*, 64 Conn. 212, 29 Atl. 470. *Neb.*—*Roby v. State*, 61 Neb. 218, 85 N. W. 61, pendency of a former information for the same offense in the same court, furnishes no ground for plea in abatement. *Wash.*—*State v. Gile*, 8 Wash. 12, 35 Pac. 417.

[a] In *Kalloch v. Superior Court*, 56 Cal. 229, 237, the court, after reviewing a number of cases holding that "another indictment pending for the same offense constitutes no ground of abatement," said: "It is true, that all the foregoing cases refer to indictments, but the rule is equally applicable to an information, as the latter is simply designed to serve the purpose and take the place of the former. Each is but an accusation, in legal form, of the offense with which the prisoner stands charged, and for which he is to be placed upon trial. We can, therefore, see nothing in the provisions of the Penal Code, or in the general principles of law, applicable to proceedings in criminal cases, which in any manner affect the regularity and validity of the second information, on the ground above stated."

[b] **An amendment** to an information may be made by filing a new information. *State v. Vinso*, 171 Mo. 576,

586, 71 S. W. 1034. As to amendment generally, see *infra*, XIII.

53. *Cal.*—*Kalloch v. Superior Court*, 56 Cal. 229, 235. *Tex.*—*Goode v. State*, 2 Tex. App. 520. *Wash.*—*State v. Se-right*, 48 Wash. 307, 93 Pac. 521; *State v. Campbell*, 40 Wash. 480, 82 Pac. 752.

[a] **If an appeal is pending on a conviction upon one information**, a nolle prosequi cannot be entered by the lower court to such information and a new information filed against the accused. The appeal must be disposed of first by the upper court. *State v. Biesemeyer*, 136 Mo. App. 668, 118 S. W. 1197.

54. *Ind.*—*State v. Clark*, 37 Ind. App. 105, 76 N. E. 649. *Kan.*—*State v. Bowman*, 80 Kan. 473, 103 Pac. 84. *Mich.*—*Mentor v. People*, 30 Mich. 91. *Tex.*—*Whitesides v. State*, 44 Tex. Crim. 410, 71 S. W. 969.

[a] When an information has been quashed the court does not lose jurisdiction over the prisoner and it may direct the district attorney to file a new information. When the information was quashed, the case stood as if no information had been filed. *Mentor v. People*, 30 Mich. 91.

55. *Cal.*—*People v. Lee Look*, 143 Cal. 216, 76 Pac. 1028. *Idaho.*—*In re Pierce*, 8 Idaho 183, 67 Pac. 316. *Ia.* *State v. Reilly*, 108 Iowa 735, 78 N. W. 680. *Utah.*—*State ex rel. Barnes v. Second Dist. Court*, 36 Utah 396, 104 Pac. 282.

[a] **But when the action is dismissed and the defendant discharged after plea**, the whole controversy is at an end and a new information cannot be filed. Nor does a statute providing that when the court, upon sustaining a demurrer to the information is of the opinion that the defects can be cured by a new information, it may direct a new one to be filed, permit the filing of a new one in such a case; the demurrer to an information and ruling thereon precede the defendant's plea. *State ex rel. Barnes v. Second Dist. Court*, 36 Utah 396, 403, 104 Pac. 282.

tained, or a mistrial thereon has resulted,⁵⁶ a new or subsequent information may be filed against the same person, for the same offense, to supply the defect in such original information,⁵⁷ or to replace it where it is insufficient because of an irregularity in the preliminary proceedings,⁵⁸ or has been lost, destroyed or mutilated.⁵⁹

The number of new informations that may be filed rests in the sound discretion of the court.⁶⁰

Notice to Accused Unnecessary. — The accused is not entitled to notice in advance of the intention of the prosecutor to file a new information although a copy must be served upon him before trial.⁶¹

Second Preliminary Examination or Complaint Unnecessary. — No new preliminary examination is necessary upon which to base the new information, where the former examination was in all respects sufficient, but it may be based upon the same examination;⁶² and it may

56. *Ex parte* Nicholas, 91 Cal. 640, 644, 28 Pac. 47; *State v. Williams*, 43 Wash. 505, 86 Pac. 847; *State v. Riley*, 36 Wash. 441, 78 Pac. 1001.

57. **Cal.**—*People v. Lee Look*, 143 Cal. 216, 76 Pac. 1028; *People v. Kilvington*, 36 Pac. 13; *Ex parte* Nicholas, 91 Cal. 640, 28 Pac. 47; *People v. Holmes*, 13 Cal. App. 212, 216, 109 Pac. 489. **Conn.**—*State v. Keena*, 64 Conn. 212, 29 Atl. 470. **Idaho.**—*In re* Pierce, 8 Idaho 183, 67 Pac. 316. **Ind.**—*Rowland v. State*, 126 Ind. 517, 26 N. E. 485; *State v. Clark*, 37 Ind. App. 105, 76 N. E. 649. **Ia.**—*State v. Reilly*, 108 Iowa 735, 78 N. W. 680. **Kan.**—*State v. Bowman*, 80 Kan. 473, 103 Pac. 84. **La.**—*State v. Terrebonne*, 45 La. Ann. 25, 12 So. 315. **Mich.**—*Mentor v. People*, 30 Mich. 91. **Mo.**—*State v. Pyscher*, 179 Mo. 140, 150, 77 S. W. 836; *State v. Vinso*, 171 Mo. 576, 585, 71 S. W. 1034; *State v. McCray*, 74 Mo. 303. **Neb.**—*Alderman v. State*, 24 Neb. 97, 38 N. W. 36. **N. D.**—*State v. Hasledahl*, 3 N. D. 36, 53 N. W. 430. **Tex.**—*Fortenberry v. State*, 44 Tex. Crim. 535, 72 S. W. 588; *Wood v. State*, 27 Tex. App. 538, 11 S. W. 525; *Smith v. State*, 25 Tex. App. 454, 8 S. W. 645; *Orr v. State*, 25 Tex. App. 453, 8 S. W. 644; *Turner v. State*, 21 Tex. App. 198, 18 S. W. 96. **Wash.**—*State v. Garland*, 65 Wash. 666, 118 Pac. 907; *State v. Riley*, 36 Wash. 441, 78 Pac. 1001; *State v. Williams*, 13 Wash. 335, 43 Pac. 15; *State v. Hansen*, 10 Wash. 235, 38 Pac. 1023. **Eng.**—*Rex v. Wilkes*, 4 Burr. 2527, 98 Eng. Reprint 327.

58. *People v. Lane*, 101 Cal. 513, 36

Pac. 16; *People v. Thompson*, 84 Cal. 598, 24 Pac. 384.

[a] If there has been a defective commitment rendering the first information void then a second information cannot be set aside if the recommitment upon which it is based shows the requisite jurisdictional facts. *People v. Thompson*, 84 Cal. 598, 24 Pac. 384. 59. See *infra*, VII.

60. *State v. Pyscher*, 179 Mo. 140, 151, 77 S. W. 836; *State v. Gile*, 8 Wash. 12, 35 Pac. 417.

61. *State v. Vinso*, 171 Mo. 576, 585, 71 S. W. 1034.

62. **Cal.**—*People v. Lane*, 101 Cal. 513, 36 Pac. 16; *People v. Kilvington*, 36 Pac. 13; *Ex parte* Nicholas, 91 Cal. 640, 28 Pac. 47; *People v. Holmes*, 13 Cal. App. 212-216, 109 Pac. 489. **Kan.**—*State v. Plowman*, 28 Kan. 569. **Mich.**—*Mentor v. People*, 30 Mich. 91. **N. D.**—*State v. Hasledahl*, 3 N. D. 36, 53 N. W. 430. **Utah.**—*State ex rel. Barnes v. Second Dist. Court*, 36 Utah 396, 402, 104 Pac. 282. **Wash.**—*State v. Seright*, 48 Wash. 307, 93 Pac. 521; *State v. Williams*, 13 Wash. 335, 43 Pac. 15.

See the title "Preliminary Examination."

[a] The quashing of the old information does not carry with it the preliminary examination and hence a new examination is not necessary to support a new information. *State v. Hasledahl*, 3 N. D. 36, 53 N. W. 430; *State ex rel. Barnes v. Second Dist. Court*, 36 Utah 396, 403, 104 Pac. 282.

[b] There must be a second examination (1) to support a second information filed against the accused when the first information was set aside upon the ground that the accused was

be upon the same complaint upon which the former information was based.⁶³

b. *Time for Filing.*—Statutes sometimes expressly provide a certain period within which a new information may be filed after the first has been quashed.⁶⁴

A statute providing for the filing of an information within a specified period after preliminary examination and commitment has no reference to the time of filing of a new information after the first information has been set aside or a demurrer sustained thereto.⁶⁵

c. *Order of Court.*—An order of court is not required to authorize the filing of a new information, after the first has been dismissed upon the motion of the district attorney.⁶⁶

But under statutes in some states, upon the sustaining of a demurrer to an information, a new one cannot be filed by the prosecuting officer without the direction of the court.⁶⁷ An order extending leave to the

not legally committed. *Ex parte Baker*, 88 Cal. 84, 25 Pac. 966. (2) The court in *People v. Kilvington* (Cal.), 36 Pac. 13, in commenting on §997 of the California Penal Code allowing new informations without a further or new examination, says: "That the reasoning in *Ex parte Baker*, 88 Cal. 84, should be confined to cases in which the information is set aside for causes other than merely technical, and susceptible of remedy without impairing the substantial rights of a defendant."

[c] **Where the accused is a fugitive from justice** an information may be filed against him without a preliminary examination by §69 of Kansas Crim. Code, and if said information is lost or destroyed a second information may be filed although there has not even yet been held the first preliminary examination; and regardless of the fact that there is no original information preserved. *State v. Plowman*, 28 Kan. 569.

63. *Johnson v. State*, 19 Tex. App. 545; *Goode v. State*, 2 Tex. App. 520.

64. See generally the statutes.

[a] §30 of the Penal Code of Georgia providing that if an indictment is found within the time limited and is quashed for any informality, a new indictment must be filed within six months from the time the first is quashed, applies interchangeably to indictments, presentments and accusations. And if an information is filed within six months after the quashing of the indictment although after the two-year period for the filing of an

original information the information is not barred by the statute of limitations. *Crawford v. State*, 4 Ga. App. 789, 797, 62 S. E. 501.

[b] **In California** the district attorney has a reasonable time after the direction of the court in which to file the new information. *People v. Arberry* (Cal.), 114 Pac. 411.

[c] **Such a Statute Is Mandatory.** *Ex parte Fowler*, 5 Cal. App. 549, 555, 90 Pac. 958.

65. *People v. Lee Look*, 143 Cal. 216, 76 Pac. 1028; *People v. Holmes*, 13 Cal. App. 212-216, 109 Pac. 489; *Ex parte Fowler*, 5 Cal. App. 549, 556, 90 Pac. 958.

66. *People v. Ammerman*, 118 Cal. 23, 50 Pac. 15.

67. *People v. Jordan*, 63 Cal. 219; *State ex rel. Barnes v. Second Dist. Court*, 36 Utah 396, 104 Pac. 282; *State v. Crook*, 16 Utah 212, 51 Pac. 1091.

[a] Where by statute (Cal. Penal Code, §1008) it is necessary for the court to order a new information or indictment to be filed, it is not necessary for the court to render an opinion that the objection to the first information could be overcome by filing another. *People v. O'Leary*, 77 Cal. 30, 18 Pac. 856.

[b] **Order of Court Resubmitting Charge After Demurrer.**—The order of the court granting the county attorney leave to file a new information, whether made at his request or not, is *tantamount to the resubmission* of the matter to him after a demurrer has been sustained to the first information and

district attorney to file a new information is insufficient in such case. There must be an express direction that such be done.⁶⁸

d. *Effect of Filing Second Information.*—Under some decisions, when as a result of the second filing there are two informations pending for the same offense, the prosecutor must elect upon which he will proceed and the remaining one is quashed or dismissed;⁶⁹ but under other authorities the filing of a subsequent information for the same offense merely suspends the operation and force of the former.⁷⁰ Under the latter cases, upon the quashing of the second information, the first revives.⁷¹

e. *Information Succeeding Indictment.*—An information may be filed before,⁷² or after a quashal,⁷³ or *nolle prosequi* of an indictment charging the same offense;⁷⁴ but not after the refusal of a grand jury

such order is, in effect, a compliance with the provisions of §§7745, 7746, 7747 of the Idaho Rev. St. *In re Pierce*, 8 Idaho 183, 67 Pac. 316.

[c] **Leave of Court Presumed.**—In *State v. Garland*, 65 Wash. 666, 118 Pac. 907, Mount, J., says: "Although it does not appear that an order of court was made granting the permission to file a new information, we must assume that such permission was had, because the court treated the new information as filed and so considered it."

68. *Ex parte Williams*, 116 Cal. 512, 48 Pac. 409. See also *State ex rel. Barnes v. Second Dist. Court*, 36 Utah 396, 104 Pac. 282.

69. *Rice v. People*, 15 Mich. 9, 15; *Alderman v. State*, 24 Neb. 97, 100, 38 N. W. 36. See *Keefe v. District Court*, 16 Wyo. 381, 390, 94 Pac. 459.

[a] *Cooley, J.*, in *Rice v. People*, 15 Mich. 9, 15, says: "It can hardly be seriously contended that there can be two informations properly on file in any case; and a prosecuting officer who adopts the practice stated must be prepared to support his case upon either. It certainly cannot rest with him, at any particular stage of the case, to say which shall and which shall not constitute the record; much less can that question be made to rest upon the oral testimony, which must always necessarily be uncertain, as to which of the two happened to be taken up by the prosecuting officer when the prisoner was arraigned or tried. Under the general rule relating to criminal proceedings—that doubts are to be solved in favor of the accused—he has a right to point out and rely upon the

defects in either; and the clerk was right in this case in sending up with the return the information supposed to be defective."

[b] **No ground for plea in abatement** that an indictment or another information is pending. See *infra*, XIV.

70. *State v. Mayer*, 209 Mo. 391, 396, 107 S. W. 1085; *State v. Williams*, 191 Mo. 205, 213, 90 S. W. 448. See *State v. Hoffman*, 70 Mo. App. 271.

[a] **New Case Made by Second Information.**—In Texas the filing of a new information makes a new case and entitles the accused, after his arrest, to two days in which to prepare his cause and file the written pleadings. *White's Ann. Code Crim. Proc. (Tex.)*, art. 567, §577; *Whitesides v. State*, 44 Tex. Crim. 410, 71 S. W. 969.

71. *State v. Mayer*, 209 Mo. 391, 397, 107 S. W. 1085.

72. *State v. McKinney*, 31 Kan. 570, 3 Pac. 356; *State v. Schenk*, 238 Mo. 429, 442, 142 S. W. 263.

73. **U. S.**—*United States v. Nagle*, 17 Blatchf. 258, 27 Fed. Cas. No. 15,852. **Ind.**—*Hoover v. State*, 110 Ind. 349, 11 N. E. 434; *State v. Cooper*, 96 Ind. 331. **Neb.**—*Alderman v. State*, 24 Neb. 97, 38 N. W. 36.

[a] The ruling on the motion to quash the indictment cannot be drawn in question on the trial on the information. *State v. Cooper*, 96 Ind. 331.

74. *Dye v. State*, 130 Ind. 87, 29 N. E. 771; *Reg. v. Mitchel*, 3 Cox C. C. (Eng.) 33.

[a] After a *nolle prosequi* is entered and a prosecution on indictment is thereby ended, the accused may be prosecuted by information if the grand

to find an indictment therefor, according to some,⁷⁵ though not all authorities.⁷⁶

The information should not be tried while the indictment is pending.⁷⁷

3. Necessity for New Indictment on Second Trial.—If, upon a trial on an indictment charging an offense, a conviction is had for a lesser offense necessarily included in the higher, and that conviction is set aside and a new trial granted, there is no necessity for a new indictment for the purpose of retrying the accused for the lesser offense,⁷⁸ although it has been held proper to enter a *nolle prosequi* as to the indictment, charging the higher degree of offense, and to prefer a new indictment for that degree of offense upon which the defendant was convicted, and for which he is to be retried.⁷⁹

VII. LOST OR MUTILATED INDICTMENTS, INFORMATIONS AND COMPLAINTS.—A. SUPPLYING OR SUBSTITUTING.—1. In-

jury has been discharged and the court is in session. *Dye v. State*, 130 Ind. 87, 29 N. E. 771.

75. *State v. Boswell*, 104 Ind. 541, 548, 4 N. E. 675, wherein the court said: "The failure of the grand jury to find an indictment does not, of course, work an acquittal of an accused person, nor does it prevent his arrest upon an affidavit made by any person competent to make an ordinary affidavit, nor does it prevent a preliminary examination from being held the second time and an order entered placing him under recognizance, but it does prevent the prosecuting attorney from driving him to final trial upon an information."

76. See *Rea v. State*, 3 Okla. Crim. 269, 105 Pac. 381, wherein it was contended that the lower court erred in overruling the motion of defendant to quash an information upon the ground that the identical offense charged therein had been "previously investigated by the grand jury, and that they refused to find an indictment against the defendant thereon, and that the offense had not been again referred to the grand jury by the court, and that no leave had been granted by the court to file the information herein." The court after quoting the statutory provision that the dismissal of a charge does not prevent its being again submitted to a grand jury as often as the court may direct, said: "This statute has no application to offenses prosecuted by information, and the court did not err in overruling the

motion to quash the information upon this ground."

77. *State v. Schenk*, 238 Mo. 429, 442, 142 S. W. 263.

[a] **Trial To Be on One Only.** Where there is an indictment and information pending at the same time for the same offense the prosecutor can proceed to trial upon only one and the other must be nollid. *State v. McKinney*, 31 Kan. 570, 574, 3 Pac. 356.

[b] Mo. Rev. St., 1909, §5055, reading: "But that mode of procedure which shall be first instituted by the filing of the indictment or information for any offense shall be pursued to the exclusion of the other, so long as the same shall be pending and undetermined," simply means that the information shall not be tried while the indictment is pending—the latter must be dismissed. *State v. Schenk*, 238 Mo. 429, 442, 142 S. W. 263.

78. Thus upon a conviction of manslaughter under an indictment charging murder, the indictment does not become *functus officio* so as to prevent a second trial for manslaughter on the same indictment, though a prosecution for murder is forever barred. Cal.—*People v. Gilmore*, 4 Cal. 376. La.—*State v. Smith*, 49 La. Ann. 1515, 22 So. 882, 62 Am. St. Rep. 680; *State v. West*, 45 La. Ann. 928; *State v. Dunn*, 41 La. Ann. 610, 6 So. 176; *State v. Denison*, 31 La. Ann. 847; *State v. Byrd*, 31 La. Ann. 419. Tex.—*Turner v. State*, 41 Tex. Crim. 329, 54 S. W. 579.

79. *State v. Hornsby*, 8 Rob. (La.) 583, 41 Am. Dec. 314.

dictments.—The overwhelming weight of authority recognizes the right of the court to substitute properly proved copies of indictments that have been lost, destroyed, mislaid, or stolen,⁸⁰ or so mutilated as to be unintelligible.⁸¹

In some states the power of the court in this respect is said to rest in the court's inherent power to protect and preserve its own records.⁸² In still other jurisdictions the courts have held that the statutes providing for the restoration of lost pleadings and records generally are broad enough to cover the loss of indictments,⁸³ while in other jurisdictions, the subject is regulated by special statutory provisions,

80. **Ala.**—Code, 1907, §7158; *Ward v. State*, 78 Ala. 455; *Bradford v. State*, 54 Ala. 230 (wherein the indictment was lost during the trial, for this reason the court distinguished the case of *Ganaway v. State*, 22 Ala. 772, holding that a lost indictment cannot be substituted upon the ground that that ruling was applicable only to a loss before arraignment); *Hampton v. State*, 1 Ala. App. 156, 55 So. 1018. **Ark.** Dig. St., §2250; *Miller v. State*, 40 Ark. 488. **Cal.**—Penal Code, §810. **Ind.** *Klein v. State*, 157 Ind. 146, 60 N. E. 1036; *Reed v. State*, 8 Ind. 200. **Ia.** *State v. Shank*, 79 Iowa 47, 44 N. W. 241; *State v. Stevisiger*, 61 Iowa 623, 16 N. W. 746 (certification unnecessary); *State v. Rivers*, 58 Iowa 102, 12 N. W. 117, 43 Am. Rep. 112. **Kan.** *Millar v. State*, 2 Kan. 174. **La.**—*State v. Heard*, 49 La. Ann. 375, 21 So. 632. **Me.**—*State v. Ireland*, 109 Me. 158, 83 Atl. 453, 1913E, Ann. Cas. 604, 41 L. R. A. (N. S.) 1079. **Miss.**—Code, 1892, §1347; *McGuire v. State*, 76 Miss. 504, 25 So. 495. See also *Helm v. State*, 67 Miss. 562, 571, 7 So. 487. **Mo.** *State v. Lovitt*, 243 Mo. 510, 147 S. W. 484; *State v. McCarver*, 194 Mo. 717, 92 S. W. 684; *State v. Burks*, 132 Mo. 363, 34 S. W. 48; *State v. Smith*, 71 Mo. 45; *State v. Simpson*, 67 Mo. 647, 3 Am. Crim. Rep. 329; *State v. Paul*, 87 Mo. App. 47. **N. Y.**—*People v. Burdock*, 3 Caines 104, Col. & C. Cas. 458. **Okla.**—*Harmon v. Territory*, 9 Okla. 313, 60 Pac. 115. **Pa.**—Com. v. Becker, 14 Pa. Super. 430. **S. D.**—*State v. Circuit Ct.*, 20 S. D. 122, 104 N. W. 1048. **Tenn.**—*Shannon's Code*, §7102; *State v. Gardner*, 13 Lea 134, 49 Am. Rep. 660; *Epperson v. State*, 5 Lea 291; *Currey v. State*, 7 Baxt. 154. **Tex.** Penal Code, art. 470; *Berg v. State*, 61 Tex. Crim. 612, 142 S. W. 884; *Kelly v. State*, 59 Tex. Crim. 14, 127 S. W.

544; *Lucas v. State*, 50 Tex. Crim. 219, 95 S. W. 1055; *Pate v. State*, 21 Tex. App. 191, 17 S. W. 461. **W. Va.** *State v. Strayer*, 58 W. Va. 676, 52 S. E. 862, loss during trial.

[a] **Where the original was not lost**, mutilated, etc., but was on file, a copy cannot be substituted. *Shehane v. State*, 13 Tex. App. 533.

[b] **Necessity for Dismissing Original.**—In *State v. Smith*, 71 Mo. 45, it was decided that a formal dismissal of the original indictment must be had before putting the accused on trial on the copy.

81. *State v. Ivy*, 33 Tex. 646.

[a] **But where the mutilation of the indictment does not destroy its identity** so that it may be restored to a condition in which it can be rendered intelligible and complete, it is sufficient as a basis for the legal proceeding. *Com. v. Roland*, 97 Mass. 598.

82. **Ala.**—*Bradford v. State*, 54 Ala. 230. **Ia.**—*State v. Shank*, 79 Iowa 47, 44 N. W. 241. **Ky.**—*Com. v. Keger*, 1 Duv. 240. **Mo.**—*State v. Simpson*, 67 Mo. 647, 3 Am. Crim. Rep. 329. **S. D.** *State v. Circuit Court*, 20 S. D. 122, 104 N. W. 1048.

But see *Bradshaw v. Com.*, 16 Gratt. (Va.) 507, 86 Am. Dec. 722.

83. **Fla.**—*Roberson v. State*, 45 Fla. 94, 34 So. 294. **Ohio.**—*Mount v. State*, 14 Ohio 295, 45 Am. Dec. 542. **Tenn.** See *State v. Gardner*, 13 Lea 134, 49 Am. Rep. 660. **Tex.**—*Berg v. State*, 64 Tex. Crim. 612, 142 S. W. 884.

[a] **Contra.**—*Bradshaw v. Com.*, 16 Gratt. (Va.) 507, 86 Am. Dec. 722, holding that if the indictment is lost at any time before the trial, though after arraignment and plea, the party cannot be tried; the statute authorizing a lost record or paper to be substituted by an authenticated copy or proof of its contents, applies only to

specifically providing for the substitution of lost indictments and other criminal pleadings.⁸⁴

Instead of substituting a lost indictment, however, a new indictment may properly be found.⁸⁵

2. Informations.—As in the case of a lost or destroyed indictment,⁸⁶ a lost or destroyed information may be supplied by the prosecuting officer by filing in court a properly proved copy of the original.⁸⁷ In some jurisdictions it is provided that a new information may be filed in such case.⁸⁸

civil cases, and does not extend to records or papers in criminal pleadings.

84. See the followings: **Ark.**—*Miller v. State*, 40 Ark. 488. **Cal.**—Penal Code, §810. **Ind.**—*Buckner v. State*, 56 Ind. 208; *Reed v. State*, 8 Ind. 200. **La.**—*State v. Heard*, 49 La. Ann. 375, 21 So. 632. **Okla.**—*Harmon v. Territory*, 9 Okla. 313, 60 Pac. 115. **Tenn.**—*Epperson v. State*, 5 Lea 291; *Boyd v. State*, 6 Coldw. 1. **Tex.**—*State v. Ivy*, 33 Tex. 646; *Withers v. State*, 21 Tex. App. 210, 17 S. W. 725; *Schultz v. State*, 15 Tex. App. 258, 49 Am. Rep. 194.

And see generally the cases and statutes cited, *supra*, this section.

[a] **Constitutionality.**—Such statutes have been held to be neither in conflict with the fourteenth amendment of the constitution of the United States nor with similar provisions of a state constitution or bill of rights. *Withers v. State*, 21 Tex. App. 210, 17 S. W. 725. See also *Schultz v. State*, 15 Tex. App. 258, 49 Am. Rep. 194.

[b] **Construction of Statutes.**—These statutes, providing for the substitution of lost indictments, are remedial in nature and hence should be liberally construed in furtherance of the ends of justice whenever it is clear that the defendant has not been prejudiced by what has been done. *Epperson v. State*, 5 Lea (Tenn.) 291. See also *Schultz v. State*, 15 Tex. App. 258, 49 Am. Rep. 194.

[c] **The use of such copies is sometimes limited to the cases provided by statute.** *Boyd v. State*, 6 Coldw. (Tenn.) 1.

85. **Ala.**—Code, 1907, §7157. **La.**—*State v. Pierre*, 39 La. Ann. 91, 3 So. 60. **Mo.**—*State v. Neiderer*, 94 Mo. 79, 6 S. W. 708. **Pa.**—*Rosenberger v. Com.*, 118 Pa. 77, 11 Atl. 182; *Com. v. Freeman*, 1 Pa. Co. Ct. 392. **Tenn.**—*Shan-*

non's Code, §7103. **Tex.**—Code Crim. Proc., art. 47; *State v. Elliott*, 14 Tex. 423; *Brown v. State*, 57 Tex. Crim. 570, 124 S. W. 101. **Can.**—*Rex v. McAuliffe*, 7 Ont. W. R. 704.

[a] In Kentucky (1) a new indictment may be found by another grand jury. Ky. St., 1909, §1140. (2) But this is not the substitution of an indictment for the one previously lost, but is the institution of a new prosecution. *Com. v. Keger*, 1 Duv. (Ky.) 240.

86. See *supra*, VII, A, 1.

87. **Cal.**—*People v. Smith*, 9 Cal. App. 224, 98 Pac. 546. **Ill.**—*Long v. People*, 135 Ill. 435, 25 N. E. 851, 10 L. R. A. 48. **Ind.**—*Klein v. State*, 157 Ind. 146, 60 N. E. 1036. **La.**—*State v. Thomas*, 39 La. Ann. 318, 1 So. 922. **Mo.**—*State v. Lovitt*, 243 Mo. 510, 147 S. W. 484; *State v. Walker*, 167 Mo. 366, 67 S. W. 228. **Neb.**—*Korth v. State*, 46 Neb. 631, 65 N. W. 792. **Wash.**—*State v. McFadden*, 42 Wash. 1, 84 Pac. 401.

[a] In *Klein v. State*, 157 Ind. 146, 60 N. E. 1036, after trial but before judgment the court ordered a copy of a lost information, which he certified to be correct, to be spread upon the record.

88. *Burns' Ann. St. (Ind.)*, 1901, §1746; *Goodman v. State*, 161 Ind. 629, 69 N. E. 442; *Kan. Gen. St.*, 1909, §6694; *State v. Plowman*, 28 Kan. 569; and generally the statutes of the several states.

[a] **Texas.**—§470, Code Crim. Proc., provides that when an information has been lost, upon suggestion to the court, another information may be filed upon the written statement of the prosecuting attorney that the substituted information is substantially the same as that lost. See *Freeman v. State*, 6 Tex. App. 462.

3. **Complaints.**—The rule permitting the substitution of a copy, where the original has been lost, has been held applicable to criminal complaints.⁸⁹

B. **PREREQUISITES TO SUPPLYING OR SUBSTITUTING.**—1. **Proof or Suggestion of Loss.**—It would seem that the loss of the original indictment, information or complaint should be shown before the substitution of a copy is permitted.⁹⁰ Indeed, the statutes in at least one state provide that the substitution may be made upon the suggestion of such loss by the prosecuting officer.⁹¹

2. **Proof of Copy.**—In order to substitute a copy for a lost indictment, information or complaint, the copy must be proved to be at least a substantially correct reproduction of the original.⁹²

89. **Idaho.**—*In re Jay*, 10 Idaho 540, 79 Pac. 202. **Mich.**—*People v. Coffman*, 59 Mich. 1, 26 N. W. 207. **Neb.**—*Bays v. State*, 6 Neb. 167. **Tex.**—*Kelly v. State*, 59 Tex. Crim. 14, 17, 127 S. W. 544; *Bradburn v. State*, 43 Tex. Crim. 309, 65 S. W. 519; *Huff v. State*, 23 Tex. App. 291, 4 S. W. 890.

[a] The changing of a date in a complaint or affidavit upon which an information is based amounts to a mutilation, and it must be substituted as provided for in the case of indictments and informations. *Kelly v. State*, 59 Tex. Crim. 14, 127 S. W. 544; *Huff v. State*, 23 Tex. App. 291, 4 S. W. 890.

90. Proof of loss of an indictment may be made upon affidavit. *Millar v. State*, 2 Kan. 174, 176.

[a] "The clerk being the proper custodian of the indictment, his affidavit of diligent search would be prima facie evidence of loss." *Epperson v. State*, 5 Lea (Tenn.) 291.

91. *Clampitt v. State*, 3 Tex. App. 638, under statute providing that "when an indictment has been lost or mislaid, the district attorney may suggest the fact to the court, and the same shall be entered upon the minutes of the court, and in such case another indictment may be substituted, upon the written statement of the district attorney that it is substantially the same as that which has been lost or mislaid."

[a] The rule of practice under the Texas Code of Criminal Procedure, quoted *supra*, was stated in *Burrage v. State* (Tex. Crim.), 44 S. W. 169, as follows: "The rule of practice under this state has been held to require the presentation of a formal motion al-

leging the loss of the indictment, and asking permission to substitute the same. This should be accompanied by a copy of the indictment, and a written statement by the district or county attorney that it is substantially the same as the indictment lost. The statute does not require, but we think the better practice would be to serve notice on defendant of the motion to substitute. On the trial before the court the judge adjudicates the matter; and if satisfied of the existence and loss of the original indictment, and that the copy presented is a substantial copy of the one lost, he should make a formal order or judgment substituting the same for the original indictment. This judgment should be entered in the minutes of the court, and constitute a part of the record."

[b] The prosecuting officer should make his suggestion of loss in writing, and such writing should set out the facts. *Clampitt v. State*, 3 Tex. App. 638.

[c] Such suggestion need not be sworn to, however, in the absence of a statute requiring it. See *Clampitt v. State*, 3 Tex. App. 638.

92. See the following: **Fla.**—*Roberson v. State*, 45 Fla. 94, 34 So. 294. **Ga.**—*Branson v. State*, 99 Ga. 194, 24 S. E. 404. **Ia.**—*State v. Thomas*, 97 Iowa 396, 66 N. W. 743. **Mo.**—*State v. Simpson*, 67 Mo. 647, 3 Am. Crim. Rep. 329. **Wash.**—*State v. McFadden*, 42 Wash. 1, 84 Pac. 401.

And see generally the cases cited *supra*, VII, A, 1, note 80.

[a] Where it does not appear of record that the original indictment was certified by the clerk, the court obtains jurisdiction to try the case on a sub-

3. Order and Minutes of Court. — Though statutory provision may alter the rule,⁹³ the substitution is made as a rule only upon an order of court.⁹⁴ So too, to supply by substitution the loss of an indictment,

stituted copy of a lost indictment. It is necessary to show, however, that the substituted copy was a true copy. *State v. Stevisiger*, 61 Iowa 623, 16 N. W. 746; *State v. Rivers*, 58 Iowa 102, 12 N. W. 117, 43 Am. Rep. 112.

[b] "The substituted indictment or information should be a correct copy (1) of the original if possible, but if the data on hand is not sufficient from which to make an exact copy, a copy as near as may be is sufficient." *State v. McFadden*, 42 Wash. 1, 84 Pac. 401. (2) Copy need be only substantially correct. *State v. Paul*, 87 Mo. App. 47. See *State v. Gardner*, 13 Lea (Tenn.) 134, 49 Am. Rep. 660; *Morrison v. State*, 43 Tex. Crim. 437, 66 S. W. 779.

[c] The copy was sufficiently proven to be correct in *State v. Rivers*, 58 Iowa 102, 12 N. W. 117, 43 Am. Rep. 112.

[d] A court having power to substitute a copy for a lost indictment, it will be presumed from the record that it acted regularly, and not arbitrarily; consequently an objection by the defendant that the order of substitution was made upon the ex parte affidavit of the district attorney, without giving the defendant opportunity to object to the sufficiency of the proof, cannot prevail where the defendant was present and objected to the order though not to the validity of the copy. *Com. v. Becker*, 14 Pa. Super. 430.

93. Under a statute providing for the entry of all indictments returned by the grand jury in full upon the minutes of the court, and that "a copy of the minutes shall be as good and valid as the originals, if at any time the latter are lost, destroyed, misplaced or purloined," there is no error in allowing a copy of an indictment to be read on the trial, although there be no order of substitution. *Epperson v. State*, 5 Lea (Tenn.) 291, wherein the court said: "Previous to the statute, a copy of a lost record could only be substituted by order of the court, adjudging that the original was lost and authorizing the substitution of the copy. *State v. Harrison*, 10 Yer., 542.

The object of the statute was to do away with the difficulties attending the supply of such papers, as shown by the case cited, and to provide a record copy of the original. 'At any time,' when the exigency arises, the copy may be used. The copy is virtually equal to the original. . . . The court must determine when the exigency arises under the statute, and this may be done as well by action during the trial as by special order."

94. *State v. Burks*, 132 Mo. 363, 34 S. W. 48; *Graham v. State*, 43 Tex. 550; *Brooks v. State*, 55 Tex. Crim. 122, 113 S. W. 920; *Burrage v. State* (Tex. Crim.), 44 S. W. 169; *Strong v. State*, 18 Tex. App. 19; *Magee v. State*, 14 Tex. App. 366; *Rogers v. State*, 11 Tex. App. 608; *Clampitt v. State*, 3 Tex. App. 638.

[a] Where an order of court is necessary to substitute a lost indictment, the clerk even though requested by the prosecuting attorney, has no authority to incorporate the lost pleading in the record without notice to the defendant, and permission of the court. *State v. Burks*, 132 Mo. 363, 34 S. W. 48.

[b] An agreement between the prosecuting officer and the counsel for the accused that a copy "is a true substituted indictment in this cause" is not a substitution, nor a judgment of substitution, where such is required, but is only evidence which can be used in regard to a proper substitution. *Carter v. State*, 41 Tex. Crim. 608, 58 S. W. 80.

[c] **Nunc Pro Tunc Order.**—Where the order of substitution by the court was actually made and the judge neglected to sign it, a nunc pro tunc order may be made at a subsequent term without notice to the defendant, substituting the lost indictment. *Moore v. State*, 52 Tex. Crim. 336, 107 S. W. 540. Compare *Reed v. State*, 42 Tex. Crim. 572, 61 S. W. 925, holding that an information lost prior to trial cannot be substituted nunc pro tunc.

[d] In *Beardall v. State*, 9 Tex. App. 262, the following order was made and entered: "In this cause comes

the minutes of the court must show not only the suggestion of the loss⁹⁵ and leave of the court to substitute, where such is necessary,⁹⁶ but must also show that substitution has been in fact made.⁹⁷

C. OBJECTIONS TO SUBSTITUTION. — Since the substitution of a lost indictment, information or complaint is a judicial act, it is competent for the defendant to contest such substitution if he sees fit,⁹⁸ by objecting to the same at the time it is sought to be made,⁹⁹ or by motion to quash or abate, when the substitution has been made.¹ But the right to demand the original indictment will be waived when not exercised before the jury is sworn,² and following the general rule of appellate practice, the appellate court will not consider the matter

the county attorney, F. C. and moves the court to grant him leave to file a substantial copy of the original indictment, which said motion having been duly considered by the court is granted; whereupon it is ordered by the court that the said copy of the said indictment be filed among the papers of the case.' This order was not sufficiently certain, either in pertinently and positively identifying the substituted instrument, or in the declaration of the fact that it was substituted." The court said "In such a procedure nothing should be left to inference or intendment. However, the order can yet be amended, or another entered *nunc pro tunc*, fully and completely establishing the fact of the proposed substitution."

95. *Carter v. State*, 41 Tex. Crim. 608, 58 S. W. 80.

96. *Graham v. State*, 43 Tex. 550; *Brooks v. State*, 55 Tex. Crim. 122, 113 S. W. 920. And see *Carter v. State*, 41 Tex. Crim. 608, 58 S. W. 80, wherein the court said: "And it has been held, so far as we are aware, since *Graham's Case*, 43 Texas 552, that the failure of the record to show that the substitution of the lost indictment was made by permission of the court will be fatal on appeal."

[a] "The record must speak the fact affirmatively that the substitution as proposed by the county attorney was made. It may be urged, however, that there appears from the record enough from which to presume that in fact the substitution was made. If, in fact, the court did not order and adjudge the substitution there was no indictment in the case; hence we cannot indulge in presumptions; the record must speak that fact, not by way

of inference, but directly and affirmatively. *Turner v. State*, 7 Texas Ct. App. 596; *Crosswell v. Byrnes*, 9 Johns. 286; *Beardall v. State*, 9 Texas Ct. App. 266." *Rogers v. State*, 11 Tex. App. 608, 619.

[b] **Entry Insufficient.**—(1) An entry of "Loss of papers suggested; the county attorney has leave to substitute the same" and a copy of the substituted indictment is not sufficient. *Clampitt v. State*, 3 Tex. App. 638. (2) It should be shown that the suggestion was made in open court. *Graham v. State*, 43 Tex. 550.

97. *Graham v. State*, 43 Tex. 550; *Carter v. State*, 41 Tex. Crim. 608, 58 S. W. 80; *Burrage v. State* (Tex. Crim.), 44 S. W. 169; *Magee v. State*, 14 Tex. App. 366; *Rogers v. State*, 11 Tex. App. 608; *Beardall v. State*, 9 Tex. App. 262; *Turner v. State*, 7 Tex. App. 596.

[a] "Presumptions will not be indulged to verify a substituted indictment, or supply a proper order in the minutes of the trial court. . . . The record, therefore, must affirmatively show as a fact that the substitution was actually made." *Carter v. State*, 41 Tex. Crim. 608, 58 S. W. 80.

98. *Bowers v. State*, 45 Tex. Crim. 185, 75 S. W. 299.

99. *Bowers v. State*, 45 Tex. Crim. 185, 75 S. W. 299.

[a] Such objection should be supported by proof. *Lucas v. State*, 50 Tex. Crim. 219, 95 S. W. 1055; *Bowers v. State*, 45 Tex. Crim. 185, 75 S. W. 299.

1. *Bowers v. State*, 45 Tex. Crim. 185, 75 S. W. 299.

2. *Currey v. State*, 7 Baxt. (Tenn.) 154.

unless the proper objection to the substitution was made at the trial.³

D. EFFECT OF FAILURE TO SUPPLY LOSS.—If the original indictment, information or complaint is lost, upon a showing of such fact, there should be a substitution of a copy; if this is not done,⁴ or cannot be done,⁵ there can be no valid trial and conviction, and a court of review will reverse the case.

E. NECESSITY FOR SECOND ARRAIGNMENT OR PLEA ON SUBSTITUTION. Upon the substitution of a lost indictment, information or complaint, the trial proceeds without a second arraignment of or plea by the accused.⁶

F. EFFECT OF FINDING ORIGINAL AFTER SUBSTITUTION OF COPY. If the original indictment, information or complaint is found, according to the rule laid down in some cases, it is the proper paper on which to have the trial, notwithstanding a copy has been established in its place;⁷ but upon this proposition the authorities are not without apparent, if not real, conflict.⁸

3. *Long v. People*, 135 Ill. 435, 25 N. E. 851, 10 L. R. A. 48; *State v. Lovitt*, 243 Mo. 510, 147 S. W. 484.

4. *Wolff v. State* (Tex.), 23 S. W. 799; *Pate v. State*, 21 Tex. App. 197, 17 S. W. 461; *Beardall v. State*, 9 Tex. App. 262; *Beardall v. State*, 4 Tex. App. 631.

[a] The court said in *Wolff v. State* (Tex.), 23 S. W. 799: "The practice seems to be well settled in this state that when, in a motion for a new trial, it is shown to the trial court that the indictment is lost, it shall be the duty of the prosecution to substitute the indictment, and, on failure so to do, the court will reverse the case (*Pate v. State*, 21 Tex. App. 197, 17 S. W. Rep. 460, and cases cited); that a conviction will not be allowed to stand when the transcript fails to bring up an indictment or information. If there was no indictment substituted, how is the defendant to move in arrest or this court to pass upon it? The judgment is reversed, and cause remanded."

5. *Hitchcock v. State*, 21 Ind. 279, holding if an indictment or information is lost and copies cannot be given, the judgment of the court, upon a trial and conviction, will be reversed.

[a] If an indictment is destroyed, and there is no record of it, the defendant cannot be tried at all upon it. It is otherwise where there is a record thereof; he may then be tried on a certified copy, taken from the record. *Buckner v. State*, 56 Ind. 207, 210.

6. Ind.—*Goodman v. State*, 161 Ind. 629, 69 N. E. 442, indictment. Miss.

McGuire v. State, 76 Miss. 504, 25 So. 495, indictment. Wash.—*State v. McFadden*, 42 Wash. 1, 84 Pac. 401, information.

7. Ga.—*Reinhart v. State*, 29 Ga. 522. Miss.—*Helm v. State*, 67 Miss. 562, 7 So. 487, in this case the substituted copy was withdrawn. Tex. *Owens v. State*, 46 Tex. Crim. 14, 79 S. W. 575.

[a] In *Reddan v. State*, 4 Greene (Iowa) 137, a second indictment was found but was quashed, upon finding the first. Held that the first was fully reinstated and unimpaired by the proceeding under the second.

8. *Branson v. State*, 99 Ga. 194, 24 S. E. 404 (holding that where a paper has been by a proper order established as a copy of a lost indictment or presentment, the copy until such order has been set aside, stands in lieu of the original. If such order is not revoked, the mere finding of a paper purporting to be the lost original cannot in any manner affect the legal status of the case); *State v. Lovitt*, 243 Mo. 510, 147 S. W. 484 (holding that where a new information has been filed and after the trial is held the original information was found, even though there was a difference between the two, the original information was an abandoned pleading and constituted no part of the record of the case).

[a] In Pennsylvania if both the lost and the substituted copy are in court the defendant may be tried on either. *Rosenberger v. Com.*, 118 Pa. 77, 11 Atl. 782.

VIII. FORMAL REQUISITES.—A. INDICTMENT OR PRESENTMENT.⁹—1. In General.—An indictment consists of three prominent features, (1) the caption, (2) the charge, and (3) the conclusion.¹⁰

2. Necessity and Form of Writing.—It is no objection to the validity of an indictment that it is in form partly written and partly printed,¹¹ even though it is declared by statute that an indictment is a "written" statement accusing a person therein named of some act or omission declared by law to be an offense.¹² Nor does the fact that an indictment is partly written in pencil vitiate it,¹³ since one wholly written in pencil would be legal.¹⁴

It is not necessary that all the counts of an indictment should be written upon the same sheet of paper,¹⁵ nor, when on separate sheets, that they should be attached together.¹⁶

Superfluous and unnecessary matter upon an indictment, but not a part of it, does not vitiate it.¹⁷

9. As to formal requisites of information, see *infra*, VIII, B.

10. *State v. Moore*, 24 S. C. 150, 58 Am. Rep. 241.

As to the caption, see *infra*, VIII, A, 3.

As to the charge, see *infra*, VIII, A, 5, and IX.

As to the conclusion, see *infra*, VII, A, 6.

11. *May v. State*, 14 Ohio 461, 45 Am. Dec. 548; *O'Bryan v. State*, 27 Tex. App. 339, 11 S. W. 443; *Winn v. State*, 5 Tex. App. 621.

[a] Reason.—"The word '*writing*' or '*written*,' under our statutes, civil as well as criminal, includes 'printing.'" *O'Bryan v. State*, 27 Tex. App. 339, 11 S. W. 443.

[b] A printed form, with its blanks properly filled in in writing is a sufficient compliance with statute. *Winn v. State*, 5 Tex. App. 621.

12. *O'Bryan v. State*, 27 Tex. App. 339, 11 S. W. 443 (under Code Crim. Proc., art. 419); *Winn v. State*, 5 Tex. App. 621.

13. *Jones v. Com.*, 124 Ky. 26, 97 S. W. 1118; *May v. State*, 14 Ohio 461, 45 Am. Dec. 548.

[a] A letter added to a word in an indictment, in pencil mark, before the indictment is found, does not vitiate the indictment. *May v. State*, 14 Ohio 461, 45 Am. Dec. 548, wherein the court said: "The court might not feel disposed to tolerate the practice of drawing an entire indictment with a lead pencil, because it is more liable to be effaced and obliterated than if drawn with ink; but there is no stat-

ute in Ohio, nor any rule of common law, nor any principle of ordinary sense, that will avoid an indictment merely because one letter in the whole indictment is added to some one word in pencil, and that letter making no difference, neither in sound, sense, nor effect, in the word to which it is joined. An indictment is usually written, but it may be printed; and is nevertheless valid. It is commonly drawn with black ink; but if written in red, blue, or yellow, who is bold enough to say that it is such a departure from usage that it vitiates the indictment? We apprehend no one. Why, then, should a single letter, in a legible pencil mark, have such an effect?"

14. *Jones v. Com.*, 124 Ky. 26, 97 S. W. 1118. Compare *May v. State*, 14 Ohio 461, 45 Am. Dec. 548.

15. *State v. Lennon*, 8 Rob. (La.) 543.

[a] Where the indictment consisted of two papers pinned together and returned into court as one bill, the two charges, being numbered, first count and second count, it was not objectionable on that account. *State v. Robbins*, 123 N. C. 730, 736, 31 S. E. 669, 68 Am. St. Rep. 841, wherein the court said: "Even if they had been returned as separate indictments and at different terms, they could be treated as different counts in the same bill, if germane." See also *Com. v. Nailor*, 29 Pa. Super. 275.

16. *State v. Lennon*, 8 Rob. (La.) 543.

17. *Minn.—State v. Johnson*, 37

That an indictment is prepared by piecing together portions of two instruments is not ground for quashing the same, if it is in fact found by the grand jury and returned as thus prepared.¹⁸ Nor does the accidental mutilation of an indictment by cutting it into several pieces, when the parts can be united without the omission of even a word, render it unfit to be the basis of further proceedings.¹⁹

3. Caption.—a. *Nature and Purpose.*—The caption is the heading of the indictment,²⁰ or more properly, the preamble to the record,²¹ when the indictment is removed from an inferior to a superior court,²²

Minn. 493, 35 N. W. 373. *Miss.*—State v. Tingle, 103 Miss. 672, 678, 60 So. 728. *Tex.*—Owens v. State, 25 Tex. App. 552, 8 S. W. 658; West v. State, 6 Tex. App. 485; Winn v. State, 5 Tex. App. 621.

[a] Thus, mottoes or business cards are not part of the indictment (1) and though unnecessary and unseemly, do not vitiate it. Owens v. State, 25 Tex. App. 552, 8 S. W. 658; West v. State, 6 Tex. App. 485; Winn v. State, 5 Tex. App. 621. (2) And putting the date when and the place where found, at the end of an indictment, after the conclusion, does not vitiate it, such date and place being no part of the indictment. State v. Johnson, 37 Minn. 493, 35 N. W. 373.

[b] Nor does the placing of numbers, indicating the several counts of an indictment, on the margin thereof, work any injury to the defendant. Webb v. State, 63 Tex. Crim. 207, 140 S. W. 95.

18. Jenkins v. State, 64 Tex. Crim. 88, 141 S. W. 223; Jenkins v. State, 64 Tex. Crim. 85, 141 S. W. 224; Jenkins v. State, 64 Tex. Crim. 86, 141 S. W. 222, wherein the court said: "While this is rather unusual, at least so far as we are aware, in the manner of writing an indictment, or preparing it, still it is not shown, or attempted to be shown, that this was not done by the grand jury and that they took this method of writing the bill, or having it prepared, instead of writing it in the usual way. If the foreman of the grand jury filed the indictment as thus prepared, and returned it in this manner into court, there is no sufficient reason why the indictment should be quashed. It is rather a novel way of preparing an indictment, yet, if the grand jury prepared the indictment in this condition and returned it into court, it would constitute no reason

why it should be quashed. Under such circumstances, it would be the act of that body and valid."

As to lost or mutilated indictments generally, see *supra*, VII.

19. Com. v. Roland, 97 Mass. 598, such as the pronouncing of sentence thereon.

[a] The accidental mutilation of an indictment by cutting it into several pieces does not destroy its identity or prevent its being restored to a condition in which it can be rendered intelligible and substantially complete in all essential particulars. Com. v. Roland, 97 Mass. 598.

[b] If when the parts are united, as can readily be done without danger of mistake, by joining together words which have been severed, there is no material omission of any averment, or even word, contained in the indictment as presented in court by the grand jury, it cannot be properly said that the indictment is destroyed or in such condition as to be rendered unfit to be the basis of further proceedings. Com. v. Roland, 97 Mass. 598.

As to substitution of copy for mutilated indictment, see *supra*, VII, A, 1.

20. State v. Moore, 24 S. C. 150, 58 Am. Rep. 241.

21. State v. Smith, 2 Harr. (Del.) 532; Robinson v. Com., 88 Va. 900, 14 S. E. 627.

22. Del.—State v. Smith, 2 Harr. 532. La.—Territory v. McFarlane, 1 Mart. (O. S.) 220, 5 Am. Dec. 706. N. Y.—People v. Bennett, 37 N. Y. 117, 4 Abb. Pr. (N. S.) 89, 93 Am. Dec. 551. Va.—Robinson v. Com., 88 Va. 900, 14 S. E. 627.

[a] **Historical.**—The caption had its origin in this way: Where an inferior court, in obedience to the mandate of the king's bench, transmitted the indictment to the crown office, it

showing the history of the proceedings preliminary to its finding.²³ Particularly, its office is to state the style of the court, the time and place when and where the indictment was found, and, in England and some of the states, the jurors by whom it was found.²⁴ It is not strictly a part of the indictment itself,²⁵ though upon this proposition

was accompanied with its history, naming the court where it was found, the jurors' names by whom found, and the time and place where found. All this was entered of record by the clerk of the superior court, immediately before the indictment, and was called the caption, but it was no part of the indictment itself. *People v. Bennett*, 37 N. Y. 117, 4 Abb. Pr. (N. S.) 89, 93 Am. Dec. 551, citing 1 Stark. Cr. Pl. (2d ed.) 233. See also *McBean v. State*, 3 Heisk. (Tenn.) 20; *Robinson v. Com.*, 88 Va. 900, 14 S. E. 627.

[b] In *McBean v. State*, 3 Heisk. (Tenn.) 20, the court said: "In England indictments are found by inferior courts, and transmitted for trial to the Court of King's Bench. The inferior court sends up with the indictment a formal history of the proceedings, describing the court before which the indictment was found, the jurors by whom and the time and place when and where it was found. This history of the proceedings of the inferior court is called the caption, and is entered of record immediately before the indictment: 1 Bishop on Crim. Proc., §146; 1 Chitty Cr. Law 267-8. Consequently the caption is that part of the record which comprehends the judicial history of the cause to the time of finding the indictment."

[c] The English caption constitutes in the first instance no part of the record below, but is an historical statement of the clerk prefixed to the record when the cause is sent up. *State v. Long*, 1 Humph. (Tenn.) 386; *Mitchell v. State*, 8 Yerg. (Tenn.) 514, 528; *McClure v. State*, 1 Yerg. (Tenn.) 206, 217.

23. *State v. Society, etc. Mfrs.*, 42 N. J. L. 504; *State v. Jones*, 9 N. J. L. 357, 17 Am. Dec. 483; *State v. Moore*, 24 S. C. 150, 58 Am. Rep. 241; *Van Dyke v. Dare*, 1 Bailey (S. C.) 65. And see *McBean v. State*, 3 Heisk. (Tenn.) 20; *Mitchell v. State*, 8 Yerg. (Tenn.) 514, 528.

[a] It is the statement of the clerk

in the record prefatory to the indictment. *State v. Paine*, 1 Ind. 163.

[b] It is drawn up by the prosecuting attorney, or clerk of the court, often not until after judgment, or until it becomes necessary to certify the proceedings had. The facts which it recites are evidenced aliunde, in the minutes and files of the court wherein the indictment is found, and these sources, therefore, usually afford indubitable proof to correct any falsity or supply any defect existing in the caption itself. *State v. Society, etc. Mfrs.*, 42 N. J. L. 504.

24. 1 Chit. Cr. Law 326, and the following cases: **U. S.**—*United States v. Howard*, 132 Fed. 325, 343. **Fla.** *Holton v. State*, 2 Fla. 476, 505. **Mass.** *Com. v. Stone*, 3 Gray 453. **Miss.** *Thomas v. State*, 5 How. 20, 1 Mor. St. Cas. 160. **N. H.**—*State v. Jenkins*, 64 N. H. 375, 10 Atl. 699; *State v. Gary*, 36 N. H. 359. See *State v. Wentworth*, 37 N. H. 196, 207. **N. J.** *State v. Jones*, 9 N. J. L. 357, 17 Am. Dec. 483. **S. C.**—*State v. Moore*, 24 S. C. 150, 58 Am. Rep. 241. **Tenn.** *McClure v. State*, 1 Yerg. 206.

[a] It is not merely the marginal statement (1) on the head of the indictment and of the venire. *Swain v. State*, 8 Ala. App. 26, 62 So. 446; *Collins v. State*, 3 Ala. App. 64, 58 So. 80. (2) It is that entry of record showing when and where the court is held, who presided as judge, the venire, and who were summoned and sworn as grand jurors. *Williams v. State*, 171 Ala. 56, 54 So. 535; *Goodloe v. State*, 60 Ala. 93; *Overton v. State*, 66 Ala. 73; *Perkins v. State*, 50 Ala. 154; *Reeves v. State*, 20 Ala. 33; *Swain v. State*, 8 Ala. App. 26, 62 So. 446; *Collins v. State*, 3 Ala. App. 64, 58 So. 80.

25. Arch. Crim. Pl. 27; 1 Bish. Crim. Pr., §661; and the following cases: **U. S.**—*Ex parte Bain*, 121 U. S. 1, 7, 7 Sup. Ct. 781, 30 L. ed. 849; *Burchett v. United States*, 194 Fed. 821, 114 C. C. A. 525; *Huas v. Henkel*, 166 Fed. 621; *United States v. Howard*, 132 Fed.

there are some authorities to the contrary.²⁶ It is, however, a part

325, 343; *United States v. Clark*, 46 Fed. 633; *United States v. Bornemann*, 35 Fed. 824; *United States v. Thompson*, 6 McLean 56, 28 Fed. Cas. No. 16,490; *United States v. Crawford*, 1 N. Y. Leg. Obs. 388, 25 Fed. Cas. No. 14,890. **Colo.**—*Farnum v. United States*, 1 Colo. 309. **Dak.**—*United States v. Beebe*, 2 Dak. 292, 11 N. W. 505. **Del.**—*State v. Smith*, 2 Harr. 532. **Ill.**—*George v. People*, 167 Ill. 447, 47 N. E. 741; *Duncan v. People*, 2 Ill. 456. **Ind.**—*State v. Paine*, 1 Ind. 163; *State v. Hopkins*, 7 Blackf. 494; *Strong v. State*, 1 Blackf. 193. **Ky.**—*Mitchell v. Com.*, 106 Ky. 602, 51 S. W. 17. **La.**—*State v. Folke*, 2 La. Ann. 744; *State v. Kennedy*, 8 Rob. 590; *Territory v. McFarlane*, 1 Mart. (O. S.) 220, 5 Am. Dec. 706. **Me.**—*State v. Conley*, 39 Me. 78; *Low's Case*, 4 Me. 439, 450. **Mo.**—*State v. Blakely*, 83 Mo. 359; *State v. Meinhart*, 73 Mo. 562; *State v. Daniels*, 66 Mo. 192; *State v. Freeman*, 21 Mo. 481; *Kirk v. State*, 6 Mo. 469. **N. H.**—*State v. Jenkins*, 64 N. H. 375, 10 Atl. 699; *State v. Gary*, 36 N. H. 359. **N. J.**—*State v. Moore*, 75 N. J. L. 619, 68 Atl. 165; *State v. Society, etc. Mfrs.*, 42 N. J. L. 504; *State v. Jones*, 9 N. J. L. 357, 365, 17 Am. Dec. 483. **N. Y.**—*People v. Bennett*, 37 N. Y. 117, 4 Abb. Pr. (N. S.) 89, 93 Am. Dec. 551; *Dawson v. People*, 25 N. Y. 399; *McGarry v. State*, 2 Lans. 227; *Gray v. People*, 21 Hun 140; *People v. Myers*, 2 Hun 6, 29. **N. C.**—*State v. Brickell*, 8 N. C. 354. **Pa.**—*Com. v. Shaffner*, 2 Pears. 450. **R. I.**—*State v. Mowry*, 21 R. I. 376, 43 Atl. 871. **S. C.**—*State v. Moore*, 24 S. C. 150, 58 Am. Rep. 241; *State v. Williams*, 2 McCord 301; *Van Dyke v. Dare*, 1 Bailey 65. **S. D.**—*State v. Brennan*, 2 S. D. 384, 391, 50 N. W. 625. **Tenn.**—*Mitchell v. State*, 8 Yerg. 514; *McClure v. State*, 1 Yerg. 206. **Tex.**—*English v. State*, 4 Tex. 125; *Winn v. State*, 5 Tex. App. 621. **Vt.**—*State v. Nixon*, 18 Vt. 70, 46 Am. Dec. 135; *State v. Gilbert*, 13 Vt. 647. **Va.**—*Robinson v. Com.*, 88 Va. 900, 14 S. E. 627. **Wis.**—*State v. Emmett*, 23 Wis. 632; *State v. McCarty*, 2 Pinn. 513, 2 Chand. 199, 54 Am. Dec. 150.

See also *Com. v. Drewry*, 126 Ky. 183, 189, 103 S. W. 266, wherein it is

said that "the caption is not an indispensable part of the indictment."

[a] It is one of its features only. *State v. Moore*, 24 S. C. 150, 58 Am. Rep. 241.

[b] The caption is merely a formal statement which, though placed at the head of the indictment, is still of no higher nature than is an entry on the docket made in court by the clerk. *State v. Mowry*, 21 R. I. 376, 382, 43 Atl. 871.

26. *Williams v. State*, 171 Ala. 56, 54 So. 535 (wherein the court said: "The caption is an essential part of an indictment"); *Overton v. State*, 60 Ala. 73; *Goodloe v. State*, 60 Ala. 93; *Perkins v. State*, 50 Ala. 154; *Reeves v. State*, 20 Ala. 33. And see: **U. S.** *United States v. Insurgents of Pennsylvania*, 2 Dall. 335, 342, 1 L. ed. 404, wherein the court said: "With respect to the objection, that a copy of the caption of the indictment has not been furnished to the prisoners, it may be observed, that, although the practice of Pennsylvania has been different, yet, the caption and the indictment seem naturally to form but one instrument; and copies of both should, therefore, be delivered under the provisions of the Act of Congress." **Ind.** *Anderson v. State*, 104 Ind. 467, 4 N. E. 63, 5 N. E. 711, wherein it is said that the present code of Indiana, "for many purposes, at least, makes the caption and upper marginal title a preliminary part of an indictment." **Mass.**—*Com. v. Hines*, 101 Mass. 33 (wherein the court said: "In our practice, a caption is indeed affixed to every indictment, and returned with it by the grand jury; and is so far a part of the indictment that it may be referred to in order to ascertain the county and state in and for which the indictment is found"); *Com. v. Edwards*, 4 Gray 1 (wherein the court said: "It is said that the name of the county is only alleged in the caption, and that the caption is no part of an indictment. In answer to this it may be replied, that in our practice every indictment has a caption attached to it, and returned by the grand jury as a part of their presentment in each particular case; and in this respect a caption, as used in this

of the record and evidence of the proper finding and return.²⁷

Distinguished From Commencement.²⁸ — The caption should not be confounded with the commencement,²⁹ nor with any other part of the indictment.³⁰ But some of the courts in this country do not recognize the distinction between the "caption" and the "commencement,"³¹

commonwealth, differs essentially from that of other tribunals where the separate indictments are returned without any caption, and the caption is added by the clerk of the court, as a general caption embracing all the indictments found at the term").

27. **U. S.**—*Burchett v. United States*, 194 Fed. 821, 114 C. C. A. 525; *United States v. Howard*, 132 Fed. 325, 343. **Ky.**—*Mitchell v. Com.*, 106 Ky. 602, 51 S. W. 17. **N. J.**—*State v. Gibbons*, 4 N. J. L. 40, 46. **S. C.**—*State v. Moore*, 24 S. C. 150, 58 Am. Rep. 241; *Van Dyke v. Dare*, 1 Bailey 65. **Va.** *Robinson v. Com.*, 88 Va. 900, 14 S. E. 627.

[a] All that part of the record, which precedes the recital of the indictment, is called the caption. *State v. Gibbons*, 4 N. J. L. 40, 46.

28. As to nature of commencement, see *infra*, VIII, A, 4, a.

29. *State v. Kennedy*, 8 Rob. (La.) 590. See also *McBean v. State*, 3 Heisk. (Tenn.) 20.

30. *State v. Kennedy*, 8 Rob. (La.) 590.

31. *United States v. Beebe*, 2 Dak. 292, 301, 11 N. W. 505.

[a] Says the court in *State v. Moore*, 24 S. C. 150, 58 Am. Rep. 241, through Simpson, C. J.: "There has been some contrariety of opinion as to where the caption ends and the indictment begins, and especially whether the words, 'the jurors, etc., on their oaths, present,' constitute a part of the caption or a part of the indictment. In England, and in many of the states following the English practice, these words are termed the 'commencement' of the indictment, and not considered to be a part of the caption. But in our state it has been distinctly held that they are part of the caption; that it is mere introductory matter, and constitutes no portion of the indictment. In the case of *State v. Creight*, 1 Brev. (S. C.) 169, Trezevant, J., said the caption ends with the words 'upon their oaths, present,' and Grimke, J., said (p. 170),

'It was resolved in an earlier unreported case (*State v. James Johnston*), that the part of the indictment here in question was a part of the caption.'"

[b] **Necessity of Determining Where Caption Ends and Indictment Begins.**

The caption being no part of the indictment, it follows that the law in reference to defects in the caption, and not the rule in reference to the charging part or the conclusion, should govern where objection is made on account of alleged defects. And it must be remembered that the rules in such cases are quite different. In reference to the charging part, the law is extremely strict, requiring the closest observance to established forms and precedents, and demanding a complete description of such facts and circumstances as constitute the crime, without inconsistency or repugnancy. Manner, time, and place must be alleged, and even particular words and phrases sometimes, though they may seem technical, must be used. This strictness is, however, not required in reference to the caption, the distinction in the two cases being that the charging part is really the matter which the accused is called upon to meet and answer, while the caption is a mere history or record of the case, up to the finding of the indictment, containing the name of the court, county and state, and where and by whom the indictment has been found. It is important for the accused to be informed fully as to the crime with which he is charged, so that he can prepare for his defense; and it is important, too, to the court that the crime charged should be set out with great particularity, so that, in looking at the record, it may decide whether the facts charged constitute an offense within its jurisdiction, whether a conviction will warrant punishment, and what the punishment shall be. These reasons, however, do not apply to the caption, and, accordingly, as we have said, the rule as to the caption is much more liberal than as to the charg-

both being by them called "caption," with the result of a great deal of confusion.³²

b. *Necessity for.*—It has been held in some jurisdictions that generally no caption is necessary to an indictment,³³ or that, if omitted altogether, or if imperfect, the general records of the term will supply the defect.³⁴ The practice, however, is to affix a caption to every indictment, whether necessary or not.³⁵

Several Counts.—The caption to an indictment applies to the indictment as a whole, and to each count thereof.³⁶ It need not be repeated

ing part of the indictment. *State v. Moore*, 24 S. C. 150, 58 Am. Rep. 241.

32. A great deal of confusion exists in the books, because the distinction between the commencement and the caption of an indictment, which has always existed in England, has not uniformly been maintained here. *People v. Bennett*, 37 N. Y. 117, 4 Abb. Pr. (N. S.) 89, 93 Am. Dec. 551.

33. See the following cases: **Ia.** *State v. Smith*, 148 Iowa 640, 127 N. W. 988, may be omitted without in any way affecting the validity of the indictment. **Ky.**—*Com. v. Drewry*, 126 Ky. 183, 189, 103 S. W. 266, not an indispensable part of the indictment. **La.**—*State v. Marion*, 15 La. Ann. 495; *State v. Lyons*, 3 La. Ann. 154; *State v. Kennedy*, 8 Rob. 590. **N. H.**—*State v. Gary*, 36 N. H. 359. **N. C.**—*State v. Haddock*, 9 N. C. 461; *State v. Brickell*, 8 N. C. 354. **Tex.**—*English v. State*, 4 Tex. 125; *Winn v. State*, 5 Tex. App. 621. **Vt.**—*State v. Nixon*, 18 Vt. 70, 46 Am. Dec. 135; *State v. Gilbert*, 13 Vt. 647.

[a] At best, it is merely a form, and neither takes from nor adds to the validity of the indictment. *Com. v. Drewry*, 126 Ky. 183, 189, 103 S. W. 266.

[b] The necessity for it cannot arise (1) while the prosecution is pending in the court in which the bill is preferred. *State v. Marion*, 15 La. Ann. 495; *State v. Lyons*, 3 La. Ann. 154; *State v. Folke*, 2 La. Ann. 744; *State v. Kennedy*, 8 Rob. (La.) 590; *People v. Jewett*, 3 Wend. (N. Y.) 314; *People v. Myers*, 2 Hun (N. Y.) 6, 29. And see *Robinson v. Com.*, 88 Va. 900, 14 S. E. 627. (2) Nor is a caption necessary where an indictment is merely removed from a superior to an inferior court. *Loomis v. People*, 19 Hun (N. Y.) 601. (3) But it is necessary that a caption

should accompany every indictment removed into a superior court, in order to show that the court which took the indictment had legal authority and power to do so. *People v. Jewett*, 3 Wend. (N. Y.) 314; *Tipton v. State*, Peck (Tenn.) 308. And see *People v. Bennett*, 37 N. Y. 117, 4 Abb. Pr. (N. S.) 89, 93 Am. Dec. 551; *People v. Fish*, 4 Park. Crim. (N. Y.) 206, 212; *People v. Myers*, 2 Hun (N. Y.) 6, 29; *People v. Town Auditors*, 13 Abb. Pr. N. S. (N. Y.) 431, 438, 44 How. Pr. 233; *People v. Guernsey*, 3 Johns. Cas. (N. Y.) 265; *Robinson v. Com.*, 88 Va. 900, 14 S. E. 627. (4) So too, a caption has been held necessary where the court acts under a special commission. *State v. Haddock*, 9 N. C. 461.

[c] A record of an indictment and conviction is not admissible in evidence to incapacitate a witness, without a proper caption, since it does not appear in such case to have been found by persons competent to find it. *Cooke v. Maxwell*, 2 Stark. 183, 3 E. C. L. 368.

[d] **An unnecessary written caption** constitutes no part of an indictment and does not impair its validity, if otherwise valid. *Owens v. State*, 25 Tex. App. 552, 8 S. W. 658; *Winn v. State*, 5 Tex. App. 621.

34. *State v. Gary*, 36 N. H. 359; *State v. Gilbert*, 13 Vt. 647.

[a] Its omission is not fatal or material, where the body of the indictment itself contains every feature that might have been inserted in the caption. *Com. v. Drewry*, 126 Ky. 183, 189, 103 S. W. 266.

35. *Com. v. Hines*, 101 Mass. 33; *Com. v. Edwards*, 4 Gray (Mass.) 1; *State v. Jenkins*, 64 N. H. 375, 10 Atl. 699.

36. **Ala.**—*Overton v. State*, 60 Ala. 73; *Pairo v. State*, 49 Ala. 25. **Ky.** *Greenwood v. Com.*, 11 Ky. L. Rep.

with each count thereof,³⁷ by express provision of statute in some states.³⁸ It is not affected by the sustaining of a demurrer or motion to quash directed at the first count.³⁹ Nor does the dismissal of the first or any other count destroy the caption; but it must be read as a part of the remaining count.⁴⁰

c. *What to Contain.*—(I.) *In General*—The form of a caption may be seen in the authorities cited in the note.⁴¹

Showing Jurisdictional Facts.—While, in indictments found in courts of limited or inferior jurisdiction, it is necessary that the facts necessary to give such courts jurisdiction should appear in the caption or commencement,⁴² it is not necessary for the caption to recite all the

220, 11 S. W. 811. **Miss.**—*Starling v. State*, 90 Miss. 255, 267, 43 So. 952, 13 Am. & Eng. Ann. Cas. 776. **Ohio.** *Davis v. State*, 19 Ohio St. 270. **Tex.** *Dancey v. State*, 35 Tex. Crim. 615, 34 S. W. 113, 938; *West v. State*, 27 Tex. App. 472, 11 S. W. 482. **Va.** *Garnett v. Com.*, 83 S. E. 1083; *Wright v. Com.*, 82 Va. 183.

[a] "The prefatory part of an indictment, showing that the process is 'in the name of the state of Mississippi,' and the presentment 'in the name and by the authority of the state of Mississippi,' and the conclusion of an indictment, charging all that has been charged to have been done, in one or many counts, is 'against the peace and dignity of the state of Mississippi,' ought not to be properly embraced in any count in any indictment, since both the preface and the conclusion of every bill of indictment apply to every count therein." *Starling v. State*, 90 Miss. 255, 268, 43 So. 952, 13 Am. & Eng. Ann. Cas. 776.

37. **Ala.**—*Overton v. State*, 60 Ala. 73; *Reeves v. State*, 20 Ala. 33. **Ky.** *Greenwood v. Com.*, 11 Ky. L. Rep. 220, 11 S. W. 811, style of the court and of the case need not be repeated with each count. **La.**—*State v. Lennon*, 8 Rob. 543. **Ohio.**—*Davis v. State*, 19 Ohio St. 270. **Tex.**—*Manovitch v. State*, 50 Tex. Crim. 260, 96 S. W. 1; *Anderson v. State*, 39 Tex. Crim. 34, 44 S. W. 824; *Dancey v. State*, 35 Tex. Crim. 615, 34 S. W. 113, 938.

38. *Mass. Rev. Laws*, 1902, ch. 218, §17.

39. *Pairo v. State*, 49 Ala. 25; *Duncan v. People*, 2 Ill. 456.

40. **Ky.**—*Greenwood v. Com.*, 11 Ky. L. Rep. 220, 11 S. W. 811. **Ohio.** *Davis v. State*, 19 Ohio St. 270. **Tex.**

West v. State, 27 Tex. App. 472, 11 S. W. 482.

See also *Garnett v. Com.* (Va.), 83 S. E. 1083.

41. Arch. Cr. Pl. & Ev. (13th Lond. ed.) 30; 3 Bac. Abr., tit. Indictment; 2 Bishop's New Cr. Proc., §§657, 658; 1 Chit. Cr. Law 326; 2 Hale P. C. 165; 1 Stark. Cr. Pl. (2d ed.) 238; Whart. Cr. Law (3d ed.), pp. 150, 151; 9 STANDARD PROC. 605, and the following cases: **Me.**—*State v. Conley*, 39 Me. 78, caption in this case "is conformable to general, if not universal practice in this and other states." **Mass.** *Com. v. Fisher*, 7 Gray 492. **N. J.** *Berrian v. State*, 22 N. J. L. 9; *State v. Price*, 11 N. J. L. 203. **N. M.**—*Tenorio v. Territory*, 1 N. M. 279. **N. Y.** *Dawson v. People*, 25 N. Y. 399. **N. C.** *State v. Jeffreys*, 1 N. C. 441. **Wis.** *Benedict v. State*, 12 Wis. 313.

[a] By the strictest rule of the common law, the caption was deemed sufficient, if it described, with reasonable certainty, the court before which the indictment was found, the time and place where it was found, and the jurors by whom it was found. *United States v. Beebe*, 2 Dak. 292, 301, 11 N. W. 505. And see generally, *supra*, VIII, A, 3, a.

42. *Mitchell v. Com.*, 106 Ky. 602, 51 S. W. 17. And see: **Ala.**—*Williams v. State*, 171 Ala. 56, 54 So. 535. **Ill.**—*Bell v. People*, 2 Ill. 397. **S. C.**—*State v. Williams*, 2 McCord 301.

See also 1 Chit. Cr. Law 329.

[a] In *State v. Williams*, 2 McCord (S. C.) 301, the court said: "The caption of an indictment must set forth with sufficient certainty, the court in which the jurors by whom and also the time and place at which the indictment was found. This strictness was required, that it might appear

facts which give the court jurisdiction, when the court in which the indictment is found is a court of general jurisdiction.⁴³

(II.) **Style of Court Where Found.**—The caption must set forth, with sufficient certainty, the style of the court in which the indictment was found and presented,⁴⁴ that it may appear on the face of the indictment

on the face of the indictment that the court had jurisdiction of the offense, that the jurors were sworn, and that the court was holden at the proper time. (2 Hawkins, P. C. 360-1-2-3.) And it will be found by a reference to the precedents that when courts were holden in vacation under special commissioners, it was usual to set out the commission at full length in the caption of the indictment."

43. **Ky.**—*Mitchell v. Com.*, 106 Ky. 602, 51 S. W. 17. **N. C.**—*State v. Haddock*, 9 N. C. 461. **Wis.**—*State v. McCarty*, 2 Pinn. 513, 2 Chand. 199, 54 Am. Dec. 150.

See also *State v. Marion*, 15 La. Ann. 495; *Rex v. Gilbert*, 1 Salk. 200, 91 Eng. Reprint 179.

44. **Ala.**—*Goodloe v. State*, 60 Ala. 93; *Reeves v. State*, 20 Ala. 33. **Miss.**—*Thomas v. State*, 5 How. 20, 31, 1 Mor. St. Cas. 160. **N. H.**—*State v. Gary*, 36 N. H. 359. **N. J.**—*Berrian v. State*, 22 N. J. L. 9; *State v. Price*, 11 N. J. L. 203. **N. M.**—*Tenorio v. Territory*, 1 N. M. 279; *Territory v. Sevailles*, 1 N. M. 119, citing *Thomas v. State*, 5 How. (Miss.) 20, 31, 1 Mor. St. Cas. 160. **N. C.**—*State v. Sutton*, 5 N. C. 281. **S. C.**—*State v. Williams*, 2 McCord 301. **Tenn.**—*Mitchell v. State*, 8 Yerg. 514, 528; *McClure v. State*, 1 Yerg. 206; *Tipton v. State*, Peck 308. **Wis.**—*Benedict v. State*, 12 Wis. 313; *Fitzgerald v. State*, 4 Wis. 395.

[a] But see *State v. Marion*, 15 La. Ann. 495, holding that the caption to an indictment is dispensed with in that state, inasmuch as a prosecution therein is never removed from one to a higher tribunal, and that the indictment itself need not describe the court before which it is found.

[b] If it be a special court, it should be so stated. *State v. Williams*, 2 McCord (S. C.) 301.

[c] Where the court is properly styled the "district court," it is objectionable to style it as a "circuit court." *Mau-zau-mau-ne-kah v. United States*, 1 Pinn. (Wis.) 124, 39 Am. Dec. 279.

[d] **Certainty to a common intent** is all that is required in designating the character of the court; any legal technicality should be disregarded especially after a trial upon the merits. See *Tenorio v. Territory*, 1 N. M. 279, citing *State v. Brisbane*, 2 Bay (S. C.) 451.

[e] The caption was sufficient in this respect in the following cases: **Cal.**—*People v. Connor*, 17 Cal. 354; *People v. Beatty*, 14 Cal. 566 (both holding that the court was properly entitled, it being styled the Court of Sessions of the City and County of San Francisco). **Dak.**—*Territory v. Pratt*, 6 Dak. 483, 43 N. W. 711. **Me.**—*State v. Conley*, 39 Me. 78, sufficient to show that the court in which the indictment was found was held in the state of Maine, at Portland, in and for the county of Cumberland. **Mass.**—*Com. v. Fisher*, 7 Gray 492 (sufficiently shows that it was found at a court held in the state); *Com. v. James*, 1 Pick. 375. **Mo.**—*State v. Meinhardt*, 73 Mo. 562. **N. J.**—*Berrian v. State*, 22 N. J. L. 9, 29; *State v. Price*, 11 N. J. L. 203. **N. M.**—*Territory v. Claypool*, 11 N. M. 568, 71 Pac. 463 (territorial court); *Tenorio v. Territory*, 1 N. M. 279. **N. Y.**—*People v. Rockhill*, 74 Hun 241, 26 N. Y. Supp. 222. **N. C.**—*State v. Jeffreys*, 1 N. C. 441. **Wis.**—*Fizell v. State*, 25 Wis. 364; *Benedict v. State*, 12 Wis. 313.

[f] The caption was insufficient in *Com. v. Mackin*, 9 Phila. (Pa.) 593, 29 Leg. Int. 85, wherein the court held that the omission of the words "of the peace" after the word "sessions," in the caption which was as follows: "In the Court of Quarter Sessions for the city and county of Philadelphia," was fatal to the indictment, since it did not appear therefrom that the proceeding was in any court recognized in the state.

[g] **Style of Courts in Territories.** **U. S.**—*Billingsley v. United States*, 178 Fed. 653, 101 C. C. A. 465; *Jackson v. United States*, 102 Fed. 473, 479, 42 C. C. A. 452 (territorial court of

ment that the court had jurisdiction of the offense charged therein.⁴⁵ Indeed, statutes in some states expressly provide that the indictment must contain the title of the action, specifying among other things the name of the court to which the same is presented.⁴⁶

The indictment is not defective, however, because the name of the court is not set forth at length in the caption.⁴⁷ On the contrary, if the name of the court is, either in express words, or by necessary implication, specified either in the caption or in the body of the indictment, it is sufficient in some states.⁴⁸

Alaska). **Dak.**—United States *v.* Spaulding, 3 Dak. 85, 13 N. W. 357, 538; United States *v.* Beebe, 2 Dak. 292, 11 N. W. 505. **Idaho.**—Pickett *v.* United States, 1 Idaho 523. **Mont.** State *v.* Upham, 2 Mont. 170. **N. M.** Territory *v.* Claypool, 11 N. M. 568, 71 Pac. 463; Tenorio *v.* Territory, 1 N. M. 279. **Wis.**—Mau-zau-mau-ne-kah *v.* United States, 1 Pinn. 124.

[h] **Style of Court in District Composed of More Than One County.** Giebel *v.* State, 28 Tex. App. 151, 167, 12 S. W. 591.

[i] Though there were two district courts in a county, each entitled to a grand jury, and the distinguishing number of the court in which the indictment was presented was not shown thereon, it sufficiently appeared that it was presented in the proper court, where it was shown that the judge was the presiding judge of the court in which the indictment was presented and in which the case was tried. Outley *v.* State (Tex. Crim.), 99 S. W. 95.

45. State *v.* Sutton, 5 N. C. 281; State *v.* Williams, 2 McCord (S. C.) 301.

46. See the following: **Ark.**—Kirby's Dig., §2243; St. Louis, etc. R. Co. *v.* State, 108 Ark. 423, 157 S. W. 1155. **Cal.**—Penal Code, §950. **Idaho.** Rev. Codes, 1908, §7677; State *v.* O'Neil, 24 Idaho 582, 135 Pac. 60. **Ia.**—Code, 1897, §5280. **Kan.**—Gen. St., 1905, §5991. **Minn.**—Rev. Laws, 1905, §5297. **Mont.**—Rev. Codes, 1907, §9147. **Nev.**—Rev. Laws, 1912, §7050. **N. Y.**—Code Crim. Proc., §275. **N. D.** Rev. Codes, 1905, §9848. **Okla.**—Rev. Laws, 1910, §5738. **S. D.**—Code Crim. Proc., §221 (Comp. Laws, 1910, p. 690). **Utah.**—Comp. Laws, 1907, §4730. **Wash.**—Rem. & Ball. Ann. Codes & St., §2055.

And see generally the statutes of the several states.

[a] **In Texas,** (1) it must appear from the indictment itself, and not merely from the record, that the same was presented in a court having jurisdiction thereof, by express provision of statute. Tex. Code Crim. Proc., art. 439 (in the district court of the county in which the grand jury is in session); Mathews *v.* State, 44 Tex. 376 (defect amendable); State *v.* Kilgough, 32 Tex. 74; Thomas *v.* State, 18 Tex. App. 213, 221. (2) The indictment is insufficient where such fact does not appear by direct affirmative allegation (Thomas *v.* State, *supra*), (3) only, however, where timely objection is taken on that ground. Long *v.* State, 1 Tex. App. 466; Hauck *v.* State, 1 Tex. App. 357. (4) Where there are two such courts in the same county, it need not be shown in which one it was presented. Sargent *v.* State, 35 Tex. Crim. 325, 33 S. W. 364.

[b] **Sufficient Averment.**—Where the indictment recited that "The grand jurors for the county of B, state aforesaid, duly organized as such at the May term, A. D. 1892, of the district court of said county, upon their oaths in said court present that A," etc., it was held that this directly and affirmatively alleged that the indictment was presented in the district court of the county having jurisdiction. Bell *v.* State (Tex. Crim.), 20 S. W. 362. 47. Harrison *v.* State, 55 Ala. 239; Bonner *v.* State, 55 Ala. 242.

[a] **Compare,** however, caption held insufficient in Com. *v.* Mackin, 9 Phila. (Pa.) 593, 29 Leg. Int. 85, as described in note 44, [f], *supra*.

48. St. Louis, etc. R. Co. *v.* State, 108 Ark. 423, 157 S. W. 1155, under Kirby's Dig., §2243. In this case, the caption of the indictment contained the style of the case, but the name or style of the court was not mentioned in the caption. The preliminary clause

It has also been held that where the record shows in what court the indictment was found, it is not absolutely necessary to state the name of the court in the caption.³⁰ Nor is the omission fatal, where statutes provide that the indictment shall not be deemed insufficient by reason of any defect or imperfection in matter of form only, which does not tend to the prejudice of the substantial rights of the defendant upon the merits.³¹

An erroneous description of the court in the caption does not necessarily vitiate the indictment,³² especially when the record shows that the court in which it was found had jurisdiction of the offense,³² for

of the indictment contained a specification that the presentation was by "the grand jury of Cross County." It was held that this was by necessary implication a statement that it was in the circuit court of that county, and sufficient, as a specification of the name of the court, to comply with the requirements of a statute providing that an indictment must contain the title of the prosecution, specifying the name of the court in which the indictment is presented.

[a] Since there can be but one court in the county by which a grand jury is impaneled, and that is the circuit court, a specification that the presentation is by "the grand jury of Cross County," is by necessary implication a statement that it is in the circuit court of that county. *St. Louis etc. R. Co. v. State*, 108 Ark. 424, 147 S. W. 1155.

[b] Where the indictment shows that it was found by the grand jury of W. county, and the orders of the court show that it was presented by the W. county grand jury to W. circuit court, and returned to and filed in that court, the failure of the indictment to give the title of the prosecution to specify the name of the court is not fatal, the object of the statute having been accomplished, although the letter was not complied with. *Spredalle v. Conn.*, 7 Ky. L. Rep. 529.

49. *State v. Craft*, 164 Mo. 631, 647, 65 S. W. 280; *State v. McIntire*, 74 Mo. 322; *State v. Duncan*, 80 Mo. 109, 120; *Ryba v. State*, 6 Mo. App. 800; also *Cuba v. United States*, 132 U. S. 211, 221, 14 Sup. Ct. 313, 38 L. ed. 472.

50. *Cuba v. United States*, 132 U. S. 211, 221, 14 Sup. Ct. 313, 38 L. ed. 472, notes 14, 15, 16.

[a] An indictment is not fatally defective because it does not state upon its face the particular court in which it was found, where the statute provides that no indictment shall be deemed invalid or in any manner affected for want of a proper or perfect venue, nor for want of any venue at all, nor for any defect or imperfection which does not tend to the prejudice of the substantial rights of the defendant upon the merits, for it cannot be said that this defect in any way tends to the prejudice of the rights of the defendant. *State v. Craft*, 164 Mo. 631, 647, 65 S. W. 280.

[b] It is an imperfection in matter of form within the meaning of statutes providing that an indictment is not insufficient by reason of an imperfection in matter of form, which does not tend to the prejudice of the substantial rights of the defendant, upon the merits. *People v. Haren*, 35 Misc. 590, 72 N. Y. Supp. 205.

51. Ala.—*Collins v. State*, 3 Ala. App. 64, 58 So. 80, indictment not defective because caption recites that it was preferred by the county court of C. county instead of by the county court of C. Ky.—*Mitchell v. Com.*, 106 Ky. 602, 51 S. W. 17, "Liquor Circuit Court" for "Lauder Circuit Court." Mo.—*State v. McIntire*, 73 Mo. 322. Mont.—*United States v. Upham*, 2 Mont. 170.

52. That the court is described as the "Cate Circuit Court" instead of the "Circuit Court of Cole County" is immaterial. *State v. McIntire*, 73 Mo. 322. See also *State v. England*, 13 Mo. 186, where the caption read "In the Hickman Circuit Court," and the indictment was held good.

53. *United States v. Upham*, 2 Mont. 170.

[c] Where the court described in

any defect in the title of the court as stated in the caption may be supplied by reference to the record.⁵² Mere surplusage in the description of the court in the caption will not vitiate the indictment.⁵³

Name of Judge.—The name or names of the judge or judges holding court at the time when the indictment was found need not appear in the caption, in the absence of any statute requiring it,⁵⁴ though upon

the caption was "The United States district court of the Territory of Montana for the second judicial district," the fact that it was described as a "United States" district court did not invalidate it, where the record accompanying the indictment showed that the indictment was found by the grand jury of the district court of the second judicial district of the Territory of Montana, which court had undoubted jurisdiction to find such indictment. *United States v. Upham*, 2 Mont. 170. To same effect is *Jackson v. United States*, 102 Fed. 473, 479 42 C. C. A. 492 (holding that the designation of the territorial court of Alaska as a district court "of the United States" would not invalidate it); *Pickett v. United States*, 1 Idaho 522 (wherein the indictment designated the venue as "In the district court of the United States of America, for the first judicial district of Idaho territory," and the court held that the insertion of the phrase "the United States of America" was unnecessary, but would be treated as nothing more serious than surplusage).

[5] That an indictment is headed "In the Circuit Court of the United States, etc.," whereas all of the proceedings were had in the "District Court," as appears from the record, does not vitiate it. Such recital does not have the force and effect of returning the indictment to the circuit court. Analogously, an order remitting it to the district court is neither necessary nor proper. *Bohrtner v. United States*, 108 Fed. 36, 47 C. C. A. 191.

[6] *Conn. v. Mullen*, 13 Allen (Mass.) 551, omission of the word "court" immaterial where by reference to the record sent up from the "competent court" it appeared that indictment was returned to that court, and that it was verified by the clerk upon the back of the indictment as having been so returned. *Commonwealth v. Matthews v. State*, 44 Tex. 376; *Lang*

v. State, 1 Tex. App. 466; *Ogden v. State*, 1 Tex. App. 357.

That errors or deficiencies in the caption may be supplied by the record, see 1879, VIII, A. 3, 4.

[7] *Pickett v. United States*, 1 Idaho 522. In this case the court should have been designated as "In the district court of the judicial district of Idaho territory," whereas it was designated as "In the district court of the United States of America, for the first judicial district of Idaho territory." It was held that the insertion of the words "the United States of America," though entirely unnecessary, could "be treated as nothing more serious than mere surplusage, and could indicate nothing further than that the district court was sitting upon the business of the United States, which is more properly deduced from the subject matter of an action, than from any title or name given to the court."

[8] The number of the judicial district is no part of the title of the district court, and, if erroneously given, may be rejected. *State v. March*, 22 Minn. 67.

[9] Where the caption of an indictment was: "Fourth Judicial Circuit, Mineral County Court," in the Circuit Court of Mineral County," the insertion of the word "Court" after the words "Mineral County" was a clerical error, and must be treated as mere surplusage, and is cured after verdict. *State v. Gilmore*, 9 W. Va. 541.

[10] **La.**—See *State v. Falke*, 2 La. Ann. 744. **N. M.**—*Tombie v. Territory*, 1 N. M. 179. **N. Y.**—*People v. Williams*, 109 N. Y. 545, 551, 36 N. D. 505. **Pa.**—See *Pennsylvania v. Hill*, 433, 156, 174, 1 Am. Dec. 298, the latter report, however, not reporting that portion of the case. **Wis.**—*Hager v. State*, 20 Wis. 438.

[11] See also *Ginn v. Shaffner*, 2 Pearson (Ala.) 430, wherein the court said: "The records are looked to for

this proposition there is authority, principally in the earlier cases, to the contrary.⁵⁶ In no event is it necessary to show his or their appointment.⁵⁷

(III.) **Time When Found.**—The caption must set forth with sufficient certainty the time at which the indictment was found and presented,⁵⁸ that it may appear on the face thereof that the court was held at the proper time.⁵⁹ Where such time is set forth with sufficient

the purpose of ascertaining the style of the court and the names of the judges, neither of which need appear on the indictment.”

[b] The court in *Tenorio v. Territory*, 1 N. M. 279, said: “It is not necessary to mention the name of the judge. Some states may require this, but the court is not aware of any act of our own legislature that requires it.”

[c] It will be presumed to have been held before a judge or judges, forming a competent court. *Pennsylvania v. Bell*, Add. (Pa.) 156, 174, 1 Am. Dec. 298.

[d] **Omission Cured by Statute.**—In *Caha v. United States*, 152 U. S. 211, 221, 14 Sup. Ct. 513, 38 L. ed. 415, objection was made to the form of the indictment in that its caption did not show the organization of the court, or who composed it or who were present as constituent parties thereof when the indictment was returned. The court, after reciting the showing made by the record, said: “With reference to all these objections it is enough to refer to section 1025 of the Revised Statutes, as follows: ‘No indictment found and presented by a grand jury in any district or circuit or other court of the United States shall be deemed insufficient, nor shall the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant.’”

[e] **Erroneous designation of name** of one of the justices holding the court at which the indictment was found held immaterial. See *People v. Thurston*, 2 Park. Crim. (N. Y.) 49.

56. *Thomas v. State*, 5 How. (Miss.) 20, 1 Mor. St. Cas. 160; *State v. Zule*, 16 N. J. L. 345, relying on 1 Chit. Cr. Law 331; 2 Hale P. C. 166. See also *Williams v. State*, 171 Ala. 56, 54 So. 535; *Goodloe v. State*, 69 Ala. 93;

Overton v. State, 60 Ala. 73; *Reeves v. State*, 20 Ala. 33; *Swain v. State*, 8 Ala. App. 26, 62 So. 446; *State v. Price*, 11 N. J. L. 203, 214.

[a] Recital in *Territory v. Sevaillies*, 1 N. M. 119, that caption “must show with sufficient certainty . . . the judge presiding,” citing *Thomas v. State*, 5 How. (Miss.) 20, 1 Mor. St. Cas. 160, must be considered as obiter, and overruled so far as this point is concerned by *Tenorio v. Territory*, 1 N. M. 279.

[b] **The purpose** of the requirement was to show that the judge was competent to hold the court, and had power to take the indictment. *State v. Zule*, 10 N. J. L. 348.

[c] The caption stated with sufficient certainty the court before which the indictment was found and the judge presiding thereat in *Fizell v. State*, 25 Wis. 364.

57. See *Pennsylvania v. Bell*, Add. (Pa.) 156, 174, 1 Am. Dec. 298 (the latter report, however, not reporting this portion of the case); *Rex v. Royce*, 4 Burr. 2073, 98 Eng. Reprint 81.

58. **Ala.**—*Reeves v. State*, 20 Ala. 33. See *Gater v. State*, 141 Ala. 10, 37 So. 692. **N. M.**—*Tenorio v. Territory*, 1 N. M. 279, caption in this case sufficient in this respect. **S. C.** *State v. Williams*, 2 McCord 301. **Tenn.** *Mitchell v. State*, 8 Yerg. 514, 528; *McClure v. State*, 1 Yerg. 206; *Tipton v. State*, Peck 308. **Wis.**—*Fitzgerald v. State*, 4 Wis. 395.

59. *State v. Williams*, 2 McCord (S. C.) 301.

[a] The day and year should be exhibited, that the indictment may appear to have been taken subsequently to the time that the offense was committed. *Tipton v. State*, Peck (Tenn.) 308. Compare *State v. Mowry*, 21 R. I. 376, 43 Atl. 871.

[b] An indictment purporting in the caption to have been found at a session of court held on a certain

certainly to a common intent, legal subtleties and niceties are to be disregarded.⁶⁰

Term of Court.—In stating the time when the indictment was found, it is not now absolutely necessary in all jurisdictions that there be a statement of the term of court at which it was found.⁶¹ In regard to all cases of offenses committed before the term, the caption may be general,⁶² the time being properly stated as of the term,⁶³ without alleging when it began,⁶⁴ or particularly describing it.⁶⁵ It, however,

day, which is the first day of the term, is good, although in fact found on a subsequent day of the same term. *Com. v. Hamilton*, 15 Gray (Mass.) 480.

[c] An objection that the indictment does not show that it was found or presented at a term of court, general or special, cannot be raised for the first time after conviction. It should be taken by motion before plea entered, a failure to do so precluding defendant from taking it later. *Territory v. Pratt*, 6 Dak. 483, 43 N. W. 711. As to objections generally, see *infra*, XIV; as to waiver of objections generally, see *infra*, XV.

60. *State v. Brisbane*, 2 Bay (S. C.) 451, cited with approval in *Tenorio v. Territory*, 1 N. M. 279, wherein the court, after stating requisites of caption, said: "In the caption of this indictment these requirements have been substantially complied with; certainty to a common intent is all that is required. Any legal technicality should be disregarded, especially after a trial upon the merits."

61. See the following cases: *Ga.* *Nixon v. State*, 121 Ga. 144, 48 S. E. 966; *Williams v. State*, 55 Ga. 391. *La.*—*State v. Granville*, 34 La. Ann. 1088, not necessary that an indictment should show, on its face, that it was found during a session of the court, when that fact appears from the record. *Mo.*—*State v. Meinhart*, 73 Mo. 562; *State v. Daniels*, 66 Mo. 192; *Kirk v. State*, 6 Mo. 469 (not indispensable for the caption to set forth the term of court at which indictment found, when these facts are shown by the record). *N. Y.*—*People v. Willson*, 109 N. Y. 345, 16 N. E. 540. *Tex.*—*Hudson v. State*, 40 Tex. 13, term of court not given in caption, nor is it one of the requisites required by the code in framing the indictment. It appears from other portions of the record.

[a] It is sufficient if this fact appears upon the back of the indictment or presentment where the return of the grand jury is entered. *Nixon v. State*, 121 Ga. 144, 48 S. E. 966.

62. *Com. v. Gee*, 6 Cush. (Mass.) 174, 180. And see *State v. Wentworth*, 37 N. H. 196.

[a] The term of holding court was sufficiently designated in the following cases: *Seal v. State*, 13 Smed. & M. (Miss.) 286, 1 Mor. St. Cas. 473; *Hudson v. State*, 40 Tex. 12; *Wright v. State*, 35 Tex. Crim. 367, 33 S. W. 973; *Garling v. State*, 2 Tex. App. 44.

63. *Com. v. Gee*, 6 Cush. (Mass.) 174, 180. And see *State v. Wentworth*, 37 N. H. 196, 206.

64. *Osborne v. State*, 24 Tex. App. 398, 6 S. W. 536. And see *Faguani v. State* (Tex. Crim.), 146 S. W. 542 (motion to quash because indictment incorrectly gave the term at which the grand jury was impaneled properly overruled); *Grayson v. State*, 35 Tex. Crim. 629, 34 S. W. 961 (statement as to time surplusage, which may be stricken out, and incorrect statement as to such time need not be amended).

[a] The term of the court is sufficiently stated, when the day is given on which the indictment was found. *People v. Beatty*, 14 Cal. 566.

[b] An indictment, purporting to have been found at a term of court begun on a certain date, is not necessarily vitiated by the fact that such date was a legal holiday. *Com. v. Chamberlain*, 107 Mass. 209; *Com. v. Cotton*, 11 Gray (Mass.) 1.

65. It need not state that it was found at a "trial term" of the court. It is sufficient to state, generally, that it was found at a "term" of the court. *State v. Wentworth*, 37 N. H. 196, 206.

[a] That the term is designated as a "special term," whereas the record shows that the indictment was pre-

the offense was committed after the commencement of the term, it would seem to be the more regular and proper mode, to recite that the indictment was found at a court begun and held on a day named, and continued by adjournment to another day named, being after the time of the alleged offense.⁶⁶

That the term is stated in figures, instead of words, is not objectionable,⁶⁷ especially if it appears from the record that an indictment was found at that term.⁶⁸

Conclusiveness of Time Stated.—The date of the finding of an indictment specified in its caption is not conclusive,⁶⁹ but it may be shown by competent evidence, including other records of the court, that it was in fact found at a later date.⁷⁰ Nor does a mistake in the time or term stated in the caption vitiate the indictment, where the records of the court show the true time,⁷¹ it being amendable in this

ferred at an "adjourned term," does not invalidate the indictment. *State v. Sweeney*, 68 Mo. 96.

[b] **Term at Which Grand Jury Sworn.**—Where the caption stated that the indictment was found at a designated term by certain men duly impaneled, sworn, and charged as grand jurors in and for the county at said term, it sufficiently showed that the indictment was found at the term of the court at which the grand jury was sworn. *Engleman v. State*, 2 Ind. 91, 52 Am. Dec. 494.

66. *Com. v. Gee*, 6 Cush. (Mass.) 174, 180; *Allen v. State*, 5 Wis. 329, 337. And see *Com. v. Stone*, 3 Gray (Mass.) 453.

67. *Johnson v. State*, 29 N. J. L. 453; *Barnes v. State*, 5 Yerg. (Tenn.) 186.

[a] That the dates in the caption to the bill of indictment are in Arabic figures, and not in Roman numerals does not invalidate it. *State v. Smith*, Peck (Tenn.) 165.

68. *Barnes v. State*, 5 Yerg. (Tenn.) 186.

69. *State v. Peloquin*, 106 Me. 358, 76 Atl. 888.

70. *State v. Peloquin*, 106 Me. 358, 76 Atl. 888; *Com. v. Colton*, 11 Gray (Mass.) 1; *Com. v. Stone*, 3 Gray (Mass.) 453 (indictment, purporting in its caption to have been found on the first day of the term, but charging an offense of a later date, may be shown, by reference to clerk's certificate indorsed thereon, to have been actually returned into court after this date).

71. **U. S.**—*United States v. Clark*,

125 Fed. 92. See *United States v. Bornemann*, 35 Fed. 824. **Ala.**—*Gater v. State*, 141 Ala. 10, 37 So. 692. **Ga.** *Williams v. State*, 55 Ga. 391; *Kincaide v. State*, 14 Ga. App. 544, 81 S. E. 910. **Ill.**—*George v. People*, 167 Ill. 447, 47 N. E. 741. **Me.**—*State v. Robinson*, 85 Me. 147, 26 Atl. 1092. **Mass.**—*Com. v. Brown*, 116 Mass. 339; *Com. v. Smith*, 108 Mass. 486; *Com. v. Hines*, 101 Mass. 33. **N. H.**—*State v. Jenkins*, 64 N. H. 375, 10 Atl. 699. **R. I.**—See *State v. Mowry*, 21 R. I. 376, 43 Atl. 871. **Tenn.**—*Firby v. State*, 3 Baxt. 358. **Tex.**—*Luster v. State*, 63 Tex. Crim. 541, 141 S. W. 209. See also *Fields v. State* (Tex. Crim.), 151 S. W. 1051, holding that where record showed true time of finding indictment, a recital in the indorsement of filing that it was filed at a date prior to the committing of the offense must be treated as a typographical or other error, not fatal to the prosecution.

[a] "An indictment which, taken in connection with the certificate indorsed thereon by the clerk at the time of its return into court, distinctly shows the dates of its presentment by the grand jury, and of the commission of the offense charged, is not invalidated by a defective description, in its caption, of the term of court at which it was found. It has already been held that an omission, in the caption, of the date of holding the term is immaterial, when the date of its presentment and return is stated in the clerk's indorsement, and the allegation in the indictment of the time of the commission of the offense is consistent therewith. Commonwealth

respect,⁷² since such a recital is no part of the indictment itself.⁷³

(IV.) **Place Where Found.**—The caption must set forth with sufficient certainty the place where the court was held and the indictment found.⁷⁴ This requires in some states a showing not only that the court in which the indictment was found was held for the proper county,⁷⁵ but also that it was held at the proper place within such county.⁷⁶

It is true that where the name of the county is given in the body of the indictment, it is not indispensable that it be named in the

v. Hines, 101 Mass. 33. We are of opinion that a like rule applies to this case, and that the statement, in the caption, of the year in which the court was held, may be rejected as inconsistent with the dates stated in the clerk's certificate and in the body of the indictment, and as manifestly erroneous." *Com. v. Smith*, 108 Mass. 486.

[b] A variance between the caption and the record in stating the term of the court at which the indictment is found is not fatal thereto, since the caption is no part of the indictment. *Mitchell v. State*, 8 Yerg. (Tenn.) 514, 528.

[c] That the record may supply defects or omission in the caption, see *infra*, VIII, A, 3, d.

72. *United States v. Clark*, 125 Fed. 92; *State v. Jenkins*, 64 N. H. 375, 10 Atl. 699.

As to amendment generally, see *infra*, XII.

73. See *supra*, VIII, A, 3, a.

74. **Ala.**—See *Gater v. State*, 141 Ala. 10, 37 So. 692; *Goodloe v. State*, 60 Ala. 93. **Me.**—See *State v. Conley*, 39 Me. 78. **Miss.**—*Lusk v. State*, 64 Miss. 845, 2 So. 256; *Thomas v. State*, 5 How. 20, 31, 1 Mor. St. Cas. 160; *Carpenter v. State*, 4 How. 163, 34 Am. Dec. 116. **N. H.**—*State v. Gary*, 36 N. H. 359. **N. M.**—*Tenorio v. Territory*, 1 N. M. 279; *Territory v. Sexavilles*, 1 N. M. 119, citing *Thomas v. State*, 5 How. (Miss.) 20, 31, 1 Mor. St. Cas. 160. **S. C.**—*State v. Williams*, 2 McCord 301. **Tenn.**—*Melton v. State*, 3 Humph. 389; *Grandison v. State*, 2 Humph. 451; *Mitchell v. State*, 8 Yerg. 514, 528; *McClure v. State*, 1 Yerg. 206; *Tipton v. State*, Peck 308. **Wis.**—*Fitzgerald v. State*, 4 Wis. 395.

[a] The place where taken should appear in order to show that it was

the place designated by law for the sitting of the court that took the indictment. *Tipton v. State*, Peck (Tenn.) 308.

[b] This requirement does not obtain in all states, however. See *People v. Willson*, 109 N. Y. 345, 351, 16 N. E. 540.

75. **Ga.**—*Stevens v. State*, 76 Ga. 96; *Forrester v. State*, 34 Ga. 107; *Lambert v. State*, 11 Ga. App. 149, 74 S. E. 858. **Miss.**—*Carpenter v. State*, 4 How. 163, 1 Mor. St. Cas. 126, 34 Am. Dec. 116. **Tenn.**—*State v. Fields*, Peck 140, must show county in which court was held.

[a] Where the county is mentioned in the caption, the last of the words "then and there" in the body of the indictment will be understood as referring to that county. *State v. Bell*, 25 N. C. 506.

76. *Lusk v. State*, 64 Miss. 845, 2 So. 256; *Sam v. State*, 13 Smed. & M. (Miss.) 189, 1 Mor. St. Cas. 430; *Kelly v. State*, 3 Smed. & M. (Miss.) 518, 1 Mor. St. Cas. 235; *Thomas v. State*, 5 How. (Miss.) 20, 1 Mor. St. Cas. 160; *Carpenter v. State*, 4 How. (Miss.) 163, 1 Mor. St. Cas. 126, 34 Am. Dec. 116; *Bob v. State*, 7 Humph. (Tenn.) 129 (must show that the court was held at the court house in the county of venue). Compare *Territory v. Claypool*, 11 N. M. 568, 574, 71 Pac. 163 (wherein the court said: "We know of no law which requires the name of the town where the district court was held to be set out in the indictment"); *State v. Shanks*, Tapp. (Ohio) 45, holding that since by law, the court must be held at the county seat, and cannot be held elsewhere, when it is recited that the court was held in a given county, it is in effect, and with sufficient certainty, said, that such court is held at the county seat of such county.

margin,⁷⁷ also that the omission to give such name in the caption of an indictment, otherwise perfect in form, does not render it fatally defective.⁷⁸ Nor is an omission to name the place within the county where the court was held a fatal defect where the record shows such fact.⁷⁹ It is otherwise where neither the record nor the caption shows such fact.⁸⁰ Where the place is set forth with sufficient certainty to a common intent, legal subtleties and niceties are to be disregarded.⁸¹

77. Ark.—*Kilgore v. State*, 73 Ark. 280, 83 S. W. 928. Ky.—*Johnson v. Com.*, 12 Ky. L. Rep. 835, 15 S. W. 662. Va.—*Tefft v. Com.*, 8 Leigh 721.

See also *State v. Buralli*, 27 Nev. 41, 71 Pac. 532.

[a] Where the county is named in the margin and the body of the indictment as well, it sufficiently appears that the indictment was found in the state of venue, without more. See *State v. Lane*, 26 N. C. 113.

78. *Kilgore v. State*, 73 Ark. 280, 83 S. W. 928.

[a] Where the caption shows that it is in the circuit court, and the name of the county is stated in the body of the indictment, the indictment is good. *Kilgore v. State*, 73 Ark. 280, 83 S. W. 928.

[b] **Presumption.**—Where an indictment recites that it was found in the circuit court of a county embracing two judicial districts, without specifying in which district it was found; and it appears from the term at which the indictment was found and the date of the clerk's indorsement upon it when it was received from the grand jury, that it was returned at a time when the court for one of the districts could alone legally be in session, it will be presumed from the indictment itself that it was returned by a grand jury legally empaneled in that district. *Helt v. State*, 52 Ark. 279, 12 S. W. 566.

79. *Coleman v. State* (Miss.), 40 So. 230, sufficient that record shows that court was held in town of C, at court house of said county.

80. *Lusk v. State*, 64 Miss. 845, 2 So. 256, arresting the judgment on that ground and holding that statute curing defects after verdict did not apply, since this defect is incurable. To same effect, *Thomas v. State*, 5 How. (Miss.) 20, 1 Mor. St. Cas. 160.

81. *State v. Brisbane*, 2 Bay (S. C.) 451. And see *Tenorio v. State*, 1 N. M. 279, citing *State v. Brisbane*, *supra*.

[a] **Place of holding court properly designated** in the following cases: Mass.—*Com. v. Fisher*, 7 Gray 492, sufficiently shown that it was found at a court held in the state. Miss. *Kelly v. State*, 3 Smed. & M. 518, 1 Mor. St. Cas. 235; *Woodside v. State*, 2 How. 655. N. M.—*Tenorio v. Territory*, 1 N. M. 279. Ohio.—*State v. Shanks*, Tapp. 45. Tenn.—*Melton v. State*, 3 Humph. 389, sufficiently appeared that court was held for L. county, without an express allegation to that effect. Tex.—*Giebel v. State*, 28 Tex. App. 151, 12 S. W. 591, "In the criminal District Court of Galveston County." Wis.—*Fizell v. State*, 25 Wis. 364.

[b] Though a statute directed that the court be held at "Conwayborough," an indictment was not bad where it alleged that it was found at "Horry Court House," instead of "Conwayborough," since both terms in one sense meant the same, the term "Horry Court House" being the more precise term. *State v. Thayer*, 4 Strobb. (S. C.) 286.

[c] Since the entire term of a court of record is, in contemplation of law, but one day, if it appear that the court was opened at the right place, the legal presumption is that it was held at the same place for every other day of the term, including the day on which the indictment was found. *Smith v. State*, 9 Humph. (Tenn.) 9.

[d] **A misrecital of the proper county** is not ground for arresting the judgment, where a statute exists curing defects or imperfections in matter of form after verdict. *State v. Sprinkle*, 65 N. C. 463.

[e] **Where several counties are attached for judicial purposes**, (1) an indictment for a crime committed in one county may be entitled as in all of the counties (*State v. Stokely*, 16 Minn. 282), (2) and entitling it in the name only of the county to which

The omission of the name of the state from an indictment, where the name of the county is inserted in the margin or body thereof, is not a fatal defect.⁸²

(V.) **Statements as to Grand Jury.**⁸³ — (A.) **ORGANIZATION, NAMES AND NUMBER.**⁸⁴ — The caption or formal parts of the indictment served on the defendant need not show the organization of the grand jury.⁸⁵ If the facts necessary to show its proper organization appear, either in the face of the indictment, or in the caption of the record of the court, it is sufficient.⁸⁶

More particularly, it need not be stated in express terms that the

the others are attached is a defect of form merely. *State v. McCarthey*, 17 Minn. 76. *Compare Giebel v. State*, 28 Tex. App. 151, 12 S. W. 591, holding that it is not necessary for an indictment to recite that it is presented in a court of both of two counties joined for judicial purposes, the statute contemplating that the indictment shall be entitled as of the county in which the crime is committed and the indictment found.

82. *State v. Blakely*, 83 Mo. 359 (failure to name the state in the margin of the indictment does not vitiate it); *State v. Lane*, 26 N. C. 113 (not cause for arresting the judgment).

[a] In *State v. Blakely*, 83 Mo. 359, the court said: "While it is said in 1 Bish. Cr. Proc., sec. 383, that it is customary to write the name of the state in the margin in connection with the name of the county, it is also said 'that the name of the state need not appear either in the margin or in any other part of the indictment.'"

83. As to grand jury generally, see the title "**Grand Jury**."

[a] As to recitals as to grand jury in commencement as distinguished from caption, see *infra*, VIII, A, 4, b, (II).

84. As to formation and organization of grand jury, see 10 STANDARD PROC. 621, et seq.

85. See the following cases: **U. S.** *United States v. Laws*, 2 Low. 115, 26 Fed. Cas. No. 15,579. **Ala.**—*Overton v. State*, 60 Ala. 73; *Curtis v. State*, 9 Ala. App. 36, 63 So. 745. **N. J.** *Berrian v. State*, 22 N. J. L. 9, 29. **Okla.**—*Jones v. Territory*, 4 Okla. 45, 51, 43 Pac. 1072; *Fisher v. United States*, 1 Okla. 252, 31 Pac. 195.

[a] These are matters which properly appear only in the minutes of the court. *Curtis v. State*, 9 Ala. App. 36, 63 So. 745.

[b] That record should show the organization of the grand jury, see 10 STANDARD PROC. 663.

[c] "It is not necessary that all preliminary steps of drawing, selecting and empanneling a grand jury shall appear in an indictment, nor would a statement in an indictment that such steps had been taken be in any manner conclusive. The selecting and empanneling of the grand jury are matters that are done in court prior to the finding or presentation of any indictment, and such proceedings are recorded in the journals of the court, and the records of the court is the proper place to look for such proceedings rather than in the formal parts of an indictment. The reasons that at one time existed for requiring these matters to be set forth in the indictment have long since ceased to exist, and in fact never did exist in this territory." *Jones v. Territory*, 4 Okla. 45, 51, 43 Pac. 1072. And see also *Keith v. Territory*, 8 Okla. 307, 57 Pac. 834; *Fisher v. United States*, 1 Okla. 252, 31 Pac. 195.

[d] **If Necessary, Omission Cured by Statute.**—The fact that the caption does not show the organization of the court in which it was found, or who composed it, or who were present as constituent parties thereof when the indictment was returned is not fatal under a statute providing that no indictment shall be deemed insufficient by reason of any defect or imperfection in matter of form, which does not tend to the prejudice of defendant. *Caha v. United States*, 152 U. S. 211, 221, 14 Sup. Ct. 513, 38 L. ed. 415.

86. *McBean v. State*, 3 Heisk. (Tenn.) 20 (on motion to quash or in arrest of judgment); *Grandison v.*

grand jury were summoned and returned as such,⁸⁷ nor by whom,⁸⁸ or by what authority they were summoned,⁸⁹ nor even that they were selected and impaneled.⁹⁰

Names of Grand Jurors.—It is now well settled that it is not necessary that the indictment itself should set forth the names of the grand jurors finding it,⁹¹ in the absence of any statute requiring it so to do.⁹² It is probably true also that the caption need not now show such

State, 2 Humph. (Tenn.) 451; Tipton v. State, Peek (Tenn.) 308.

87. *Berrian v. State*, 22 N. J. L. 9, 29; *State v. Jones*, 9 N. J. L. 357, 371, 17 Am. Dec. 483.

88. *Berrian v. State*, 22 N. J. L. 9; *State v. Price*, 11 N. J. L. 203.

89. *Berrian v. State*, 22 N. J. L. 9; *State v. Price*, 11 N. J. L. 203.

[a] Need not be shown that the grand jury was legally called before the court. *Harrington v. State*, 36 Ala. 236.

90. See the following cases: *Ala.* *Morgan v. State*, 19 Ala. 556. *N. J.* *Berrian v. State*, 22 N. J. L. 9, 29. *N. Y.*—*People v. Reavey*, 38 Hun 418, that grand jury was drawn or sworn not now required to be stated. *Okla.* *Jones v. Territory*, 4 Okla. 45, 51, 43 Pac. 1072.

[a] "In a very few of the precedents, the word 'impanelled, sworn and charged,' are used, but in a case reported in 3 Salk. 191, in the second of Anne, an exception to a caption for the want of the word 'impanelled' was overruled, and the word held to be unnecessary." *State v. Jones*, 9 N. J. L. 357, 371, 17 Am. Dec. 483.

[b] No allegation as to the time when they were impaneled is necessary. If one be made, it may be disregarded as surplusage. *State v. Miller*, 6 Ind. App. 653, 34 N. E. 27. An imperfect statement thereof does not render the indictment bad. *State v. Miller*, 6 Ind. App. 653, 34 N. E. 27.

[c] **Impounded for Impaneled.** That the word "impounded" is substituted for the word "impaneled" in the caption of an indictment is not reversible error. *Williams v. State*, 3 Heisk. (Tenn.) 376.

[d] That an indictment states that the grand jurors were "sworn, chosen and selected" instead of "selected, chosen and sworn," is no ground for quashing it. *Wesley v. State*, 65 Ga. 731.

[e] **Omission To State Grand Jury Attending Court.**—An indictment is not bad for its omission to state that the grand jury was attending the court. *State v. Williams*, 49 W. Va. 220, 38 S. E. 495, the court saying: "That is not material in the indictment. It does not enter into the charge. Its omission could not prejudice the accused. The record shows an indictment in that court, and the grand jury must have been attending that court and none other."

91. See the following cases: *U. S.* *United States v. Crawford*, 1 N. Y. Leg. Obs. 388, 25 Fed. Cas. No. 14,890, need not appear in the indictment itself. *Ala.*—*State v. Murphy*, 9 Port. 487. *Ga.*—*Williams v. State*, 107 Ga. 721, 33 S. E. 648. *La.*—*State v. Shay*, 30 La. Ann. 114; *State v. Marion*, 15 La. Ann. 495. *Me.*—*State v. McAlister*, 26 Me. 374. *Mass.*—*Com. v. Johnson*, Thach. Cr. Cas. 284. *N. Y.* *People v. Willson*, 109 N. Y. 345, 351, 16 N. E. 540; *People v. Bennett*, 37 N. Y. 117, 4 Abb. Pr. (N. S.) 89, 93 Am. Dec. 551; *McGarry v. People*, 2 Lans. 227; *People v. Haynes*, 55 Barb. 450, 38 How. Pr. 369. *Ohio.* *Fouts v. State*, 8 Ohio St. 98, 104; *Mahan v. State*, 10 Ohio 232 (obiter). *S. C.*—*State v. Pressly*, Riley 234. *Eng.*—*Rex v. Aylett*, 6 Ad. & El. 246, 33 E. C. L. 148.

[a] In *Mahan v. State*, 10 Ohio 232, the court said (obiter): "They (the names of the grand jurors) may be set forth in the indictment itself, but this is not usual."

92. Under the Georgia statutory form for indictments, it is mandatory that the names of the grand jurors should be inserted in the indictment, a failure to do so rendering it fatal where timely objection is taken, as where taken on arraignment and before pleading. *Willerson v. State*, 14 Ga. App. 451, 81 S. E. 391, explaining dictum in *Taylor v. State*, 121 Ga. 362,

names.⁹³ It is essential, however, that the record of the case should show these names.⁹⁴ Formerly, a different rule prevailed, and the indictment, or more properly the caption, which is really no part of the indictment, was required to set forth the names of the grand jurors making the finding.⁹⁵

Where required, a merely clerical error in writing one of the names will not invalidate the indictment.⁹⁶ Nor is it a fatal objection that one of the names as it appears in the caption or indictment is substantially different from his name in the panel,⁹⁷ if in reality it is

49 S. E. 317, and *Williams v. State*, 107 Ga. 721, 33 S. E. 648.

[a] It is not required that the grand jurors insert their names with their own hands; but the names may all be in one handwriting. *Minor v. State*, 63 Ga. 318.

[b] **Need Not Designate Foreman.** "But there is no statutory requirement that one of the grand jurors should be designated as foreman in the indictment." *Taylor v. State*, 121 Ga. 362, 49 S. E. 303.

93. See *People v. Wilson*, 109 N. Y. 345, 16 N. E. 540; *McGarry v. People*, 2 Lans. (N. Y.) 227; also *Dawson v. People*, 25 N. Y. 399; *Fouts v. State*, 8 Ohio St. 98, *overruling dicta* to contrary in *Mahan v. State*, 10 Ohio 232.

94. *Fouts v. State*, 8 Ohio St. 98, 104; *Mahan v. State*, 10 Ohio 232 (obiter that names of grand jurors should appear in some part of the record). And see *supra*, IV, A, 3.

95. See the following cases, holding that the caption must set forth with sufficient certainty the jurors by whom the indictment was found. *Ala. State v. Murphy*, 9 Port. 487. *Miss. Thomas v. State*, 5 How. 20, 31, 1 Mor. St. Cas. 160. *N. M.—Territory v. Sevailes*, 1 N. M. 119. *N. Y.—People v. Bennett*, 37 N. Y. 117, 4 Abb. Pr. (N. S.) 89, 93 Am. Dec. 551. *S. C. State v. Williams*, 2 McCord 301. *Tenn. Mitchell v. State*, 8 Yerg. 514, 528; *McClure v. State*, 1 Yerg. 206. *Wis. Fitzgerald v. State*, 4 Wis. 395.

[a] In *Dawson v. People*, 25 N. Y. 399, the court said: "Most of the writers on criminal law state that the indictment (or rather the caption, which is not a part of the indictment), should contain the names of the grand jurors by whom the presentment is made, and the usual, but not constant practice has been to insert them."

[b] In *Mahan v. State*, 10 Ohio 232, the court said (obiter): "It is a well-settled principle, in criminal pleading, that it must appear, in the caption of an indictment, that it was taken upon oath, and that the names of all the jurors by whom taken must be stated." This case is now considered as overruled on this point, however, by *Fouts v. State*, 8 Ohio St. 98.

[c] **For development of English doctrine**, see 1 Saund. 248, note, 85 Eng. Reprint 292.

[d] **Time for Objection.**—If the objection that the grand jurors are not named in the caption is available at all, it must be presented on motion to quash or by demurrer; it is too late to present it upon writ of error after judgment. *Dawson v. People*, 25 N. Y. 399; *Rex v. Aylett*, 6 Ad. & El. 246, 33 E. C. L. 148. As to time for taking objections generally, see *infra*, XIV.

96. *Harrell v. State*, 11 Ga. App. 407, 75 S. E. 507; *State ex rel. Dunn v. Noyes*, 87 Wis. 340, 58 N. W. 386, 41 Am. St. Rep. 45, 27 L. R. A. 733.

97. *State v. Dayton*, 23 N. J. L. 49, 61, 33 Am. Dec. 270; *State v. Norton*, 23 N. J. L. 33, 47 (defect amendable).

[a] In the Norton case (23 N. J. L. 33, 47), the court said: "It is by no means clear that the names, as they appear in the panel and in the caption, are not idem sonans, . . . and the objection upon this ground not well founded. But, admitting the names to be substantially variant, when there is no pretense that the persons named in the panel and in the caption are really different, but the difficulty consists in the misprision of the clerk in preparing the caption, the court will not permit the indict-

the same person. It is no objection that the initials of their Christian names are used.⁹⁸

Number of Grand Jurors.—It is not necessary either in the caption or in the body of the indictment to expressly recite the number of the grand jury,⁹⁹ it being sufficient if the indictment show upon its face that the grand jury were of the number and qualifications required by law.¹ Nor is it necessary to state that the indictment was found by the concurrence of twelve or more grand jurors.²

(B.) **QUALIFICATIONS.**³—It is not necessary to state the qualifications of the grand jurors at length in the caption,⁴ it being sufficient if it be shown that they were good and lawful men, which comprehends every necessary qualification prescribed by law.⁵ Nor is accuracy in making this showing important, where every facility is offered to

ment upon that ground to be quashed. The caption is amendable.”

[b] **Variance Between Indorsement and Body of Indictment.**—Where an indictment was indorsed “true bill,” and signed by B as foreman of the grand jury, the fact that in the body of the indictment the names of the grand jurors were stated, but the word “foreman” was written opposite the name of another juror, was no reason for quashing the indictment. *Taylor v. State*, 121 Ga. 362, 49 S. E. 303.

98. *Minor v. State*, 63 Ga. 318; *Stephen v. State*, 11 Ga. 225.

99. **N. Y.**—*McGarry v. State*, 2 Lans. 227. **Ohio.**—*Young v. State*, 6 Ohio 435. **Wis.**—See *Fitzgerald v. State*, 4 Wis. 395.

[a] The legal presumption, where there is no recital, (1) is that the jury was rightly constituted. *Fitzgerald v. State*, 4 Wis. 395. And see *Young v. State*, 6 Ohio 435. (2) On the other hand, if there be a recital as to the number of grand jurors, and it shows that the grand jury was not composed of the number required by law, the indictment is invalid and a conviction thereunder cannot be sustained. *Fitzgerald v. State*, 4 Wis. 395.

1. *McGarry v. People*, 2 Lans. (N. Y.) 227.

As to necessity for statement of qualifications, see *supra*, this section.

2. *United States v. Laws*, 2 Low. 115, 26 Fed. Cas. No. 15,579; *Turns v. Com.*, 6 Mete. (Mass.) 224, 233.

[a] In *Johnston v. State*, Mart. & Y. (Tenn.) 129, it was objected to the indictment that it did not show that it was found by the oaths of twelve men. The court held that the caption

showed that fact, and that it was not necessary to repeat it on the face of the indictment.

[b] The signature of the foreman, certifying the indictment to be a true bill, legally imports that it was so found. *Turns v. Com.*, 6 Mete. (Mass.) 224, 233. And see *United States v. Laws*, 2 Low. 115, 26 Fed. Cas. No. 15,579; *Watts v. Territory*, 1 Wash. Ter. 409; *McAllister v. Territory*, 1 Wash. Ter. 360. As to signature of foreman, see *infra*, VIII, A, 7, a.

[c] **Cured by Statute.**—The fact that an indictment does not contain an express recital that it was found by the concurrence of at least twelve jurors is not fatal under a statute providing that no indictment shall be deemed insufficient by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant. *Caha v. United States*, 152 U. S. 211, 221, 14 Sup. Ct. 513, 38 L. ed. 415, under §1025, Rev. St.

As to number which must concur in finding, see the title “Grand Jury.”

3. As to qualifications generally, see the title “Grand Jury.”

4. *State v. Price*, 11 N. J. L. 203; *State v. McCarty*, 2 Pinn. (Wis.) 513, 2 Chand. 199, 54 Am. Dec. 150.

5. **Ind.**—*Mathis v. State*, 94 Ind. 562; *Beauchamp v. State*, 6 Blackf. 299; *Jerry v. State*, 1 Blackf. 395. **N. J.**—*State v. Price*, 11 N. J. L. 203. **N. C.**—*State v. Glasgow*, 1 N. C. 38, 2 Am. Dec. 629. **Tenn.**—*Cornwell v. State*, Mart. & Y. 147; *Bonds v. State*, Mart. & Y. 143, 17 Am. Dec. 795.

[a] It need not be stated that they were freeholders or householders in such case. *Cornwell v. State*, Mart. &

the defendant to ascertain their qualifications.⁶ It is not even necessary, that the qualifications of the jurors should appear in the case of proceedings in the superior courts.⁷

From County Where Indictment Found.—The caption or other formal part of the indictment should show that the grand jury were of the county where the court was held, for which they were sworn and the indictment found, the omission being a fatal defect in some states.⁸ Indictments have been sustained, however, without the name of the county being stated in describing the grand jury in the body of the

Y. (Tenn.) 147; *Bonds v. State*, Mart. & Y. (Tenn.) 143, 17 Am. Dec. 795.

6. *Cornelius v. State*, 12 Ark. 782, 27 L. R. A. 789n.

[a] If the indictment, after reciting the state and county, and the term of the court, aver that, the grand jurors of the state named, "being good and lawful men of the county of W., aforesaid, and being then and there duly elected, empanelled and sworn," etc., it is sufficient to show that the grand jury was composed of duly qualified men. *Weeks v. State*, 31 Miss. 490. See also *Mathis v. State*, 94 Ind. 562; *Benedict v. State*, 12 Wis. 348.

[b] Where the caption states that the grand jurors were "balloted for, elected, tried, and sworn," it sufficiently appears that the jury was composed of qualified men. *Turner v. State*, 9 Humph. (Tenn.) 119.

7. *Stone v. State*, 30 Ind. 115; *Weinzorpflin v. State*, 7 Blackf. (Ind.) 186; *Cornwell v. State*, Martin & Y. (Tenn.) 147 (citing 1 Chit. Cr. Law 333; Hawk. P. C., ch. 2, §17; *Rex v. Darly*, 4 East (Eng.) 175); *Bonds v. State*, Martin & Y. (Tenn.) 143, 17 Am. Dec. 795. See also *State v. Alderson*, 10 Yerg. (Tenn.) 523. Compare *Grandison v. State*, 2 Humph. (Tenn.) 451, holding that a caption which does not state that a grand jury of good and lawful men were impaneled is defective.

[a] In *Weinzorpflin v. State*, 7 Blackf. (Ind.) 186, the caption stated that the grand jury impaneled and sworn at the circuit court of, etc., found the indictment. The court said: "This is equivalent to saying the jury was impanelled, etc., in open court; and as the Circuit Court possesses extensive and general criminal jurisdiction, it was not necessary to specify the qualifications of the

jurors, or to allege that they were good and lawful men. All this must be presumed."

8. See the following cases: Ark. *Cornelius v. State*, 12 Ark. 782, 27 L. R. A. 789. Miss.—*Carpenter v. State*, 4 How. 163, 1 Mor. St. Cas. 126, 34 Am. Dec. 116; *Woodsides v. State*, 2 How. 655, 1 Mor. St. Cas. 95; *Byrd v. State*, 1 How. 163, 171. N. M. *Tenorio v. Territory*, 1 N. M. 279 (grand jury must appear to have been sworn for the body of the county); *Territory v. Sevailles*, 1 N. M. 119. Tenn.—*State v. Davidson*, 2 Coldw. 184; *Mitchell v. State*, 8 Yerg. 514, 528; *Cornwell v. State*, Mart. & Y. 147, 163; *Tipton v. State*, Peck 307; *State v. Hunter*, Peck 166; *State v. Fields*, Peck 140. Tex.—*State v. Hilton*, 41 Tex. 565 (wherein name of county was wholly omitted); *Vanvickie v. State*, 22 Tex. App. 625, 2 S. W. 642; *Davis v. State*, 6 Tex. App. 133. Wis.—*Mau-zau-mau-ne-kah v. United States*, 1 Pinn. 124, 39 Am. Dec. 279, not merely for the "territory."

Compare *Jones v. Territory*, 4 Okla. 45, 51, 43 Pac. 1072.

[a] For otherwise, they had no right to find it. *Tipton v. State*, Peck (Tenn.) 307.

[b] This fact must be shown by the caption, or it will be presumed that the court has proceeded without authority. *Carpenter v. State*, 4 How. (Miss.) 163, 34 Am. Dec. 116.

[c] In *Territory v. Sevailles*, 1 N. M. 119, the indictment only described the grand jurors as the grand jurors of the territory of New Mexico, inquiring for the county of San Miguel, etc. It did not show that they were chosen, impaneled, and sworn for the county. The court said: "They may have been chosen, impaneled, and sworn in any other county, as far as

instrument, where the county and court have been properly designated in the caption or title thereof.⁹ And it has been definitely settled that when it is stated in an indictment that the jurors were duly summoned and impaneled and sworn in and for the body of the county, the fact that they were of the county for which they were sworn is made to appear with sufficient certainty.¹⁰

the caption gives information to the defendant. It is true that the record may supply deficiencies in the caption in some cases, but it is conceived that if the caption undertakes to describe the grand jurors, that the law will require the territory to make a full and legal description."

[d] It need not specify the place (1) at which the grand jury was sitting (*Rosencrans v. United States*, 165 U. S. 257, 263, 17 Sup. Ct. 302, 41 L. ed. 708), (2) nor that they are residents in the division of the district in which they served. *May v. United States*, 199 Fed. 53, 117 C. C. A. 431. (3) It is no more necessary to state this latter fact than it is to state that they were of legal age, or that they were citizens, or that their names had been placed in the box by the clerk and commissioner and then been drawn alternately from the box by those officials. *May v. United States*, 199 Fed. 53, 117 C. C. A. 431.

[e] As to necessity for showing that court was held in the proper county, see *supra*, VIII, A, 3, c, (IV).

9. See the following cases: **Ala.** *Morgan v. State*, 19 Ala. 556. **Ga.** *Stevens v. State*, 76 Ga. 96, wherein an indictment headed "Georgia, Liberty County," was held to show that the grand jury was drawn and sworn in that county. **Ind.**—*State v. Kiger*, 4 Ind. 621. **Nev.**—*State v. Buralli*, 27 Nev. 41, 71 Pac. 532. **N. M.**—*Leonardo v. Territory*, 1 N. M. 291. **Vt.**—*State v. Brady*, 14 Vt. 353.

[a] **Reason.**—A grand jury in regular organization and attendance upon a court is necessarily one within and for the county where the court is in session. *State v. Buralli*, 27 Nev. 41, 71 Pac. 532.

10. *Keith v. Territory*, 8 Okla. 307, 57 Pac. 834. And see *Leonardo v. Territory*, 1 N. M. 291; *Fizell v. State*, 25 Wis. 364. Compare *Tipton v. State*, Peck (Tenn.) 307, holding that this should appear by a direct statement, not be made out by inference.

[a] Where it is recited that the grand jurors "were impaneled, sworn, and charged to inquire within and for the body of the county of B," the caption is not defective because it does not state in express terms that they were taken from such county. *Leonardo v. Territory*, 1 N. M. 291, wherein the court said that "it is an extremely forced presumption, to suppose that a grand jury thus designated were taken from a neighboring county, instead of the county where the trial took place and in which the offense was committed. It is therefore sufficiently apparent that they were properly and legally selected."

[b] A recital that the grand jury were "inquiring in and for the county of D." is sufficient, without the words "for the body of the county." *Fizell v. State*, 25 Wis. 364.

[c] If an indictment is found by the grand jurors, inquiring for the body of the proper county, it will be presumed, after trial, that they were performing their duties within the county when the bill was found. *Com. v. Jackson*, 1 Grant Cas. (Pa.) 262.

[d] It was sufficiently shown that the indictment was found by a grand jury of the proper county in the following cases: **Ind.**—*Howell v. State*, 4 Ind. App. 148, 30 N. E. 714. **Kan.** *Wise v. State*, 2 Kan. 419, 85 Am. Dec. 595; *Guy v. State*, 1 Kan. 448. **Mass.**—*Jeffries v. Com.*, 12 Allen 145; *Com. v. Edwards*, 4 Gray 1, 6 (sufficient that, in the caption or by reference thereto, they describe themselves as grand jurors for the county of venue); *Com. v. Johnson*, Thach. Cr. Cas. 284. **Miss.**—*Woodside v. State*, 2 How. 655, 1 Mor. St. Cas. 95; *Shaffer v. State*, 1 How. 238, 1 Mor. St. Cas. 65; *Byrd v. State*, 1 How. 163, 172. **Mo.**—*State v. Gilson*, 114 Mo. App. 652, 90 S. W. 400. **N. Y.**—*People v. Rockhill*, 74 Hun 241, 26 N. Y. Supp. 222. **Tex.**—*Vanvickie v. State*, 22 Tex. App. 625, 2 S. W. 642; *Davis v. State*, 6 Tex. App. 133.

(C.) SWEARING OF GRAND JURY. — The form of indictment prescribed by statutes in some states omits a recital of the swearing of the grand jury;¹¹ and it has been held that it is not necessary to the validity of an indictment that it should appear in the caption that the grand jury were sworn if it so appears in the body of the indictment.¹² Of course, formerly, it was usual, if not indeed essential, to recite in the caption or commencement that the grand jury were sworn, and such may still be the rule in some states in the absence of statutory

[e] Where an indictment was headed "Georgia, Liberty County," this was sufficient to show for what county the grand jurors were drawn and served, and of what county they were. *Stevens v. State*, 76 Ga. 96.

[f] An indictment purporting to be by "the grand jurors of the state of Ohio, inquiring of crimes and offenses within and for the county of Monroe," must be taken as found by a grand jury of that county, as well as for the state. *Mackey v. State*, 3 Ohio St. 362.

[g] Where the caption of the indictment showed that it was presented by a grand jury "taken from the body of the good and lawful men" of the first circuit court district of a county and state named, it sufficiently showed that the grand jury returning the indictment was impaneled from the proper district. *Coleman v. State* (Miss.), 40 So. 230.

[h] Where the caption describes the court, and the term at which it was returned, and then recites that it was found by "the grand jurors for the commonwealth on their oath," while the record shows the names of the grand jurors, the indictment was sufficient as against the objection that it does not appear on its face that it was made by the jurors of the county of venue. *Com. v. Johnson*, Thach. Cr. Cas. (Mass.) 284.

[i] It is not objectionable that an indictment purports, on its face, to have been found by "the grand jury of said court," instead of said county, where the caption shows the venire, and the general organization of the grand jury. *Perkins v. State*, 50 Ala. 154.

[j] An erroneous designation of the grand jury in this respect is not fatal, especially where a statute provides that no indictment is insufficient by reason of a defect or imperfection in

matter of form which does not tend to prejudice the substantial rights of the defendant upon the merits. *Jackson v. United States*, 102 Fed. 473, 481, 42 C. C. A. 452.

11. See the statutes, and *Mo.*—*State v. Vincent*, 91 Mo. 662, 4 S. W. 430, that they were empanelled, sworn and charged. *N. Y.*—*People v. Reavey*, 38 Hun 418, that grand jury was drawn or sworn not now required to be stated. *Ore.*—*State v. Guglielmo*, 46 Ore. 250, 79 Pac. 577, 80 Pac. 103, 69 L. R. A. 466, under *Bell. & C. Codes & St.*, §1304.

[a] Under the Texas code, it is not necessary that the indictment should state that the grand jurors were sworn. It is sufficient if it appears from the face of the indictment that it was the act of the grand jury of the proper county. *Hart v. State* (Tex. Crim.), 44 S. W. 1105; *Vanvickie v. State*, 22 Tex. App. 625, 2 S. W. 642; *Chevarrio v. State*, 17 Tex. App. 390.

[b] Of course, before the grand jury can enter upon the discharge of their duties, an oath is required to be administered to them, the form of which is generally prescribed by statute. *State v. Guglielmo*, 46 Ore. 250, 79 Pac. 577, 80 Pac. 103, 69 L. R. A. 466. And see 10 STANDARD PROC. 627.

12. *McBean v. State*, 3 Heisk. (Tenn.) 20; *State v. Long*, 1 Humph. (Tenn.) 386, followed in *Melton v. State*, 3 Humph. (Tenn.) 389; *McClure v. State*, 1 Yerg. (Tenn.) 206, overruling *State v. Fields*, Peck (Tenn.) 140.

[a] It was expressly held, in the case of *McClure v. State*, 1 Yerg. (Tenn.) 206, that the "recital in the indictment that the grand jurors were elected, empanelled, sworn and charged, will be sufficient," even if the caption omit to state that they were sworn. And this case was reviewed

provisions upon the subject.¹³ It is not necessary, however, that the caption should allege that they were "then and there" sworn.¹⁴

If the indictment purports to be on the affirmation of some of the grand jurors, it must be shown¹⁵ that they were persons entitled by law

and approved in the subsequent case of *State v. Long*, 1 Humph. (Tenn.) 386.

13. At common law, it was essential that the indictment should state in the caption or commencement that the grand jurors presenting the same were sworn as such. *Chevarrio v. State*, 17 Tex. App. 390.

[a] If the caption shows that the jury found the bill upon their oaths, it need not state that they were sworn and charged. *Rex v. Morgan*, 1 Ld. Raym. 710, 91 Eng. Reprint 1373.

[b] The recital that the indictment was found "upon the oath" of the grand jury is usually found in the commencement, as distinguished from the caption. See *infra*, VIII, A, 4, b, (II).

[c] Where the indictment recites that the grand jury was selected, impaneled, sworn and charged, and that they on their oaths present, etc., this is enough, when the case arrives in the supreme court, to show the proper swearing of the grand jury. *Powers v. United States*, 223 U. S. 303, 312, 32 Sup. Ct. 281, 56 L. ed. 448, *distinguishing* *Crain v. United States*, 162 U. S. 625, 16 Sup. Ct. 952, 40 L. ed. 1097; and see *Potsdamer v. State*, 17 Fla. 895.

[d] An objection that the indictment does not show that the jurors were impaneled, charged, or sworn, cannot be raised for the first time after conviction, but should be taken by motion before pleading. A failure to do so precludes taking the objection later. *Territory v. Pratt*, 6 Dak. 483, 43 N. W. 711. As to objections generally, see *infra*, XIV; as to waiver of objections, see *infra*, XV.

14. Ind.—*Beauchamp v. State*, 6 Blackf. 299. Miss.—*Shaffer v. State*, 1 How. 238. N. J.—*State v. Price*, 11 N. J. L. 203. Wis.—*Pizell v. State*, 25 Wis. 364.

Contra, *People v. Town Auditors*, 13 Abb. Pr. N. S. (N. Y.) 431, 438; *People v. Guernsey*, 3 Johns. Cas. (N. Y.) 265.

[a] "Lord Hale, in the form which he has given, 1 Chitty's C. C. 327, has omitted the words, 'then and there,' which he probably would not have done, if he had deemed them material. Chitty himself is more explicit on this subject, and says in express terms, that these words are unnecessary, and cites many authorities in support of his position. 1 Chitty's C. L. 334." *Shaffer v. State*, 1 How. (Miss.) 238.

[b] It need not be shown when and where they were so sworn. *Vaughn v. State*, 4 Mo. 530.

15. *State v. Fox*, 9 N. J. L. 244; *State v. Harris*, 7 N. J. L. 361; *State v. Putnam*, 1 N. J. L. 260.

[a] It must appear that they alleged themselves to be conscientiously scrupulous of taking an oath, if such be the statutory exception. *State v. Fox*, 9 N. J. L. 244.

[b] Historical.—"The requirement that an indictment, when founded upon the affirmation of one or more grand jurors, should state that those persons were relieved from taking the oath by some statutory provision was recognized, with reluctance, by Lord Mansfield, in *Rex v. Wilkes*, 4 Burr. 2527, upon the authority of some older cases. The doctrine was accepted, with equal reluctance, by our supreme court, in the case of *State v. Harris*, *supra* (7 N. J. L. 361), upon the authority of an unreported case, known as Sharp's case. The doctrine was repudiated in Massachusetts, in the case of *Commonwealth v. Fisher*, 7 Gray 492. An objection to an indictment upon the same ground was ignored in the case of *Reg. v. Mulcahey*, L. R., 3 H. L. 306. So far as I have traced it, it has not, nor need it be now, passed upon by this court. . . . Inasmuch as the caption shows that all were sworn, there was no need of any further statement respecting the qualification of the jurors." *State v. Moore*, 75 N. J. L. 619, 68 Atl. 165.

[c] Waiver of Objection.—Objection on the ground that the caption does not set out such fact comes too late

to take an affirmation in lieu of an oath, in some, but not all, jurisdictions.¹⁶

(VI.) **Names of Parties.**—Statutes in some states provide that the indictment must contain the title of the action, specifying among other things, the names of the parties.¹⁷ The omission of the names of the parties from the caption or a mistake therein is not a fatal objection, however.¹⁸ Nor will the indictment be set aside or quashed because it does not contain the title of the cause.¹⁹

(VII.) **Name of Offense.**—It is not necessary that the name of the offense be stated in the caption.²⁰ But if stated, the description of the offense in the body of the indictment must prevail over and control the description given in the caption, where there is a variance between them.²¹

on assignment of error, where a statute provides that defects in form shall be taken by demurrer or motion to quash before the jury are sworn and not afterwards. *Engeman v. State*, 54 N. J. L. 247, 253, 23 Atl. 676. As to waiver of objections generally, see *infra*, XV.

16. **U. S.**—See *Bram v. United States*, 168 U. S. 532, 568, 18 Sup. Ct. 183, 42 L. ed. 568. **Mass.**—*Com. v. Fisher*, 7 Gray 492. **Eng.**—*Reg. v. Mulcahey*, L. R., 3 H. L. 306.

17. See the following: **Cal.**—*Penal Code*, §950. **Idaho.**—*Rev. Codes*, 1908, §7677; *State v. O'Neil*, 24 Idaho 582, 135 Pac. 60. **Ind.**—*Cronkhite v. State*, 11 Ind. 307, under early statute. **Ia.** *Code*, 1897, §5280; *State v. McIntire*, 59 Iowa 264, 13 N. W. 286; *State v. McIntire*, 59 Iowa 267, 13 N. W. 287 (both under §4296, *Code*, 1873). **Kan.** *Gen. St.*, 1905, §5991. **Minn.**—*Rev. Laws*, 1905, §5297. **Mont.**—*Rev. Codes*, 1907, §9147. See *State v. Howard*, 30 Mont. 518, 77 Pac. 50. **Nev.**—*Rev. Laws*, 1912, §7050. **N. Y.**—*Code Crim. Proc.*, §275; *People v. Cavanagh*, 157 App. Div. 224, 141 N. Y. Supp. 812. **N. D.**—*Rev. Codes*, 1905, §9848; *State v. Kerr*, 3 N. D. 523, 58 N. W. 27. **Okla.**—*Rev. Laws*, 1910, §5738. See *Cox v. State*, 3 Okla. Crim. 129, 104 Pac. 1074, 105 Pac. 369. **S. D.**—*Code Crim. Proc.*, §221 (*Comp. Laws*, 1910, p. 690). **Utah.**—*Comp. Laws*, 1907, §4730. **Wash.**—*Rem. & Ball. Ann. Codes & St.*, §2055.

And see generally the statutes of the several states.

18. *Cronkhite v. State*, 11 Ind. 307; *State v. McIntire*, 59 Iowa 264, 13 N. W. 286; *State v. McIntire*, 59 Iowa 267, 13 N. W. 287.

[a] The caption need not contain the name of the person indicted. If it otherwise identifies the indictment as one duly found and presented, it is sufficient. *State v. Parks*, 61 N. J. L. 438, 39 Atl. 1023.

[b] A mistake in the caption which describes the indictment as against H. and not against P. does not alter the fact that it is against P. *Haas v. Henkel*, 166 Fed. 621.

19. *State v. McIntire*, 59 Iowa 264, 13 N. W. 286; *State v. McIntire*, 59 Iowa 267, 13 N. W. 287.

[a] A failure to set forth the title of the action is not a fatal objection where the statute is only directory. *People v. Walters*, 1 Idaho 271, under early Idaho provision of criminal practice act, providing simply that "the indictment shall contain the title to the action."

20. *Williams v. State*, 47 Ark. 230, 1 S. W. 149; *Howard v. State*, 67 Ind. 401. And see *Cronkhite v. State*, 11 Ind. 307; *Pierson v. State*, 11 Ind. 341; *State v. Gillett*, 92 Iowa 527, 64 N. W. 169; *State v. McIntire*, 59 Iowa 264, 13 N. W. 286 (holding that it is not a valid objection that the name of the offense is omitted or wrongly stated).

[a] It is sufficient to charge it in the body of the indictment. *Williams v. State*, 47 Ark. 230, 1 S. W. 149.

21. *Howard v. State*, 67 Ind. 401. And see *State v. Wyatt*, 76 Iowa 328, 41 N. W. 31.

(VIII.) **Signature.**—It is not necessary for the foreman to sign the caption.²²

d. *Effect of Defects or Omissions Therein.*²³—If the indictment is otherwise perfect in form, a defect in the caption does not render it fatally defective,²⁴ especially where the whole record clearly shows it to be a mere clerical error,²⁵ it being well settled that the record may supply errors or deficiencies in the caption in some,²⁶ though it would seem not in all cases.²⁷ The body of the indictment may also be looked to in aid of a defect or deficiency in the caption,²⁸ just as

22. *State v. Jones*, 9 N. J. L. 2.

[a] As to necessity for foreman to sign indictment, see *infra*, VIII, A, 7, a, (I).

23. For treatment of similar subject in connection with commencement, see *infra*, VIII, A, 4, c.

24. See the following cases: **U. S.** *United States v. Clark*, 125 Fed. 92; *United States v. Bornemann*, 35 Fed. 824. **Ark.**—*Kilgore v. State*, 73 Ark. 280, 83 S. W. 928. **Ill.**—*George v. People*, 167 Ill. 447, 47 N. E. 741. **Ind.** *Malone v. State*, 14 Ind. 219. **Ia.** *Hampton v. United States*, Morris 489. **N. H.**—*State v. Gary*, 36 N. H. 359. **N. C.**—*State v. Sprinkle*, 65 N. C. 463. **Pa.**—*Com. v. Shaffner*, 2 Pears. 450. **Tex.**—*English v. State*, 4 Tex. 125. **Wis.**—*State v. Gaffrey*, 3 Pinn. 369, 4 Chand. 163.

[a] An informal caption is not a ground of error, if the description cannot be mistaken. *Hampton v. United States*, Morris (Ia.) 489.

[b] **Reason.**—Since the caption is no part of the indictment. *United States v. Bornemann*, 35 Fed. 824.

[c] That caption is generally not considered a part of the indictment, see *supra*, VIII, A, 3, a.

25. *United States v. Bornemann*, 35 Fed. 824.

26. See the following cases: **U. S.** *United States v. Clark*, 125 Fed. 92; *United States v. Bornemann*, 35 Fed. 824. **Ala.**—*Gater v. State*, 141 Ala. 10, 37 So. 692; *Bonner v. State*, 55 Ala. 242; *Harrison v. State*, 55 Ala. 239. **Ga.**—*Williams v. State*, 55 Ga. 391; *Kincade v. State*, 14 Ga. App. 544, 81 S. E. 910. **Ill.**—*George v. People*, 167 Ill. 447, 47 N. E. 741. **Ky.** *Spradlin v. Com.*, 7 Ky. L. Rep. 529. **Me.**—*State v. Peloquin*, 106 Me. 358, 76 Atl. 888; *State v. Robinson*, 85 Me. 147, 26 Atl. 1092. **Mass.**—*Com. v. Brown*, 116 Mass. 329; *Com. v. Mul-*

len, 13 Allen 551; *Com. v. Colton*, 11 Gray 1; *Com. v. Stone*, 3 Gray 453. **Miss.**—*Coleman v. State*, 40 So. 230. **Mo.**—*State v. Craft*, 164 Mo. 631, 647, 65 S. W. 280; *State v. Meinhardt*, 73 Mo. 562; *State v. Daniels*, 66 Mo. 192, 206; *Kirk v. State*, 6 Mo. 469. **Mont.** *United States v. Upham*, 2 Mont. 170. **N. H.**—*State v. Jenkins*, 64 N. H. 375, 10 Atl. 699; *State v. Gary*, 36 N. H. 359. **N. J.**—*State v. Jones*, 9 N. J. L. 357, 17 Am. Dec. 483. **N. M.**—*Territory v. Sevaillies*, 1 N. M. 119. **N. C.** *State v. Brickell*, 8 N. C. 354. **Pa.** *Pennsylvania v. Bell*, Add. 175, 1 Am. Dec. 298. **Tenn.**—*Firby v. State*, 3 Baxt. 358; *McBean v. State*, 3 Heisk. 20; *Fletcher v. State*, 6 Humph. 249; *Mitchell v. State*, 8 Yerg. 514. **Tex.** *Luster v. State*, 63 Tex. Crim. 541, 141 S. W. 209, mistake in time or term of court does not vitiate indictment, where records show true time of finding. **Vt.**—*State v. Gilbert*, 13 Vt. 647.

27. See *Territory v. Sevaillies*, 1 N. M. 119, holding that where the caption undertakes to describe the grand jurors, it should make a full and legal description.

[a] Under a Texas statute requiring that it must appear from the indictment "that the same was presented in a court having jurisdiction of the offense set forth," it has been held that this fact must appear from words used in the indictment itself, and not be left to be gathered from expressions in or inferences from other parts of the records, or to be known ex officio by the courts of the state. *Mathews v. State*, 44 Tex. 376. And see *Long v. State*, 1 Tex. App. 466; *Hauck v. State*, 1 Tex. App. 357.

28. See the following cases: **Ark.** *St. Louis, etc. R. Co. v. State*, 108 Ark. 424, 157 S. W. 1155; *Kilgore v. State*, 73 Ark. 280, 83 S. W. 928

the latter may be looked to in aid of the former.²⁹ So too, statutory provisions for the cure of defects or imperfections in indictments have been held to cure such objections to the caption as are curable.³⁰ Of course, if the caption be defective in an essential particular, and it is not aided by the record or by reference to the indictment, and is not curable by such statutes, there may be cases wherein it will vitiate the indictment.³¹

Mere surplusage in the caption may be rejected, it not vitiating the indictment.³²

e. *May Aid Indictment*.—The caption of an indictment, being a part of the record, though no part of the indictment, may be looked to in aid of the indictment.³³

(omission to name the county in caption, otherwise perfect in form, not fatal defect, where caption shows that it is in the circuit court, and name of county is stated in body of indictment). **Ky.**—*Johnson v. Com.*, 12 Ky. L. Rep. 835, 15 S. W. 662; *Spradlin v. Com.*, 7 Ky. L. Rep. 529. **Nev.**—See *State v. Buralli*, 27 Nev. 41, 71 Pac. 532. **Va.**—*Tefft v. Com.*, 8 Leigh 721.

[a] The description of the offense in the body of the indictment prevails over and controls the description thereof given in the caption in case of a variance between them. *Howard v. State*, 67 Ind. 401. And see *State v. Wyatt*, 76 Iowa 328, 41 N. W. 31.

29. That caption may aid indictment, see *infra*, VIII, A, 3, e.

30. **U. S.**—*Bram v. United States*, 168 U. S. 532, 567, 18 Sup. Ct. 183, 42 L. ed. 568; *Caha v. United States*, 152 U. S. 211, 221, 14 Sup. Ct. 513, 38 L. ed. 415 (both under §1025, Rev. St.). See *Jackson v. United States*, 102 Fed. 473, 480, 42 C. C. A. 452, under Oregon statute. **Mo.**—*State v. Craft*, 164 Mo. 631, 65 S. W. 280, under Rev. St., 1899, §2535. **N. Y.** *People v. Haren*, 35 Misc. 590, 72 N. Y. Supp. 205; *People v. Peek*, 2 N. Y. Crim. 314, *affirmed*, 96 N. Y. 650 (both under Code Crim. Proc., §285). **Okla.**—See *Cox v. State*, 3 Okla. Crim. 129, 104 Pac. 1074, 105 Pac. 369.

[a] As to statutory provisions for cure of defects or objections, see generally the statutes, and *infra*, XIV.

31. *Lusk v. State*, 64 Miss. 845, 2 So. 256 (wherein neither the caption nor the record showed where the court was held; it was held that the

defect was incurable by statutory provision for cure of defects, and judgment arrested); *Thomas v. State*, 5 How. (Miss.) 20, 1 Mor. St. Cas. 160. See also *State v. Zule*, 10 N. J. L. 348; *Com. v. Mackin*, 9 Phila. (Pa.) 593, 29 Leg. Int. 85.

32. See the following cases: **U. S.** *Jackson v. United States*, 102 Fed. 473, 479, 42 C. C. A. 452. **Idaho.** *Pickett v. United States*, 1 Idaho 523. **Minn.**—*State v. Munch*, 22 Minn. 67. **Tex.**—*Osborne v. State*, 24 Tex. App. 398, 6 S. W. 536. **W. Va.**—See *State v. Gilmore*, 9 W. Va. 641.

33. **U. S.**—*Burchett v. United States*, 194 Fed. 821, 114 C. C. A. 525; *United State v. Boyden*, 1 Low. 266, 24 Fed. Cas. No. 14,632. **Ala.**—*Gater v. State*, 141 Ala. 10, 37 So. 692; *Noles v. State*, 24 Ala. 672, 694. **Ind.**—*Anderson v. State*, 104 Ind. 467, 4 N. E. 63, 5 N. E. 711; *State v. Paine*, 1 Ind. 163. See *Howell v. State*, 4 Ind. App. 148, 30 N. E. 714. **Mass.**—*Com. v. Edwards*, 4 Gray 1. **Nev.**—*State v. Buralli*, 27 Nev. 41, 71 Pac. 532. **N. H.**—*State v. Jenkins*, 64 N. H. 375, 10 Atl. 699. **N. J.**—*State v. Moore*, 75 N. J. L. 619, 68 Atl. 165. **N. C.**—*State v. Hadlock*, 9 N. C. 461. **Va.**—*Robinson v. Com.*, 88 Va. 900, 14 S. E. 627.

See also *People v. Iron Foundry*, 78 Misc. 191, 139 N. Y. Supp. 447.

[a] **Illustrations.**—(1) It may be looked to in order to ascertain whether the inferior court had jurisdiction (*Robinson v. Com.*, 88 Va. 900, 14 S. E. 627), (2) for the purpose of ascertaining the court to which the jury were summoned, in which it was charged, when the indictment was returned (*Burchett v. United States*, 194 Fed. 821, 114 C. C. A. 525), (3) whether

4. **Commencement.**—a. *Nature and Necessity.*—The commencement of the indictment is to be distinguished from the caption thereof in many respects,³⁴ though like the caption, it is not, strictly speaking, a part of the indictment,³⁵ though a part of the record.³⁶ It is but a recital of certain preliminary facts, only necessary to be stated in order to render the instrument intelligible of itself, without having reference to the files and records of the court where it was found.³⁷ Accordingly, if it appears from the face of the record not only that the indictment is sufficient in form and substance, but that it was properly preferred by a lawful grand jury to a court having jurisdiction over the subject, it is sufficient although the commencement be wholly omitted.³⁸

b. *What to Contain.*—(I.) **In General.**—The forms of commencement vary slightly with the different jurisdictions, but are usually simply variations of the English form.³⁹ Where a statutory form is

or not the grand jury was sworn where it is objected that the indictment fails to show such fact (*Burchett v. United States*, 194 Fed. 821, 114 C. C. A. 525; *Noles v. State*, 24 Ala. 672, 694), (4) or in aid of a defective description of the grand jury in the charging part of the indictment (*State v. Buralli*, 27 Nev. 41, 71 Pac. 532), (5) or to supply a defect or clerical error in the commencement thereof. *Gater v. State*, 141 Ala. 10, 37 So. 692.

[b] It may be referred to to show that the United States mentioned in the body of the indictment (1) are the United States of America (*United State v. Boyden*, 1 Low. 266, 24 Fed. Cas. No. 14,632). (2) Where the name of the county was fully set forth in the caption, a reference thereto in the indictment, as "in said county" was held proper to find the county where the offense was alleged to have been committed. *Com. v. Edwards*, 4 Gray (Mass.) 1. (3) But it may not be referred to for the purpose of making more certain any of the essential elements relating to that part of the indictment which charges the offense. *United States v. Howard*, 132 Fed. 325, 343.

34. See *supra*, VIII, A, 3, a.

35. *Mitchell v. Com.*, 106 Ky. 602, 51 S. W. 17; *State v. Monson*, 41 Minn. 140, 42 N. W. 790.

[a] That caption is no part of the indictment, see *supra*, VIII, A, 3, a.

36. *Mitchell v. Com.*, 106 Ky. 602, 51 S. W. 17.

37. *State v. Freeman*, 21 Mo. 481.

38. *State v. Blakely*, 83 Mo. 359; *State v. Daniels*, 66 Mo. 192; *State v. Freeman*, 21 Mo. 481.

39. In *State v. Nixon*, 18 Vt. 70, 46 Am. Dec. 135, the first objection urged to the indictment was, that it commenced: "The grand jurors for the people of the state of Vermont." The court said: "This is not the usual form of the commencement of indictments in this state; but nevertheless, it may be questioned, whether it is not more correct, than the one commonly used. The grand jurors in this state, as well as in Great Britain, are to inquire for all offenses in the county, for which they are returned: 2 Hawk. P. C., c. 25, p. 299. They are to present in behalf of and for the sovereign power, which is considered as the prosecutor for all public offenses; and hence the style or language of the indictment is not uniform. In England the form is, 'The grand jurors for our Lord the King on their oaths present;' in New York, 'for the people,' &c.; in Massachusetts, 'for the Commonwealth.' In some cases this part of the indictment is used only to designate the jury, who present,—as, 'The grand inquest of the United States for the district of Virginia;'—'The grand jurors of the United States in and for the body of the district of New York;'—'The grand jurors within and for the body of the county,' &c.; and this latter is the form usually adopted in this state, and in Connecticut. The better form, I think, is the one used in Georgia, found in 6 Peter's 528,—'The grand jurors,

prescribed by statute,⁴⁰ a literal compliance with the form is not required, but only a substantial compliance therewith is necessary.⁴¹

That the name of the accused is not repeated therein is immaterial, in the absence of a statute requiring the same,⁴² as is an error in designating the name of the crime.⁴³

Several Counts. — If there be more than one count to an indictment, it is sometimes required that each additional count shall commence in a prescribed form.⁴⁴ Ordinarily, the words "the jurors aforesaid, on their oath aforesaid, do further present," are proper for introducing a new count, though they do not necessarily mean that a new count begins with them.⁴⁵ They should, however, only be employed for their one legitimate purpose, namely, that of beginning a new count.⁴⁶

sworn, chosen and selected for the county of ———, in the name and behalf of the citizens of Georgia.' In this state, when we wish to designate the sovereign power, we usually say, The State of Vermont; but I apprehend it is as well to designate it by the term,—The People. . . . We cannot, therefore, attach any importance to this objection to the indictment,—considering it wholly immaterial whether the indictment commenced by saying, The grand jurors for the county, or for the state, or for the people of the state; and that either mode would be conformable to approved forms."

[a] **For forms of commencement,** see 9 STANDARD PROC. 605; 1 Bishop New Crim. Proc. 524; 2 Chit. Cr. Law 1; and the following cases: Fla. *Savage v. State*, 18 Fla. 909, 947. La. *State v. Valsin*, 47 La. Ann. 115, 16 So. 768. Mass.—*Jeffries v. Com.*, 12 Allen 145. Mo.—*State v. Vincent*, 91 Mo. 662, 4 S. W. 430. N. Y.—*People v. Bennett*, 37 N. Y. 117, 4 Abb. Pr. (N. S.) 89, 93 Am. Dec. 551. Ohio. *Mackey v. State*, 3 Ohio St. 362. Vt. *State v. Nixon*, 18 Vt. 70, 46 Am. Dec. 135.

40. **Statutory form of commencement.** Ga.—Code, 1910, §954. Ill. Hurd's Rev. St., 1913, ch. 48, §408. Minn.—*State v. Hinckley*, 4 Minn. 345. Neb.—*Kruger v. State*, 1 Neb. 365.

41. *Kruger v. State*, 1 Neb. 365. In this case, it was contended that the commencement or caption was defective because of the omission of the word "chosen," which was found in the form. It stated, however, that the grand jurors were "selected." The court said: "We think there has been a substantial compliance with the re-

quirements of this section, which is all that is necessary. . . . the words 'chosen' and 'selected,' have, in common parlance, the same meaning. They are used synonymously by the best writers and speakers. The use of both words in this connection would be mere tautology, a needless repetition of the same thing."

[a] A commencement is sufficient, which is as follows: "The grand jurors for the county of Rice and State of Minnesota, upon their oaths present, etc.," though the form provided by statute is as follows: "A. B. is accused by the grand jury of the county of ———, by this indictment, of the crime of," etc. *State v. Hinckley*, 4 Minn. 345.

42. *State v. Mounson*, 41 Minn. 140, 42 N. W. 790.

[a] It is true the early forms of commencement seem to have given the name of the accused, together with any additions. See the forms in 9 STANDARD PROC. 605. As to description of accused in indictment or information generally, see *infra*, IX.

43. *State v. Howard*, 66 Minn. 309, 68 N. W. 1096, 61 Am. St. Rep. 403, 34 L. R. A. 178; *State v. Munch*, 22 Minn. 67.

44. Ga. Code, 1910, §954, providing that each additional count shall commence in the following form: "And the jurors aforesaid, in the name and behalf of the citizens of Georgia, further charge and accuse the said A. B. with having committed the offense of ———."

45. *State v. Fraker*, 148 Mo. 143, 49 S. W. 1017. See also *State v. Vincent*, 91 Mo. 662, 4 S. W. 430.

46. *State v. Fraker*, 148 Mo. 143, 49 S. W. 1017.

(II.) Recitals as to Grand Jury and Presentment by Them.⁴⁷ — It is not essential that the indictment should commence with the words "the grand jurors,"⁴⁸ though it is customary to do so;⁴⁹ it is sufficient if it commence with the words "the jurors," where the other entries in the record show that it was found by a grand jury.⁵⁰

The jurors are sometimes described in the commencement as being of the county or district for which they are inquiring; it is more usual to make the recital as to the venue in the caption, however.⁵¹

The omission of the word "present," so often found in the form of commencement, is not objectionable in some states.⁵²

Presentment Upon Their Oath or Affirmation. — At the common law, it was essential that the commencement should show that the indictment was presented upon the oath or affirmation of the grand jurors.⁵³ Such is still the rule in the absence of a statute to the contrary,⁵⁴ though

47. As to statements or recitals as to grand jury which must be contained in the caption, see *supra*, VIII, A, 3, c, (V).

48. *State v. Pearce*, 14 Fla. 153; *Com. v. Edwards*, 4 Gray (Mass.) 1, 6.

49. See *supra*, VIII, A, 4, b, (I), note 39.

50. **U. S.**—*United States v. Williams*, 1 Cliff. 5, 28 Fed. Cas. No. 16,707. **Fla.**—*State v. Pearce*, 14 Fla. 153. **Mass.**—*Com. v. Edwards*, 4 Gray 1, 6. **N. Y.**—*People v. Bennett*, 37 N. Y. 117, 4 Abb. Pr. (N. S.) 89, 93 Am. Dec. 551.

[b] **Reason.**—No other jurors than grand jurors being authorized by law to find and return bills of indictment, the indictment, under this form of description, must be taken to have been found by the grand jury. *Com. v. Edwards*, 4 Gray (Mass.) 1, 6.

[b] The old forms of commencement usually began: "The jurors," etc. See 9 STANDARD PROC. 605.

51. For treatment of this subject, see *supra*, VIII, A, 3, (V), (B).

52. *State v. Freeman*, 21 Mo. 481, where record shows presentment. Compare *Vanvickie v. State*, 22 Tex. App. 625, 2 S. W. 642, the ordinary words, to-wit, "on their oath present" were entirely omitted, and no similar or equivalent words were used or substituted. It was held that the indictment was insufficient.

53. See the following: **Ill.**—*Curtis v. People*, 1 Ill. 256. **Me.**—*Low's Case*, 4 Me. 439, 450. **Mo.**—*State v. Sanders*, 158 Mo. 610, 59 S. W. 993, 81 Am. St. Rep. 339, citing *Heydon's Case*, 4 Coke 41b; 3 Chit. Cr. Law 750; Whart.

on Homicide, §849. **Ore.**—*State v. Guglielmo*, 46 Ore. 250, 79 Pac. 577, 80 Pac. 103, 69 L. R. A. 466. **Tex.**—*Vanvickie v. State*, 22 Tex. App. 625, 2 S. W. 642; *Chevarrio v. State*, 17 Tex. App. 390.

[a] Said the court in *State v. Guglielmo*, 46 Ore. 250, 79 Pac. 577, 80 Pac. 103, 69 L. R. A. 466: "The form usually prescribed for the commencement of an indictment was, after stating the venue, as follows: 'The jurors for our lady the Queen upon their oath present,' etc. 1 Archbold, Crim. Pr. & Pl. *76. Sir Matthew Hale, in speaking of the caption of a written accusation, and of the necessity of stating therein the oath of the jurors, says: 'It must return that the indictment was made per sacramentum.' 2 Hale's P. C. 167."

54. **Ill.**—*Curtis v. People*, 1 Ill. 256. **Me.**—*State v. McAllister*, 26 Me. 374. **Mo.**—*State v. Sanders*, 158 Mo. 610, 59 S. W. 993, 81 Am. St. Rep. 330 (failure to do so vitiates indictment); *State v. Furgerson*, 152 Mo. 92, 53 S. W. 427; *State v. Wagner*, 118 Mo. 626, 24 S. W. 219. **Tenn.**—*McBean v. State*, 3 Heisk. 20, necessary that indictment should show on its face that it is made upon the oath of the grand jury. **Tex.**—*Vanvickie v. State*, 22 Tex. App. 625, 2 S. W. 642. **Eng.**—*Rex v. Wilkes*, 4 Burr. 2527, 98 Eng. Reprint 327.

[a] **Omission matter of form only**, however, for which objection must be taken before trial where it is provided that exceptions which go merely to the form of an indictment shall be

the use of the usual phrase, "on their oath present" is not essential, if it appears from other equivalent expressions that it was so presented.⁵⁵ As indicated, however, under some statutes, it is not essential to state that the presentment was so made.⁵⁶

That an indictment purports to have been made upon the "oaths" of the grand jury, instead of "oath," is not objectionable.⁵⁷ Nor is it objectionable that the word "oath" is used, instead of "oaths," where the latter is considered proper.⁵⁸

Several Counts.—Where this requirement exists, it extends to all counts of the indictment, and each must show that it is so presented.⁵⁹

made before trial. *Curtis v. People*, 1 Ill. 256.

[b] **Oath and Affirmation.**—It is not objectionable that the recital be that the indictment is presented "upon the oath" of the jurors, when the fact is that it was presented upon the "oath and affirmation" of the jurors. *Bram v. United States*, 168 U. S. 532, 567, 18 Sup. Ct. 183, 42 L. ed. 568, defect, if it be such, rendered harmless by the curative provisions of section 1025, Rev. St.

[c] When some are sworn, and some are affirmed, it is sufficient for the indictment to be presented upon "their oath and affirmation," although not one of them has taken both an oath and an affirmation. *Com. v. Fisher*, 7 Gray (Mass.) 492.

[d] As to necessity for showing that grand jurors were persons entitled to take affirmations in lieu of oaths, see *supra*, VIII, A, 3, (VI), (C).

55. See the following cases: **Fla.** *Potsdamer v. State*, 17 Fla. 895. **Mo.** *State v. Craig*, 79 Mo. App. 412, wherein the indictment recited that the grand jurors were "impaneled, sworn and charged." **Tenn.**—*McBean v. State*, 3 Heisk. 20. **Wis.**—*Byam v. State*, 17 Wis. 145, wherein the jurors returned that "being impannelled, sworn and charged," they made the presentment.

[a] Thus, where after the recital that the grand jury were duly summoned, elected, sworn, etc., it is said that they "present and say," it is sufficient without expressly reciting such presentment to be "on their oath aforesaid." *McBean v. State*, 3 Heisk. (Tenn.) 20.

[b] It is, at most, but matter of inducement, and not of the substance

of the accusation. *Byam v. State*, 17 Wis. 145.

[c] **Amendment.**—Where the commencement recited that "the grand jurors impaneled and sworn," etc., "upon their ——— present," an amendment was allowed, inserting the word "oath." *State v. Moore*, 1 Ind. 548.

56. *Vanvickle v. State*, 22 Tex. App. 625, 2 S. W. 642; *Chevario v. State*, 17 Tex. App. 390 (sufficient if it appear from indictment that it is act of a grand jury of the proper county).

57. **Ind.**—*Jerry v. State*, 1 Blackf. 395. **Mass.**—*Com. v. Shades*, 13 Allen 554. **N. J.**—*State v. Dayton*, 23 N. J. L. 49, 53 Am. Dec. 270; *State v. Norton*, 23 N. J. L. 33, 47; *State v. Morris Canal, etc. Co.*, 22 N. J. 537.

58. *Wagner v. People*, 54 Barb. (N. Y.) 367, after verdict, such a defect would be cured by statute.

[a] The words "on their oath" are equivalent to the words "on their several oaths," and sufficient. *Com. v. Johnson, Thach. (Cr. Cas. (Mass.))* 284.

59. *State v. McAllister*, 26 Me. 374; *State v. Furgerson*, 152 Mo. 92, 53 S. W. 427; *State v. Wagner*, 118 Mo. 676, 24 S. W. 219. In the last case, the court said: "The old and familiar rule is that 'every separate count should charge the defendant, as if he had committed a distinct offense,' etc. In a word, each count in an indictment must be complete in itself as to the description of the offense, and to each count must be prefixed a statement, that the jury *supra accusatum suum alterius presentant*, and without such commencement the count will be bad. The following authorities fully support these positions: 1 Chitty on Criminal Law 175, 249; 1 Bishop on Criminal Procedure (3d

(III.) **Recital of Authority by Which Presentment Made.**⁶⁰ — It is not necessary that the indictment should state that it is presented by the grand jury "in the name and by the authority of the state," in the absence of a statute or constitutional provision requiring it to be carried on in such manner.⁶¹ Statutory or constitutional provisions requiring all prosecutions to be so conducted exist in most states.⁶² Even under such provisions, however, according to the weight of authority, it is not essential that an indictment shall contain a recital in terms that the prosecution is by the authority of the state, where they do not expressly require it, it being sufficient if the record shows that the prosecution is so conducted.⁶³ It is otherwise, of course, if

ed.), secs. 132, 426, 429; *State v. McAllister*, 26 Me. 374; *Malone's Criminal Briefs* 34, and cases cited; *State v. Longley*, 10 Ind. 482; *State v. Phelps*, 65 N. C. 450; *Wharton Cr. Pl. and Prac.* (9th ed.), sec. 95."

[a] In *State v. McAllister*, 26 Me. 374, there was no reference in the third count to another count for the allegation, that it was presented upon the oath of the jurors. It alleged, that, "the jurors aforesaid for the State aforesaid do further present," without saying as aforesaid, or in manner aforesaid. In other words, there was nothing in the third count either of allegation or of reference, from which it could be made to appear to have been presented *per sacramentum suum*. It was held insufficient on this account. In *State v. Vincent*, 91 Mo. 662, 4 S. W. 430, where the third count recited "and the grand jurors aforesaid, upon their oath aforesaid," it sufficiently referred to the first count and was sufficient in this respect.

[b] In *Huffman v. Com.*, 6 Rand. (Va.) 685, though the third count omitted to state that the grand jury "on their oath" present (the first two counts being regular in that respect), it was held that the objection was obviated by the fact that the record states, that they were sworn in open court.

60. For treatment of similar question in connection with formal requisites of information, see *infra*, VIII, B, 4.

61. *Holt v. State*, 47 Ark. 196, 1 S. W. 61.

62. See the following: Fla.—*Savage v. State*, 18 Fla. 909, 948. Ga.—*Horne v. State*, 37 Ga. 80, 90, 92 Am. Dec. 49. Ill.—*Whitesides v. People*, 1 Ill.

21. Ind.—*Crutz v. State*, 4 Ind. 385. Ia.—*Wrocklege v. State*, 1 Iowa 167; *Harriman v. State*, 2 Greene 270. Ky. *Allen v. Com.*, 2 Bibb 210. La.—*State v. Valsin*, 47 La. Ann. 115, 16 So. 768; *State v. Russell*, 2 La. Ann. 604. Miss.—*Greeson v. State*, 5 How. 36; *State v. Johnson*, Walk. 392. N. D. *State v. Kerr*, 3 N. D. 525, 58 N. W. 27. Okla.—*Arie v. State*, 1 Okla. Crim. 666, 100 Pac. 23. S. C.—*State v. Anthony*, 1 McCord L. 285. S. D.—*State v. Thompson*, 4 S. D. 95, 55 N. W. 725. Tex.—*State v. Killough*, 32 Tex. 74; *Moss v. State*, 60 Tex. Crim. 268, 131 S. W. 1088; *Brown v. State*, 46 Tex. Crim. 572, 81 S. W. 718; *Weaver v. State* (Tex. Crim.), 76 S. W. 564; *Jefferson v. State*, 24 Tex. App. 535, 7 S. W. 244; *Saine v. State*, 14 Tex. App. 144. Wis.—*State v. Delue*, 2 Pinn. 204, 1 Chand. 166.

And see generally the constitutional and statutory provisions.

63. Fla.—*Savage v. State*, 18 Fla. 909, 948. Ind.—*Crutz v. State*, 4 Ind. 385. Ia.—*Wrocklege v. State*, 1 Iowa 170; *Baurose v. State*, 1 Iowa 374. Ky.—*Allen v. Com.*, 2 Bibb 210. La. *State v. Russell*, 2 La. Ann. 604. Miss. *Greeson v. State*, 5 How. 33; *State v. Johnson*, Walk. 392. N. D.—*State v. Kerr*, 3 N. D. 523, 58 N. W. 27, not necessary that such facts should be specially recited. Okla.—*Arie v. State*, 1 Okla. Crim. 666, 100 Pac. 23, 33. S. D.—*State v. Thompson*, 4 S. D. 95, 55 N. W. 725. Wis.—*State v. Delue*, 2 Pinn. 207, 1 Chand. 166.

But see *Whitesides v. People*, 1 Ill. 21; *State v. Cutter*, 65 Mo. 503.

[a] An extensive review of the cases is made in *Caples v. State*, 3 Okla. Crim. 72, 104 Pac. 493, 26 L. R. A. (N. S.) 1033, which discusses the necessity of an information to re-

such provisions expressly require such showing in the indictment, as is the case in at least one state.⁶⁴

Several Counts.—It is not required that each count shall commence "in the name and by the authority of the state," even though the indictment must make such showing.⁶⁵ If the first count contains a proper commencement, it may always be looked to to supply, if necessary, such allegation, as to the commencement of any subsequent count.⁶⁶

Illustrations of sufficient and insufficient showings of authority by which presentment made appear in the notes.⁶⁷

cite in terms that the prosecution is carried on in the name and by the authority of the state. And see *infra*, VIII, B, 4.

[b] In *Savage v. State*, 18 Fla. 909, 948, the court says, "The Constitution says all prosecutions shall be conducted in the name and by the authority of the state. It is not required that the indictment on its face shall say in words that it is 'prosecuted in the name and by the authority' of the state. It merely directs that the state in its name and by its authority shall prosecute, and that no other name or any other authority shall control the prosecution. It is sufficient that the court shall recognize the state and its authority, and no other party or authority in such prosecutions, and that the proceedings are so conducted and the record show it."

[c] In *State v. Russell*, 2 La. Ann. 604, the court also said: "The expressions, which it is contended should be used in the indictment, occur in the constitutions of several states of the Union, and the point now presented has been so frequently decided in those states that it can scarcely be considered an open question. It has been repeatedly held to be a sufficient compliance with the constitutional requisition, that the prosecution should appear to be conducted in the name of the state, and that a formal averment that it was found by the authority of the state, was not essential to the validity of the indictment."

[d] **Indictment Transferred From Territorial to State Court.**—It is not necessary for such an indictment to show that it is prosecuted in the name and by the authority of the state. *Reeves v. Territory*, 2 Okla. Crim. 351, 101 Pac. 1039.

64. *Brown v. State*, 46 Tex. Crim.

572, 81 S. W. 718. And see *Jefferson v. State*, 24 Tex. App. 505, 7 S. W. 244; *Saine v. State*, 14 Tex. App. 141.

[a] An early Texas case is to be compared with the later ones, however. In that case, the court said: "No prescribed form of words is necessary in order that the prosecution be carried on in the name and by the authority of the republic of Texas." It is enough that the prosecution is conducted by the proper law officer, acting under the authority and conducting the prosecution in the name of the government." *Drummond v. Republic*, 2 Tex. 156.

[b] In an early Georgia case, it was held that an indictment should be "in the name and behalf of the citizens of Georgia," such being the form prescribed by statute; that if these words were omitted, on timely objection, it would be quashed; but such objection, being merely to form of indictment, should have been taken before trial, and could not be taken in arrest of judgment. *Horne v. State*, 37 Ga. 89, 90, 92 Am. Dec. 40.

65. *Manovitch v. State*, 50 Tex. Crim. 260, 96 S. W. 1.

66. *Manovitch v. State*, 50 Tex. Crim. 260, 96 S. W. 1; *Dancy v. State*, 35 Tex. Crim. 615, 34 S. W. 114, 948.

67. **Sufficient Showings.**—While it would be seem appropriate to express an indictment to be "in the name and by the authority of the state," yet it is sufficient if it recites the name of the state, and then recites that it is presented "in behalf of said state." *Wentworth v. State*, 1 Iowa 167.

[a] That the article "the" is omitted, making the proceedings run in the name of "state of Texas," instead of "the state of Texas," is not fatal, (1) those terms being essentially the same. *Harriman v. State*, 2

c. *Effect of Defects or Omissions Therein.*⁶⁸ — In accordance with a rule applicable to indictments, mere clerical and grammatical errors in the beginning of the indictment do not vitiate it,⁶⁹ since defects or

Greene (Iowa) 270, 277. (2) So also, where the indictment commenced simply with the name of the state, instead of with "State of," naming it, it was nevertheless held a sufficient compliance with the constitutional requirement. *State v. Anthony*, 1 McCord L. (S. C.) 285.

[b] Nor does the omission altogether of the name of the state render the showing insufficient, where it sufficiently appears what state was intended. Thus, where the indictment commenced, "State of Missouri, county of Hickory. The grand jurors for the state of _____, empaneled, charged and sworn to inquire within and for the body of the county of Hickory aforesaid," it was held sufficient, as against the objection that it did not appear that the prosecution was carried on in the name of the state. *State v. England*, 19 Mo. 386.

[c] **Use of common abbreviation for name of state sufficient** in *State v. Foster*, 61 Mo. 549.

[d] An indictment entitled in the name of the state of venue as plaintiff against the person charged with a crime as defendant, reciting that it is found and presented to the court by a grand jury of the state in and for the proper county, duly and legally impaneled, charged, and sworn, and which concludes that the crime charged was committed against the peace and dignity of the state of venue, and is signed by the state's attorney of the proper county, sufficiently shows that the prosecution is carried on in the name and by the authority of the state. *State v. Thompson*, 4 S. D. 95, 55 N. W. 725, followed in *State v. Kerr*, 3 N. D. 523, 58 N. W. 27.

[e] An indictment commencing "state of Louisiana, Parish of, etc.," which recites that, "The grand jurors for the State of Louisiana, etc., acting in the name and by the authority of the state," etc., (1) is a sufficient compliance with the requirement that all prosecutions shall be carried on in the name and by the authority of the state (*State v. Seaborne*, 8 Rob. [La.] 518), (2) as is one commencing thus:

"In the name and by the authority of the State of Louisiana, the grand jurors . . . do," etc. *State v. Valsin*, 47 La. Ann. 115, 16 So. 768.

[f] **Insufficient Showing.**—In *State v. Cutter*, 65 Mo. 503, the indictment commenced: "The grand jurors of the county of Wayne, in the state of Missouri, being duly empaneled, . . . within and for the body of the county of Wayne, do, upon their oath present," etc. This was held insufficient, the court saying: "The constitution requires all prosecutions to be conducted in the name of the state of Missouri. If the words 'of the county of Wayne' be rejected, as it is contended they may be, as surplusage, the result will be that you will have left merely the words: 'The grand jurors . . . in the state of Missouri,' &c. This is altogether too loose."

[g] **In Texas**, (1) the statute provides that the indictment must commence, "In the name and by the authority of the state of Texas," and the omission of the word "by" therefrom renders the indictment fatally defective. *Brown v. State*, 46 Tex. Crim. 572, 81 S. W. 718. (2) But the addition of the word "of" after the word "name" in the formula does not change the meaning thereof, and is not fatal to the indictment. *Moss v. State*, 60 Tex. Crim. 268, 131 S. W. 1088. (3) Nor does the omission of the word "the" from before the word "authority" invalidate the indictment, since the constitutional provision does not prescribe its use, but only the statutory provision. *Brown v. State* (Tex. Crim.), 77 S. W. 12; *Weaver v. State* (Tex. Crim.), 76 S. W. 564. (4) It is not objectionable that this article "the" is inserted, since it does not add to, or in the least vary the sense and meaning of the constitutional requirement. *Spencer v. State*, 48 Tex. Crim. 580, 90 S. W. 638.

68. For treatment of similar subject in connection with caption, see *supra*, VIII, A, 3, d.

69. Where an indictment commenced thus: "The grand jurors within and the body of the county," the

omissions therein can generally be corrected by amendment,⁷⁰ or are cured by recitals in the record,⁷¹ or by statutory provisions for the cure of defects in the indictment.⁷²

5. Charging Part.—The requisites of the charging part of the indictment are treated elsewhere in this article.¹ It is sufficient at this place to say that it need not repeat matter properly contained in the caption,² whether it be the style of the court in which the indictment is found,³ the place where,⁴ or authority by which it was held,⁵ the character of the judge who presided,⁶ the time when found by the grand jury,⁷ the names⁸ and number⁹ of the grand jury. It need not show the organization of the grand jury,¹⁰ or that the indictment was returned into court.¹¹

6. Conclusion.—a. *In General.*¹²—The "conclusion" of an indictment, although prescribed by the fundamental law, is nevertheless one of its formal parts or divisions.¹³ It indicates the power or author-

omission of the word "for" after the word "and" did not vitiate it. *State v. Brady*, 14 Vt. 353.

70. See *State v. Moore*, 1 Ind. 548, omission of word "oath" from clause "upon their oath present," may be supplied by amendment.

As to amendments generally, see *infra*, XII.

71. Though more formal for the indictment to read "The grand jury for the state of Missouri, summoned from the body of the county of T., duly empaneled," etc., the omission to follow that form is not fatal, provided it sufficiently appears from the record that the indictment was preferred by a lawful grand jury in and to a court of competent jurisdiction. *State v. Brooks*, 94 Mo. 121, 7 S. W. 24.

72. See *Kruger v. State*, 1 Neb. 365. As to statutory provisions for cure of defects, see *infra*, XIV.

1. See *infra*, IX.

2. *Perkins v. State*, 50 Ala. 154; *Noles v. State*, 24 Ala. 672, 694; *State v. Murphy*, 9 Port. (Ala.) 487; *Rose v. State, Minor (Ala.)* 28; *Dean v. State, Martin & Y. (Tenn.)* 127.

[a] Matter properly belonging to the caption may be rejected as surplusage from the body of the indictment. *Perkins v. State*, 50 Ala. 154; *Rose v. State, Minor (Ala.)* 28.

3. *Ala.*—See *Rose v. State, Minor* 28. *La.*—See *State v. Marion*, 15 La. Ann. 495. *Tenn.*—*Dean v. State, Mart. & Y.* 127, office of caption to show such fact.

4. *Harrington v. State*, 36 Ala. 236. See *Rose v. State, Minor (Ala.)* 28.

5. See *Rose v. State, Minor (Ala.)* 28.

6. See *Rose v. State, Minor (Ala.)* 28.

7. See *Rose v. State, Minor (Ala.)* 28.

8. *State v. Murphy*, 9 Port. (Ala.) 487. And see the following cases: *U. S.*—*United States v. Crawford*, 25 Fed. Cas. No. 14,890. *Ala.*—*Rose v. State, Minor* 28. *La.*—*State v. Marion*, 15 La. Ann. 495. *N. Y.*—*People v. Bennett*, 37 N. Y. 117, 93 Am. Dec. 551; *People v. Haynes*, 55 Barb. 450. *S. C.*—*State v. Pressly, Riley* 53.

9. See *Rose v. State, Minor (Ala.)* 28.

10. *United States v. Laws*, 2 Lowell 115, 26 Fed. Cas. No. 15,579; *Harrington v. State*, 36 Ala. 236; *State v. Murphy*, 9 Port. (Ala.) 487.

11. *Harrington v. State*, 36 Ala. 236. And see *United States v. Laws*, 2 Lowell 115, 26 Fed. Cas. No. 15,579 (holding that indictment need not show that twelve concurred in finding it); *Robinson v. Com.*, 88 Va. 900, 14 S. E. 627 (holding that the indictment need not show on its face that it was found by a special grand jury, where the record, "that is, the caption," showed such fact).

12. As to conclusion of an information, see *infra*, VIII, B. 6.

13. *Fla.*—*Shiver v. State*, 41 Fla. 630, 27 So. 36. *Ind.*—*Cain v. State*, 4 Blackf. 512. *Mo.*—*State v. Waters*, 1 Mo. App. 7. *N. J.*—*State v. Minford*, 64 N. J. L. 518, 45 Atl. 817. *N. C.*—*State v. Craft*, 83 S. E. 772; *State v. Kirkman*, 104 N. C. 911, 10 S. E. 312.

ity against which the facts charged constitute an offense.¹⁴ It is not essential to restate the time or place of the commission of the offense in the conclusion.¹⁵

b. *Against Peace and Dignity.*—(I.) *Necessity for.*—One special feature in every indictment recognized at common law, except those for mere non-feasance, was that it should conclude with words indicating that the acts committed were an offense against the peace and dignity of the sovereign power in whose name the accusation proceeded.¹⁶ There were various terminations, depending on the time and character of the crime charged.¹⁷ The usual words were, “against the peace of our Lord the King (or Lady the Queen), his crown and dignity.”¹⁸

In this country the words are simply changed to conform to the proper designation of the sovereign power, and are generally such words as are designated by the constitution or statute law of the par-

Pa.—Com. v. Paxton, 14 Phila. 665, 36 Leg. Int. 444.

[a] In *Starling v. State*, 90 Miss. 255, 43 So. 952, 13 Am. & Eng. Ann. Cas. 776, the court said: “It may be proper to remark that whether those words ‘against the peace and dignity of the state,’ constitute matter of form or matter of substance, as those terms are used in the technical law of criminal pleading, depends solely on the idea inherently set forth by those words, or, to put it differently, on the essential nature of the thing embraced by those words, and not upon the mere fact that the constitution required them to be used. If those words are of the substance of an indictment, they are so for the same reason that any other words are of the substance of an indictment, because they are essential to the definition of the offense intended to be charged—not because they are required by the constitution to be used in the conclusion of the indictment. For example, if the constitution had done so foolish a thing as to say that an indictment should conclude with a picture of a drawn sword, since the constitution is the organic law of the land, an indictment without that picture would certainly be void; and yet is any logical mind required to admit that the picture of a drawn sword, though required by the constitution, is matter of substance in any indictment? The constitution may arbitrarily make anything it pleases essential to the conclusion of an indictment; but whether the thing required to be in the conclusion of an indictment is matter of substance or matter

of form depends on the essential nature of that thing, and not on the arbitrary requirement that it shall be contained in the preface, or in the conclusion of an indictment.”

14. *State v. Waters*, 1 Mo. App. 7.

15. *State v. Hudspeth*, 150 Mo. 12, 21, 51 S. W. 483, that is not the office of a conclusion.

16. 1 Chit. Cr. Law 246, and the following cases: Fla.—*Shiver v. State*, 41 Fla. 630, 27 So. 36. Ga.—*Hardin v. State*, 106 Ga. 384, 32 S. E. 365, 71 Am. St. Rep. 269. N. J.—*State v. Minford*, 64 N. J. L. 518, 45 Atl. 817. Eng.—*Reg. v. Lane*, 2 Ld. Raym. 1034, 92 Eng. Reprint 187; s. c., 3 Salk. 190, 91 Eng. Reprint 770; 6 Mod. 128, 87 Eng. Reprint 884; *Holmes’ Case*, Cro. Car. 377, 79 Eng. Reprint 928; *Palfrey’s Case*, Cro. Jac. 527, 79 Eng. Reprint 451.

The conclusion, against the peace of the king, has been uniformly held in England to be necessary in all indictments whether for statutory or common law offenses. *State v. Kirkman*, 104 N. C. 911, 10 S. E. 312; *State v. Parker*, 81 N. C. 531.

17. *State v. Stapely*, 19 Ohio Dec. (N. P.) 110.

[a] The validity of the indictment depended upon the use of the proper termination. *State v. Stapely*, 19 Ohio Dec. (N. P.) 110.

18. *Hardin v. State*, 106 Ga. 384, 32 S. E. 365, 71 Am. St. Rep. 269; Com. v. Paxton, 14 Phila. (Pa.) 665, 36 Leg. Int. 444.

[a] It was usual, but not necessary to add, “his crown and dignity.”

ticular jurisdiction,¹⁹ such as, "contrary to the laws of the state, the good order, peace and dignity thereof,"²⁰ "against the peace and dignity of the state,"²¹ or "of the commonwealth,"²² or "of the United States."²³ And the authorities seem to be absolutely uniform, that when the rule in relation to this particular form of the indictment

State v. Minford, 64 N. J. L. 518, 45 Atl. 817.

19. *Hardin v. State*, 106 Ga. 384, 32 S. E. 365, 71 Am. St. Rep. 269.

20. *Hardin v. State*, 106 Ga. 384, 32 S. E. 365, 71 Am. St. Rep. 269; *Bulloch v. State*, 10 Ga. 47, 62, 54 Am. Dec. 369; *Badger v. State*, 5 Ga. App. 477, 63 S. E. 532.

21. *Ala.*—Code, 1907, §7131; *Fowler v. State*, 155 Ala. 21, 45 So. 913; *Cagle v. State*, 151 Ala. 84, 44 So. 381; *Smith v. State*, 139 Ala. 115, 36 So. 727. *Ark.*—Const., 1861, art. vi, §15; *State v. Culbreath*, 71 Ark. 80, 71 S. W. 254; *Williams v. State*, 47 Ark. 230, 1 S. W. 149; *State v. Hazle*, 20 Ark. 156; *State v. Cadle*, 19 Ark. 613, 621; *Anderson v. State*, 5 Ark. 444. *Ill.*—Const., 1870, art. vi, §33 ("against the peace and dignity of the same," i. e., of the people of the state of Illinois); *Kirkham v. People*, 170 Ill. 9, 48 N. E. 465; *Zarresseller v. People*, 17 Ill. 101. *La.* *State v. Nunn*, 29 La. Ann. 589, under early constitutional provision. *Md.* Const., 1867, art. iv, §13 ("against the peace, government and dignity of the state"); *State v. Dyeer*, 85 Md. 246, 36 Atl. 763. *Minn.*—Const., art. 6, §14. *Miss.*—Const., 1890, §169; *Starling v. State*, 90 Miss. 255, 43 So. 952, 13 Am. & Eng. Ann. Cas. 776; *Love v. State*, 8 So. 465; *State v. Johnson*, Walk. 392. *Mo.*—Const., 1875, art. vi, §38; *State v. Donaldson*, 243 Mo. 460, 148 S. W. 79; *State v. Warner*, 220 Mo. 23, 119 S. W. 399; *State v. Campbell*, 210 Mo. 202, 109 S. W. 706, 14 Am. & Eng. Ann. Cas. 403; *State v. Campbell*, 210 Mo. 202, 109 S. W. 706; *State v. Hays*, 78 Mo. 600; *State v. Ulrich*, 96 Mo. App. 689, 70 S. W. 933; *State v. Waters*, 1 Mo. App. 7; *State v. Reakey*, 1 Mo. App. 3. *N. H.*—Const., pt. II, art. 87; *State v. Kean*, 10 N. H. 347, 34 Am. Dec. 162. *N. J.*—Const., art. viii, §3; *State v. Minford*, 64 N. J. L. 518, 45 Atl. 817. *Ohio.*—Const., 1851, art. iv, §20; *Olendorf v. State*, 64 Ohio St. 118, 59 N. E. 892; *Finnical v. Cadiz*, 61 Ohio St. 494, 56 N. E. 200; *Fendrick v. State*, 9 Ohio C. C. (N. S.).

49, 18 Ohio Cir. Dec. 724, reversing 17 Ohio Dec. (N. P.) 73, affirmed, 77 Ohio St. 298, 82 N. E. 1078; *State v. Stapely*, 19 Ohio Dec. (N. P.) 110; *State v. Mulford*, 12 Ohio Dec. (N. P.) 724, 727. *S. C.*—Const., 1895, art. v, §31; *State v. Powers*, 59 S. C. 200, 37 S. E. 690; *State v. Mason*, 54 S. C. 240, 32 S. E. 357; *State v. Robinson*, 27 S. C. 615, 4 S. E. 579 (under Const., 1868); *State v. Strickland*, 10 S. C. 191 (under Const., 1868); *State v. Washington*, 1 Bay 120, 1 Am. Dec. 601. *Tenn.*—Const., 1870, art. vi, §12; *Rice v. State*, 3 Heisk. 215. *Tex.*—Code Crim. Proc., art. 439, subd., §8; *State v. Pratt*, 44 Tex. 93; *State v. Sims*, 43 Tex. 521; *State v. Durst*, 7 Tex. 74; *Poss v. State*, 47 Tex. Crim. 486, 83 S. W. 1109; *Bird v. State*, 37 Tex. Crim. 408, 35 S. W. 382; *Saine v. State*, 14 Tex. App. 144; *Hamm v. State*, 13 Tex. App. 383, 44 Am. Rep. 706; *Calvert v. State*, 8 Tex. App. 538; *Cox v. State*, 8 Tex. App. 254, 34 Am. Rep. 746. *Vt.*—Const., 1793, ch. 2, §32; *State v. Amidon*, 58 Vt. 524, 2 Atl. 154. *W. Va.*—Const., 1872, art. ii, §8; *State v. McClung*, 35 W. Va. 280, 13 S. E. 654; *State v. Allen*, 8 W. Va. 680; *Lemons v. State*, 4 W. Va. 755, 6 Am. Rep. 293. *Wis.*—Const., 1848, art. vii, §17; *Nichols v. State*, 35 Wis. 308; *Williams v. State*, 27 Wis. 402.

And see generally the constitutions and statutes of the several states.

[a] In Arkansas, this is the only formal requirement other than the style of the case, which is essential to be observed. *State v. Culbreath*, 71 Ark. 80, 71 S. W. 254.

22. *Ky.*—*Boggs v. Com.*, 9 Ky. L. Rep. 342, 5 S. W. 307. *Pa.*—Const., 1874, art. v, §23; *Rogers v. Com.*, 5 Serg. & R. 463; *Com. v. Jackson*, 1 Grant Cas. 262; *Com. v. Paxton*, 14 Phila. 665, 36 Leg. Int. 444. *Va.* Const., 1902, §106; *Brown v. Com.*, 81 Va. 466, 10 S. E. 745; *Thompson v. Com.*, 20 Gratt. 724; *Carney v. Com.*, 4 Gratt. 546.

23. *United States v. Lemmons*, Hempst. 62, 26 Fed. Cas. No. 15,521a;

is expressly provided for by the written law of the state, it must be strictly complied with, its omission in toto being fatal,²⁴ whether excepted to or not.²⁵ though on this latter proposition there is authority to the contrary.²⁶

Even in the absence of constitutional or statutory provisions now,²⁷ the common-law rule would still prevail,²⁸ unless it has been changed by statute.²⁹ And under the statutes in some jurisdictions, this rule of the common law is abolished, and it is now no longer material that the indictment omits the formal conclusion, *contra pacem*.³⁰

United States *v.* Crittenden, Hempst. 61, 25 Fed. Cas. No. 14,890a; United States *v.* Boling, 4 Cranch. 579, 24 Fed. Cas. No. 14,621 (under 2 St. at L., p. 115).

24. **U. S.**—United States *v.* Lemmons, Hempst. 62, 26 Fed. Cas. No. 15,591a; United States *v.* Crittenden, Hempst. 61, 25 Fed. Cas. No. 14,890a; United States *v.* Boling, 4 Cranch C. C. 579, 24 Fed. Cas. No. 14,621. **Ala.** Fowler *v.* State, 155 Ala. 21, 45 So. 913; Cagle *v.* State, 151 Ala. 84, 44 So. 381; Smith *v.* State, 139 Ala. 115, 36 So. 727. **Ark.**—State *v.* Cadle, 19 Ark. 613, 622. **Ga.**—Hardin *v.* State, 106 Ga. 384, 32 S. E. 365, 71 Am. St. Rep. 269, material defect rendering indictment subject to special demurrer. **La.**—State *v.* Nunn, 29 La. Ann. 589. **Md.**—State *v.* Dycer, 85 Md. 246, 36 Atl. 763, constitutional provision mandatory. **Miss.** See Love *v.* State, 8 So. 465. **Mo.** State *v.* Stacy, 103 Mo. 11, 15 S. W. 147; State *v.* Pemberton, 30 Mo. 376; State *v.* Lopez, 19 Mo. 254; State *v.* Clevenger, 25 Mo. App. 655. **Tenn.** Rice *v.* State, 3 Heisk. 215, 220, statute mandatory. **Tex.**—State *v.* Sims, 43 Tex. 521; Durst *v.* State, 7 Tex. 74; Holden *v.* State, 1 Tex. App. 225. **Va.** Early *v.* Com., 86 Va. 921, 11 S. E. 795; Thompson *v.* Com., 20 Gratt. 724; Com. *v.* Carney, 4 Gratt. 546. **Wis.**—Williams *v.* State, 27 Wis. 402.

[a] "Some of the cases say that it is void; some that it is insufficient to support a conviction; others that it is mandatory and the courts must enforce it; and still others that 'the courts have no authority to dispense with that which the constitution requires.' The effect of the language of all is, that the omission of the required constitutional words renders the instrument void." Justice White, dissenting in *Chemgas v. Tynan*, 51 Colo. 35, 47, 116 Pac. 1045.

25. State *v.* Pemberton, 30 Mo. 376; State *v.* Lopez, 19 Mo. 254; State *v.* Sims, 43 Tex. 521; Holden *v.* State, 1 Tex. App. 225.

26. Hardin *v.* State, 106 Ga. 384, 32 S. E. 365, 71 Am. St. Rep. 269.

[a] In Georgia, (1) the omission is a defect of form, and as such, subject to demurrer (Hardin *v.* State, 106 Ga. 384, 32 S. E. 365, 71 Am. St. Rep. 269; Badger *v.* State, 5 Ga. App. 477, 63 S. E. 532); (2) but furnishes no ground for a motion in arrest of judgment, being waived by a plea to the merits, and cured by verdict. Badger *v.* State, 5 Ga. App. 477, 63 S. E. 532.

27. As to such provisions, see *supra*, this section.

28. **Ark.**—Anderson *v.* State, 5 Ark. 444, constitution merely declaratory, and in affirmance of an old principle, not the creation of a new one. **Fla.** Shiver *v.* State, 41 Fla. 630, 27 So. 36. **Ga.**—Hardin *v.* State, 106 Ga. 384, 390, 32 S. E. 365, 71 Am. St. Rep. 269. **Me.** Damon's Case, 6 Me. 148.

29. Shiver *v.* State, 41 Fla. 630, 27 So. 36.

30. Shiver *v.* State, 41 Fla. 630, 27 So. 36, and the following cases: Hall *v.* State, 8 Ind. 439 (under 2 Rev. St., 1852, p. 368, providing that indictment shall not be deemed invalid by reason of its omission); Com. *v.* Frelove, 150 Mass. 66, 22 N. E. 435 (statute [Pub. St., ch. 213, §16] expressly enacting that no indictment shall be quashed on this ground, if the omission does not tend to prejudice the defendant, not unconstitutional).

[a] Under a statute providing that (1) "No indictment shall be quashed, or judgment be arrested, or new trial be granted, on account of any defect in the form of the indictment . . ., or for any cause whatsoever, unless the court shall be of the opinion that the indictment is so vague, indistinct and in-

Against Government at Time of Commission of Offense. — It has at all times been held that the indictment should charge the offense as having been done against the peace of the government which exercises jurisdiction at the time the offense is committed.³¹

definite as to mislead the accused and embarrass him in the preparation of his defense or expose him after conviction or acquittal to substantial danger of a new prosecution for the same offense," it has been held that the rule of the common law is abolished, and it is now no longer material that the indictment omits the formal conclusion. *Shiver v. State*, 41 Fla. 630, 27 So. 36. (2) See also *Frisbie v. United States*, 157 U. S. 160, 168, 15 Sup. Ct. 586, 39 L. ed. 657, holding that the omission to so conclude is of a matter of form, which does not tend to the prejudice of the defendant, and is, therefore, to be disregarded, within the rule of §1025, Rev. St., providing that an indictment shall not be deemed insufficient by reason of any defect which does not tend to the prejudice of the substantial rights of the defendant on the merits.

[b] In North Carolina it is not now essential that an indictment shall conclude "against the peace and dignity of the state," the early rule requiring such averment not being sanctioned either by the constitution or statutes of the state. *State v. Craft* (N. C.), 83 S. E. 772; *State v. Peters*, 107 N. C. 876, 12 S. E. 74; *State v. Kirkman*, 104 N. C. 911, 10 S. E. 312, *overruling State v. Joyner*, 81 N. C. 534, in so far as it is in conflict upon this point.

[c] Especially is this so since the statute, now Rev. §3254, which makes the bill "sufficient in form, for all intents and purposes, if it express the charge against the defendant in a plain, intelligible, and explicit" manner, and, if that is done, forbids that the bill should either be "quashed or judgment arrested by reason of any informality or refinement." *State v. Craft* (N. C.), 83 S. E. 772; *State v. Kirkman*, 104 N. C. 911, 10 S. E. 312.

[d] In *State v. Parker*, 81 N. C. 531, the court held sufficient an indictment concluding "against the peace and dignity," omitting the words "of the state," though it would seem that the omitted words were precisely the material ones required by the constitutional provision of 1776.

31. **Me.**—*Damon's Case*, 6 Mo. 148, indictment for offense committed before separation of Maine from Massachusetts should have concluded against the peace of Massachusetts. **Mo.**—See *State v. Campbell*, 210 Mo. 202, 109 S. W. 706; *State v. Renkey*, 1 Mo. App. 3. **N. J.**—See *State v. Minford*, 64 N. J. L. 518, 45 Atl. 817. **Eng.**—*Rex v. Lookup*, 3 Burr. 1901, 97 Eng. Reprint 1160; 1 Chit. Cr. Law 246.

[a] "So punctilious were the courts" at the common law, "that if it appeared on the face of the indictment that the offence charged was committed in a previous reign it was necessary to conclude the indictment accordingly. In 1766, on a writ of error to the King's Bench, the lords took the opinion of the judges, which unanimously was that the concluding an indictment against the peace of the ~~now~~ king, when the offence was charged to have been committed in the time of the ~~late~~ king, was fatal and rendered the indictment insufficient. . . . *Rex v. Lookup*, 3 Burr. 1901." *State v. Minford*, 64 N. J. L. 518, 45 Atl. 817.

[b] "By the ancient law, in all peculiar jurisdictions, offenses were said to be done against his peace in whose court they were tried; in a county palatine, *contra pacem domini*; in a sheriff's court, *contra pacem vice-comitis*; in the court of a corporation, *contra pacem ballivorum*; and, as in the Court of King's Bench, the supreme court of common law in the Kingdom of England, they are said to be done *contra pacem Regis*—'against the peace of the King'—so, in this republic, they must by law be alleged, in the conclusion of the indictment, of course, to be done 'against the peace and dignity of the State.'" *State v. Reakey*, 1 Mo. App. 3.

[c] In Alaska, an indictment properly concludes "against the peace and dignity of the United States." *Jackson v. United States*, 102 Fed. 473, 42 C. C. A. 452.

[d] Where a state statute makes counterfeiting an offense, an indictment for a violation of such law prop-

An indictment concluding *contra pacem* charges only a violation of the common law.³²

(II.) **Sufficiency of.**—An indictment concludes properly, if it follows the form prescribed by the statute or constitutional provision.³³

An examination of the authorities indicates some difference in the degree of exactness required, in following the constitutional or statutory language, however;³⁴ but they are all practically uniform that there must be a substantial, if not an exact, compliance with such constitutional or statutory requirements.³⁵

erly concludes against the sovereignty of the state, and not against the sovereignty of the United States. If it were an indictment for a violation of the federal statute, it would then conclude against the sovereignty of the United States; but in that event, the prosecution could not properly be sustained in the state court. *Harlan v. People*, 1 Doug. (Mich.) 207, 216.

[e] **Indictment Transferred From Territorial Court.**—It is not necessary for an indictment transferred from a territorial court to a state court, upon a change from a territory to statehood, to conclude "against the peace and dignity of the state." *Reeves v. Ter.*, 2 Okla. Crim. 351, 101 Pac. 1039.

[f] **But an indictment found after the adoption of a state constitution for an offense committed before the adoption of that instrument and while the jurisdiction comprised only a territory is nevertheless properly concluded "against the peace and dignity of the people of the state."** *Packer v. People*, 8 Colo. 361, 8 Pac. 564; *Wishard v. State*, 5 Okla. Crim. 610, 115 Pac. 796; *Baker v. State*, 3 Okla. Crim. 265, 105 Pac. 379; *Faggard v. State*, 3 Okla. Crim. 159, 104 Pac. 930.

32. *State v. Evans*, 7 Gill & J. (Md.) 290.

33. *Crabb v. State*, 88 Ga. 584, 15 S. E. 455; *Camp v. State*, 25 Ga. 689.

[a] **Name of State in Conclusion.** An indictment commencing with the words "the state of," naming the state, and concluding "against the peace and dignity of the same" is sufficient, under a constitutional requirement that it conclude "against the peace and dignity of the same." *State v. Johnson*, Walk. (Miss.) 392.

[b] So too, an allegation that the offense was committed "against the peace and dignity of the state," without mentioning the name of the state

is sufficient, where the state is mentioned in the caption, and the constitution or statute does not require the name of the state to be stated in the conclusion. *Atwell v. State*, 63 Ala. 61; *Com. v. Young*, 7 B. Mon. (Ky.) 1.

34. *State v. Campbell*, 210 Mo. 202, 109 S. W. 706, 14 Am. & Eng. Ann. Cas. 403, reviewing authorities.

35. **Mo.**—*State v. Warner*, 220 Mo. 23, 119 S. W. 399; *State v. Campbell*, 210 Mo. 202, 109 S. W. 706, 14 Am. & Eng. Ann. Cas. 403; *State v. Waters*, 1 Mo. App. 7. **N. J.**—*State v. Minford*, 64 N. J. L. 518, 45 Atl. 817. **Tex.**—*Bird v. State*, 37 Tex. Crim. 408, 35 S. W. 382; *Thompson v. State*, 15 Tex. App. 168. **W. Va.**—*Lemons v. State*, 4 W. Va. 755, 6 Am. Rep. 293. **Wis.**—*Williams v. State*, 27 Wis. 402.

[a] In *State v. Waters*, 1 Mo. App. 7, it is announced that the general doctrine is that if the intent of the constitution be substantially responded to in this part of the indictment, a literal transcript of the formula is not essential.

[b] A conclusion "against the peace and dignity of the ———" was fatal under a constitutional provision requiring that all prosecutions shall conclude "against the peace and dignity of the same," i. e. of the state. *State v. Nunn*, 29 La. Ann. 589.

[c] An indictment concluding "against the peace of the statute and the statute in such case made and provided" does not comply with the constitutional requirement. *State v. Lopez*, 19 Mo. 254.

[d] In *Cox v. State*, 8 Tex. App. 254, 34 Am. Rep. 746, the indictment concluded "against the peace and dignity of the statute." This was held sufficient grounds for holding the indictment invalid.

[e] **Omission Contra Dignitatem.**

Changes in the phraseology of the conclusion prescribed which do not change the sense thereof do not invalidate the indictment.⁶⁶

Where all the words required by the constitutional or statutory provision are contained in the conclusion, additional words contained therein are mere surplusage, not invalidating the indictment.⁶⁷

The words "against the peace of the state," naming it, are insufficient where the constitution requires a conclusion "against the peace and dignity of the state." *Williams v. State*, 27 Wis. 402. And see *Cain v. State*, 4 Blackf. (Ind.) 512.

[f] **Omission of Word.**—Where the indictment concluded "against the peace and dignity of the People of the State of Illinois;" where the constitution provided for a conclusion "against the peace and dignity of the same people, etc.," the mission of the word "same" did not vitiate it. *Kirkham v. People*, 170 Ill. 9, 48 N. E. 465; *Zarresseller v. People*, 17 Ill. 101.

[g] **The omission of the article** (1) "the" before "state" is fatally defective. *State v. Warner*, 220 Mo. 23, 119 S. W. 399; *State v. Campbell*, 210 Mo. 202, 109 S. W. 706, 14 Am. & Eng. Ann. Cas. 403; *Thompson v. State*, 15 Tex. App. 168, following *Thompson v. State*, 15 Tex. App. 39. (2) Its omission changes not only the sense but the very substance of the clause. *State v. Campbell*, 210 Mo. 202, 224, 109 S. W. 706, 14 Am. & Eng. Ann. Cas. 403.

[h] **Misspelling of Word "Against."**—Where the letters "ag" in the word "against" were entirely omitted, making the word "ainst" instead of "against," the omission was fatal to the indictment. *Bird v. State*, 37 Tex. Crim. 408, 35 S. W. 382. But where the letters "i" and "n" were transposed, so as to make the word spell "aganist" instead of "against," the indictment was not fatally defective. *Hudson v. State*, 10 Tex. App. 215, 227, holding case of *Cox v. State*, 8 Tex. App. 254, in which the word "statute" was substituted for "state" not analogous.

[i] **Abbreviations.**—W. Virginia was held not equivalent to West Virginia in a conclusion "against the peace and dignity of the state of West Virginia." *Lemons v. State*, 4 W. Va. 755, 6 Am. Rep. 293.

36. Ala.—*Washington v. State*, 53 Ala. 29. Ill.—*Zarresseller v. People*, 17

Ill. 101. N. H.—*State v. Kean*, 10 N. H. 347, 34 Am. Dec. 162. Ohio.—*State v. Stapely*, 19 Ohio Dec. (N. P.) 110. S. C.—*State v. Powers*, 59 S. C. 200, 37 S. E. 690; *State v. Robinson*, 27 S. C. 615, 4 S. E. 570.

[a] **Illustrations.**—The fact that an indictment concludes "against the peace and dignity of the state," either naming or omitting to name the state, instead of "against the peace and dignity of the same," as required by the constitutional or statutory provision is not fatal to it. Ala.—*Washington v. State*, 53 Ala. 29. La.—*State v. Johnson*, 35 La. Ann. 842. Pa.—*Rogers v. Com.*, 5 Serg. & R. 463; *Com. v. Paxton*, 14 Phila. 605, 33 Leg. Int. 444. S. C.—*State v. Anthony*, 1 McCool 285. Compare *Com. v. Jackson*, 1 Grant Cas. (Pa.) 262, holding an indictment concluding "to the great damage of the said L. C. P. (the prosecutor) against the peace of the state, the government and dignity of the same" instead of "against the peace and dignity of the same" defective.

[b] **"Our Said State."**—In one of the leading cases, *State v. Kean*, 10 N. H. 347, 34 Am. Dec. 162, the language used in the conclusion was "against the peace and dignity of our said state," instead of "the state" as required by the constitution. It was held by the court that the use of the language was not such a departure from the language required by the constitution as to vitiate the indictment.

37. Ark.—*Anderson v. State*, 5 Ark. 444, interpolation upon the form of the words "people of the" will not vitiate indictment. Md.—*Richardson v. State*, 66 Md. 295, 7 Atl. 43. Minn.—*State v. Johnson*, 37 Minn. 493, 35 N. W. 373. Mo.—*State v. Schloss*, 93 Mo. 361, 6 S. W. 244; *State v. Hays*, 78 Mo. 600; *State v. Waters*, 1 Mo. App. 7; *State v. Reakey*, 1 Mo. App. 3. N. H.—*State v. Kean*, 10 N. H. 347, 34 Am. Dec. 162. Ohio.—*State v. Stapely*, 19 Ohio Dec. (N. P.) 110. S. C.—*State v. Powers*, 59 S. C. 200, 37 S. E. 690; *State v. Mason*, 54 S. C. 249, 32 S. E. 357;

The words "contrary to the laws of said state, the good order, peace, and dignity thereof," appearing at the conclusion of an indictment, though apparently in their grammatical connection referring to a preceding statement therein not relating to the commission of the act constituting the offense charged, will be held to apply to that act.³⁸

c. *Against Statute.* — (I.) *Necessity and Object.* — The conclusion "contrary to the form of the statute" is now dispensed with in many jurisdictions, under statutes expressly providing that its omission shall not invalidate the indictment,³⁹ or that the indictment shall not be deemed insufficient by reason of any defect which does not tend

State v. Robinson, 27 S. C. 615, 4 S. E. 570; *State v. Washington*, 1 Bay 120, 1 Am. Dec. 601. **Tex.**—*Adams v. State* (Tex. App.), 13 S. W. 1009; *Rowlett v. State*, 23 Tex. App. 191, 4 S. W. 582.

[a] Where there is a mere redundancy of words in the conclusion of an indictment, an excess in form shall be made subsidiary to the ends of justice. *Anderson v. State*, 5 Ark. 444, 451.

[b] *Illustrations.* — An indictment, under a constitutional requirement that it conclude "against the peace and dignity of the state," is not invalidated by the addition of the words "same," and "aforesaid" in describing the state. *State v. Powers*, 59 S. C. 200, 37 S. E. 690; *State v. Mason*, 54 S. C. 240, 32 S. E. 357; *State v. Robinson*, 27 S. C. 615, 4 S. E. 570; *State v. Washington*, 1 Bay (S. C.) 120, 1 Am. Dec. 601.

[c] Nor is an indictment rendered fatally defective (1) because it adds the name of the state to the conclusion (**Mo.**—*State v. Hays*, 78 Mo. 600. **Tex.** *State v. Pratt*, 44 Tex. 93. **Va.**—*Brown v. Com.*, 86 Va. 466, 10 S. E. 745. **W. Va.** *State v. Allen*, 8 W. Va. 680), (2) or because the phrase "contrary to the form of the statute" is also added to the words required by the constitution. *State v. Schloss*, 93 Mo. 361, 6 S. W. 244; *State v. Waters*, 1 Mo. App. 7; *State v. Reakey*, 1 Mo. App. 3.

[d] Putting the date when and the place where found, at the end of an indictment, after the concluding phrase thereof, does not vitiate it; such date and place are no part of the indictment. *State v. Johnson*, 37 Minn. 493, 35 N. W. 373.

[e] But see *Haun v. State*, 13 Tex. App. 383, 44 Am. Rep. 706, holding that an indictment concluding "against the peace and dignity of the state, this the 14th day of November, 1882" was bad,

such conclusion being in violation of the constitutional provision.

[f] *Second Count.*—Where a second count of an indictment concludes "against the peace and dignity of the state of Ohio, being a further description of the same transaction complained of in the first count of this indictment," the additional words following the prescribed conclusion may be treated as surplusage, and will not invalidate this count of the indictment. *State v. Stapely*, 19 Ohio Dec. (N. P.) 110.

38. *Jones v. State*, 115 Ga. 814, 42 S. E. 271.

[a] Though an indictment in setting out the offense of false pretenses denies the truth of each pretense charged to have been made and immediately following the last pretense so negatived, separated only by a semicolon, concludes with the formal language, "against the peace and dignity of the state," it is not open to the objection that the concluding clause is limited to the one averment immediately preceding it, instead of referring to and modifying the entire charge. *State v. Donaldson*, 243 Mo. 460, 148 S. W. 79.

39. **Ala.**—Code, 1907, §7134; *State v. Brown*, 4 Port. 410. **Ark.**—*State v. Cadle*, 19 Ark. 613, 621. **Ind.**—*Burn's Ann. St.*, 1914, §2063. **Ia.**—Code, 1897, §5290; *State v. Stroud*, 99 Iowa 16, 68 N. W. 450. **Me.**—*Rev. St.*, 1903, ch. 132, §13; *State v. Dorr*, 82 Me. 341, 19 Atl. 861. **Mass.**—*Rev. Laws*, 1902, ch. 218, §33; *Com. v. Frelove*, 150 Mass. 66, 22 N. E. 435 (statute not unconstitutional). **Mich.**—*Howell's St.*, 1913, §15079; *People v. Arnold*, 46 Mich. 268, 9 N. W. 406. See *Durand v. People*, 47 Mich. 332, 11 N. W. 184. **Miss.**—*Smith v. State*, 58 Miss. 867, under Code, 1871, §2884. **Mo.**—*Rev. St.*, 1909, §5115; *State v. Schloss*, 93 Mo. 361, 6 S. W.

to the prejudice of the substantial rights of the defendant on the merits.⁴⁰ In the absence of such statutes, however, if a statute creates the offense, the indictment should, in addition to the conclusion, "contra pacem."⁴¹ also contain the conclusion contrary to the form of the statute,⁴² though upon this proposition there are some authorities to the contrary.⁴³

So also, where a statute declares a common-law offense, when committed under particular circumstances, not necessarily included in the original offense, punishable in a different manner from what it would have been without such circumstances,⁴⁴ or where the statute changes the nature of the common-law offense to one of a higher degree, as where what was originally a misdemeanor is made a felony,⁴⁵ or entirely supersedes the common law, as where the entire

244 (under Rev. St., 1879, §1821). **Neb.**—Rev. St., 1913, §9050; *Smith v. State*, 4 Neb. 277. **N. C.**—Rev., 1905, §3255; *State v. Peters*, 107 N. C. 876, 12 S. E. 74; *State v. Harris*, 106 N. C. 682, 11 S. E. 377. **Tenn.**—Shannon's Code, §7078; *State v. Stephens*, 127 Tenn. 282, 154 S. W. 1149; *Rice v. State*, 3 Peisk. 215, 221. **Vt.**—Pub. St., 1906, §2272. **Wis.**—Sts., 1898, §1959. **Eng.** Act 14 & 15 Vict., ch. 100, §24; *Castro v. Reg.*, 6 App. Cas. 229, 50 L. J., Q. B. 497, 44 L. T. 350, 29 W. R. 669, 14 Cox C. C. 546, 45 J. P. 452.

And see generally the statutes.

40. *Frishie v. United States*, 157 U. S. 160, 168, 15 Sup. Ct. 586, 39 L. ed. 657; *Com. v. Kennedy*, 15 B. Mon. (Ky.) 531; *Kitchen v. Com.*, 14 Ky. L. Rep. 764. See also *People v. O'Brien*, 64 Cal. 53, 28 Pac. 59 (holding that a misplacement of the concluding phrase of the indictment was a defect or imperfection in matter of form which did not tend to the prejudice of the substantial rights of the defendant upon the merits, rendering the indictment insufficient); *Queen v. Doyle*, 27 Nova Scotia (Can.) 294.

41. See *supra*, VIII, A, 6, b.

42. **U. S.**—*United States v. Smith*, 2 Mason 143, 150; *United States v. Andrews*, 2 Paine 451, 24 Fed. Cas. No. 14,455. **Ind.**—*Fuller v. State*, 1 Blackf. 63. **Ky.**—*McCullough v. Com.*, Hard. 95. Such rule is changed by statute now. **Me.**—*State v. Soule*, 20 Me. 19; *Damon's Case*, 6 Me. 148. **Md.**—*State v. Evans*, 7 Gill & J. 290. **Mass.**—*Com. v. Stockbridge*, 11 Mass. 279; *Com. v. Springfield*, 7 Mass. 9; *Com. v. Northampton*, 2 Mass. 116. **N. Y.**—*People v. Enoch*, 13 Wend. 159, 27 Am. Dec. 197,

People v. Cook, 2 Park. Crim. 12; *Hughes' Case*, 4 City Hall Rec. 132. **N. C.**—*State v. Fox*, 82 N. C. 679; *State v. Dill*, 75 N. C. 257; *State v. Minton*, 61 N. C. 196. **Pa.**—*Warner v. Com.*, 1 Pa. 154, 44 Am. Dec. 114; *Chapman v. Com.*, 5 Whart. 427, 34 Am. Dec. 565; *Russell v. Com.*, 7 Serg. & R. 489; *White v. Com.*, 6 Binn. 179, 6 Am. Dec. 443; *Com. v. Searle*, 2 Binn. 332, 4 Am. Dec. 446; *Com. v. Liehtreu*, 1 Pears. 107. **S. C.**—*State v. McKettrick*, 14 S. C. 346; *State v. Strickland*, 10 S. C. 191. **Eng.**—*Reg. v. Harman*, 2 Ld. Raym. 1104, 92 Eng. Reprint 231; *Rex v. Clerk*, 1 Salk. 370, 91 Eng. Reprint 322; *Faulkner's Case*, 1 Wm. Saunders 249, 85 Eng. Reprint 292; *Rex v. Dickenson*, 1 Wm. Saund. 135, 85 Eng. Reprint 142; *Rex v. Pearson*, 24 E. C. L. 483; 1 Chit. Cr. L. 290.

See also *State v. Loftin*, 19 N. C. 31.

43. Where neither the constitutional nor statutory provisions require it. *State v. Culbreath*, 71 Ark. 80, 71 S. W. 254; *State v. Cadle*, 19 Ark. 613; *State v. Runyon*, 62 Ore. 246, 124 Pac. 259.

[a] It is customary to conclude "against the statute," etc., even in such jurisdictions, however. *State v. Runyon*, 62 Ore. 246, 124 Pac. 259.

44. **N. H.**—*State v. Card*, 34 N. H. 510, 517. **N. Y.**—*People v. Enoch*, 13 Wend. 159, 27 Am. Dec. 197. **Eng.**—1 Chit. Cr. Law 290. But see *Reg. v. Blea*, 8 Car. & P. 735, 34 E. C. L. 291.

45. **Md.**—*State v. Evans*, 7 Gill & J. 290. **N. H.**—*State v. Card*, 34 N. H. 510, 517. **N. Y.**—*People v. Enoch*, 13 Wend. 159, 27 Am. Dec. 197. **N. C.**—*State v. Lawrence*, 81 N. C. 522; *State v. Ratts*, 63 N. C. 503. **S. C.**—*State v. Strickland*, 10 S. C. 191. **Tenn.**—*State*

subject is revised by statute,⁴⁶ the indictment should so conclude.

But if the statute is only declaratory of what was previously an offense at common law, without adding to, or altering the punishment,⁴⁷ or merely regulates the jurisdiction in which a common-law offense may be prosecuted,⁴⁸ or merely deprives the accused of some benefit to which he was at common law entitled,⁴⁹ or merely alters a rule of evidence,⁵⁰ there is no necessity for the indictment to so conclude. And where a statute merely alters the punishment of a common-law offense, the statutory punishment may be inflicted, although the indictment does not conclude *contra formam statuti*.⁵¹

Surplusage.—Where the indictment charges an offense indictable at common law, and there is no statute in addition making it punishable, the concluding words of the indictment “contrary to the form of the statute,” are to be rejected as surplusage, and do not vitiate the indictment.⁵²

r. Humphreys, 1 Overt. 306. **Eng.**—1 Chit. Cr. Law 290; 2 Hale P. C., 189; *Rex v. Dickenson*, 1 Wm. Saunders, 135, note, 85 Eng. Reprint 142.

46. **Com. v. Cooley, 10 Pick. (Mass.) 37; *State v. McKettrick*, 14 S. C. 346; *State v. Gray*, 14 Rich. (S. C.) 174; *State v. Ripley*, 2 Brev. (S. C.) 300.**

47. **Ind.**—*Fuller v. State*, 1 Blackf. 63, followed with approval in *Hudson v. State*, 1 Blackf. 317. **Minn.**—*State v. Coon*, 18 Minn. 518; *O’Connell v. State*, 6 Minn. 279. **N. Y.**—*People v. Enoch*, 13 Wend. 159, 27 Am. Dec. 197. **Pa.**—*Pennsylvania v. Bell*, Add. 156, 1 Am. Dec. 298. **S. C.**—*State v. Coleman*, 8 S. C. 237; *State v. Poey*, 4 Strobb. L. 103, 124. **Eng.**—*Reg. v. Wyatt*, 1 Salk. 380, 91 Eng. Reprint 331; 1 Chit. Cr. Law 289, 290.

[a] It is an offense at common law to obstruct the execution of powers granted by statute, and an indictment for such offense need not, and ought not, to conclude “*contra formam statuti*.” *King v. Smith*, 2 Dougl. 441, 99 Eng. Reprint 283.

[b] Where the judgment of the court may be either at common law, or under a statute, a conclusion *contra formam statuti* is not improper, however. *Davis v. State*, 3 Har. & J. (Md.) 154.

48. *State v. Dunkley*, 25 N. C. 116; *Rex v. Sawyer*, 2 C. & Kirw. (N. P.) 101, 61 E. C. L. 100, 113; *Reg. v. Serva*, 2 C. & Kirw. (N. P.) 53, 61 E. C. L. 53; 1 Chit. Cr. Law 290.

49. 1 Chit. Cr. Law 290; 2 Hale P. C. 190.

50. 1 Chit. Cr. Law 290; 2 Hale P. C. 190, 288.

51. **U. S.**—*United States v. Norris*, 1 Cranch 411, 27 Fed. Cas. No. 15,899. **Md.**—*State v. Evans*, 7 Gill & J. 290. **Nev.**—*State v. Harris*, 12 Nev. 414. **N. C.**—*State v. Lawrence*, 81 N. C. 522; *State v. Ratts*, 63 N. C. 503. **Pa.**—*Russell v. Com.*, 7 Serg. & R. 489; *White v. Com.*, 6 Binn. 179, 6 Am. Dec. 443; *Com. v. Searle*, 2 Binn. 332, 4 Am. Dec. 446. **Eng.**—*Williams v. Reg.*, 7 Q. B. 250, 14 L. J. M. C. 164, 10 Jur. 155, 1 Cox C. C. 179.

[a] **Indictment May So Conclude.** In *Queen v. Bethell*, 6 Mod. 17, 87 Eng. Reprint 781, the court said, that where a statute takes notice of a common law offense, and adds a further penalty, an indictment thereupon may well be said to be *contra formam statuti*.

52. **Ark.**—*Vanderworker v. State*, 13 Ark. 700. **Idaho.**—*People v. Buchanan*, 1 Idaho 681. **Ky.**—*Gregory v. Com.*, 2 Dana 417. **Mass.**—*Com. v. Reynolds*, 14 Gray 87, 74 Am. Dec. 665; *Com. v. Hoxey*, 16 Mass. 385. **Minn.**—*State v. Crummev*, 17 Minn. 72. **N. H.**—*State v. Straw*, 42 N. H. 393; *State v. Card*, 34 N. H. 510, 517; *State v. Buckman*, 8 N. H. 203, 29 Am. Dec. 646. **N. J.**—*Cruiser v. State*, 18 N. J. L. 206. **N. Y.**—*Syracuse, etc. R. Co. v. People*, 66 Barb. 25. See *People v. Conger*, 2 Wheel. Cr. Cas. 448. **N. C.**—*State v. Harris*, 106 N. C. 682, 688, 11 S. E. 377; *State v. Bryson*, 79 N. C. 651. **Pa.**—*Pennsylvania v. Bell*, Add. 156, 171, 1 Am. Dec. 298; *Respublica v. Newell*, 3 Yeates 407, 2 Am. Dec. 381; *Com. v. Kay*, 14 Pa. Super. 376, 383. **R. I.**

Object of Conclusion. — This conclusion to an indictment designates it as a prosecution under a statute and not at the common law.⁵⁴ It is not its office to supply averments of fact in the indictment.⁵¹

(II.) Sufficiency of. — Though the technical words, "against the form of the statute in such case made and provided" are constantly used in all indictments, which consult accuracy and precision,⁵⁵ yet equivalent expressions are just as sufficient in point of law.⁵⁶ All that is required is, that some phrase should be used, which shows that the offense charged is founded on some statute.⁵⁷ It is not necessary that the indictment should specify the particular statute upon which it is founded, however,⁵⁸ unless it be a private statute, whereof the court

State v. Bacon, 27 R. I. 252, 61 Atl. 653. **S. C.**—*State v. White*, 15 S. C. 381, 389; *State v. Kennerly*, 10 Rich. 152. **Tenn.**—*Haslip v. State*, 4 Hayw. 272. **Vt.**—*State v. Burt*, 25 Vt. 373; *State v. Phelps*, 11 Vt. 116, 34 Am. Dec. 672; *State v. McLeran*, 1 Aik. 311.

[a] **England.**—The negative of this question was formerly held by the English courts; but later decisions have been in accordance with the rule stated in the text. *Reg. v. Wigg*, 2 Ld. Raym. 1163, 92 Eng. Reprint 269; *Page & Harwood's Case*, Aleyn 44, 82 Eng. Reprint 907; *Rex v. Mathews*, 5 T. R. 162, 101 Eng. Reprint 93; *Rex v. Bathurst*, Sayer 225, 96 Eng. Reprint 860; 1 Chit. Cr. Law 289.

53. *Town of Paris v. People*, 27 Ill. 74.

54. *State v. Stroud*, 99 Iowa 16, 68 N. W. 450.

55. *United States v. Smith*, 2 Mason (U. S.) 143, 150.

56. *United States v. Smith*, 2 Mason (U. S.) 143, 150; *State v. Smith*, 63 N. C. 234 ("no particular magic in the conclusion against the form of the 'statute,' for other words may be used which might serve the same purpose"). See also *Com. v. Stockbridge*, 11 Mass. 279, wherein the court while holding that the phrase "against the law in such case provided" was insufficient, said that, "It may be going too far to say that no other form of words can be devised which would be equivalent to *contra formam statuti*; . . ."

[a] **Equivalent Expressions.** — (1) The following expressions have been held sufficient: "Contrary to the statute" (*State v. Toadvine*, 1 Brev. (S. C.) 16), (2) "contrary to law" (*Hudson v. State*, 1 Blackf. (Ind.) 317; *Fuller v. State*, 1 Blackf. (Ind.) 63). (3) And see *Camp v. State*, 25 Ga. 689,

conclusion "contrary to the laws of said state" form prescribed by the statute. But see *Com. v. Inhab. of Stockbridge*, 11 Mass. 279; *State v. Lowder*, 85 N. C. 564. (4) "Contrary to the true intent and meaning of the Act of Congress of the United States, in such case made and provided." *United States v. Smith*, 2 Mason (U. S.) 143, 151. Compare *State v. Tribatt*, 32 N. C. 151. (5) Against the "force" instead of the "form" of the statute. *State v. Davis*, 80 N. C. 384.

[b] **Contrary to Form of "Statue."** (1) That the offense is alleged to be contrary to the form of the "statue" instead of contrary to the form of the "statute" is not objectionable (*State v. Smith*, 63 N. C. 234; *State v. Newton*, 42 Vt. 537), (2) especially under a statute providing that an entire omission of the words shall not vitiate the indictment. *State v. Dorr*, 82 Me. 341, 19 Atl. 861.

[c] The expression "in contempt of the laws of the United States of America," without referring to the statute was insufficient in *United States v. Andrews*, 2 Paine 451, 24 Fed. Cas. No. 14,455.

57. *United States v. Smith*, 2 Mason (U. S.) 143, 150.

[a] **All matter beyond this is surplusage**, which may be rejected, leaving the proper conclusion. *United States v. Lehman*, 39 Fed. 768.

58. **U. S.**—*United States v. Nickerson*, 17 How. 204, 15 L. ed. 219. **Ga.**—*Crabb v. State*, 88 Ga. 584, 15 S. E. 455. **Ia.**—*Zumhoff v. State*, 4 Greene 526. **Md.**—*Slymer v. State*, 62 Md. 237. **Mass.**—*Com. v. Cotton*, 138 Mass. 500; *Com. v. Hove*, 11 Gray 462; *Com. v. Griffin*, 21 Pick. 523. **Eng.**—1 Chit. Cr. Law 276; 2 Hale P. C. 172; *Hawkins' P. C.*, ch. 25, §§100, 101. See also *Rex*

cannot take notice, in which event the statute must be named.⁵⁹

A statute of the state of venue must be intended by the conclusion "contrary to the form of the statute in such case made and provided."⁶⁰ A conclusion against the statute of another jurisdiction renders the indictment bad.⁶¹

(III.) In Plural or Singular.—By express provision of statute in some jurisdictions, an indictment is not bad on account of the insertion of the words "contrary to the form of the statute," instead of the words "against the form of the statutes," or vice versa.⁶² Even in the absence of statute, by the weight of authority though an offense is prohibited by several independent statutes, a conclusion in the singular is sufficient;⁶³ but as indicated, upon this proposition there

r. Pugh, 6 Mod. 140, 87 Eng. Reprint 900.

59. 2 Hale's P. C. 172.

60. *State v. Karn*, 16 La. Ann. 183, "the criminal statutes of no other government are cognizable, properly speaking, by our courts."

[a] An indictment for an offense committed in a territory returned after it became a state concluding "contrary to the form of the statute in such cases made and provided" means against the statute in force at the time the offense was committed, and continued in force by the enabling act and the constitution of the state. *Wishard v. State*, 5 Okla. Crim. 610, 115 Pac. 796.

61. Where an indictment in South Carolina, since the revolution, concluded against "a British act of Parliament made of force in this state," the indictment was held to be bad, although there was an act of assembly against the offense committed, which was an exact transcript of the English statute. *State v. Holly*, 2 Bay 262.

[a] But where an indictment concluded "contrary to the act of assembly of the state of South Carolina," whereas the act under which the indictment was prosecuted was an act of the Province of South Carolina, it was decided that the indictment was nevertheless good. *State v. Turnage*, 2 Nott & McCord 158.

62. *N. J.*—Comp. St., 1910, vol. 2, p. 1831, §33. *N. C.*—Rev., 1905, §3255. *Vt.*—Pub. St., 1906, §2272.

And see generally the statutes.

[a] "The defect has been cured in England by the statute. 7 Geo. 4, ch. 64, sec. 20." *State v. Abernathy*, 44 N. C. 428.

[b] Under a statute providing that "no indictment shall be quashed, . . . on account of any defect in the form of the indictment, or of any misjoinder of offenses, or for any cause whatsoever," etc., it is immaterial that the indictment concludes against the form of the "statutes" where it should properly conclude against the form of the "statute." *Michael v. State*, 40 Fla. 265, 23 So. 944, under §2893, Rev. St., 1892.

[c] "Formerly, it was necessary to set out at length the statute, or statutes, if more than one, upon which an indictment was founded, in order that the party might be informed of the law, against which it was alleged that he had offended. This particularity being attended with much inconvenience, and rendering the proceedings very cumbersome, the conclusion '*contra formam statuti*' or '*contra formam statutorum*' if the indictment was founded upon more than one statute, was received as a sufficient compliance with the law, instead of the long recital. But as many prosecutions still failed, because of the conclusion, '*contra formam statuti*,' when it should have been '*statutorum*,' and vice versa, the courts permitted the device of concluding '*contra formam statuti*,' and would construe the abbreviation to be *statuti* or *statutorum*, in order to fit the case." *State v. Smith*, 63 N. C. 234.

63. *U. S.*—United States *v. Trout*, 4 Biss. 105, 28 Fed. Cas. No. 16,542; *Kenrick v. United States*, 1 Gall. 268, 14 Fed. Cas. No. 7,713. *N. J.*—*State v. Dayton*, 23 N. J. L. 49, 53 Am. Dec. 270; *Townley v. State*, 18 N. J. L. 311; *State v. Berry*, 9 N. J. L. 374. *N. Y.* *People v. Walbridge*, 6 Cow. 512, con-

is authority to the contrary, following the old doctrine.⁶⁴

A conclusion in the plural is sometimes necessary where one statute is in relation to another, as where one creates the offense and another fixes the penalty.⁶⁵ But where the statute creating the offense is only amended or regulated, or altered in parts thereof which do not relate

clusion in plural not necessary. **R. I.** *State v. Wilbor*, 1 R. I. 199, 36 Am. Dec. 245.

[a] A conclusion against the form of the statute, in the singular, is sufficient in all cases, where the offense is distinctly within more than one independent statute. *United States v. Gilbert*, 2 Sumn. 19, 25 Fed. Cas. No. 15, 204.

64. **Ind.**—*Francisco v. State*, 1 Ind. 179; *State v. Hunter*, 8 Blackf. 212; *Tevis v. State*, 8 Blackf. 303. **N. C.** *State v. Sandy*, 25 N. C. 570; *State v. Pool*, 13 N. C. 202; *State v. Jim*, 7 N. C. 3. But now in this state, the rule has been changed by statute. **Eng.** *Rex v. Cox*, 2 Bulstr. 258, 80 Eng. Reprint 1105.

[a] The reason was, "that the party has a right to know the law against which, it is alleged, he has offended. Hence if the indictment be given by statute, it must conclude against the statute, otherwise it is at common law; and if the party be not punishable by that law, there can be no judgment against him. So, with reference to offences depending on more than one statute, the indictment must be varied in the conclusion, to suit the truth. For anciently, the pleadings recited the statute or statutes, and, of course, the necessity which caused the recital of the one, when there was but one, would likewise require the recital of all, when there was more than one. Afterwards, the general conclusion, *contra formam*, etc., was received instead of the recital. But it is manifest, that the reference to the statute or statutes in the general conclusion ought to correspond to the recital or recitals, for which it was substituted. Hence, as has been already stated, it is clear law, that a conclusion, *contra formam statuti*, is bad, when there are two or more statutes, and the conclusion ought to be *contra formam statutorum*." *State v. Sandy*, 25 N. C. 570.

[b] Where but one statute created, defined and punished the offense, though another related to the form of

prosecuting it, an indictment concluding in the singular was nevertheless sufficient. *State v. Hoyle*, 28 N. C. 1, with which should be compared *State v. Pool*, 13 N. C. 202, holding that where one statute creates an offense, imposes a penalty and gives an action to recover it, and another makes the offense indictable, the indictment for the offense should conclude "against the form of the statutes."

[c] Where the offense and the penalty are declared by the same statute, though by different sections, the indictment being founded on this statute, there is no necessity that it should conclude in the plural. *Crawford v. State*, 2 Ind. 132.

[d] So also, where the offense was described by two chapters, which were but parts of one statute, a conclusion in the singular was sufficient. *State v. Bell*, 25 N. C. 506.

65. **Ind.**—*King v. State*, 2 Ind. 523; *State v. Moses*, 7 Blackf. 244. **Md.** *State v. Cassel*, 2 Har. & G. 407. **N. Y.** *Kane v. People*, 8 Wend. 203, 212.

[a] And see 2 Hale's Pleas of the Crown, 173, where he says, if one statute be relative to another, as where the former makes the offence, and the latter adds a penalty, the indictment ought to conclude *contra formam statutorum*, and in support of which principle he refers to *Dingley v. Moor*, Cro. Eliz., 750, 78 Eng. Reprint 982. To the same effect, see 3 Bacon's Abr., tit. Indictment, 571; Archb., Cr. Pl., p. 28.

[b] But where one statute creates an offense and inflicts the penalty, and a subsequent statute imposes another and further penalty, the indictment may well conclude *contra formam statuti*—in the singular. *Butman's Case*, 5 Me. 113; *State v. Robbins*, 1 Stoolb. (S. C.) 355. And see *Bennett v. State*, 3 Ind. 167; *Strong v. State*, 1 Blackf. (Ind.) 192 (both holding that though the punishment is altered by a subsequent statute, a conclusion in the singular is correct). See also *Rex v. Pim*, Russ. & R. (Eng.) 425, holding that if one statute subjects an act to a pe-

to the offense or to the punishment thereof, a conclusion in the singular is proper.⁶⁶ If a statute is made perpetual by a second statute, a conclusion in the singular will be sufficient.⁶⁷

An indictment on a single statute concluding in the plural is good, even in the absence of a statute,⁶⁸ though upon this proposition there are also decisions to the contrary.⁶⁹

d. *Special Conclusions.*—In addition to the usual conclusion “contra pacem”⁷⁰ and “contra formam,”⁷¹ special conclusions are sometimes required to indictments charging certain offenses, such as murder,⁷² nuisances,⁷³ perjury,⁷⁴ and treason.⁷⁵ The indictment need no longer conclude “to the great damage of the party” particularly injured by the offense, “to the evil example of all others,” nor “to the great displeasure of Almighty God.”⁷⁶

e. *To Each Count or Charge.*—While under some statutes, and probably by the weight of authority, it is not necessary that each count of an indictment should conclude with the formal conclusion,⁷⁷

cuniary penalty, and a subsequent statute makes it a felony, an indictment for the felony, concluding against the form of the statute is sufficient. *Compare* Reg. v. Adams, 1 C. & M. 299, 41 E. C. L. 167, holding that where a statute declares an offense and awards a punishment, and by a subsequent statute the punishment is altered, the indictment for such offense should conclude in the plural.

66. Ind.—King v. State, 2 Ind. 523. N. J.—See State v. Berry, 9 N. J. L. 374. N. Y.—Kane v. People, 8 Wend. 203.

67. State v. Berry, 9 N. J. L. 374.

[a] The same is true if one statute adopt and continue the provisions of another. Rex v. Morgan, 2 Str. 1066, 93 Eng. Reprint 1036. And see King v. State, 2 Ind. 523.

[b] Where the crime prohibited by one statute is greater in degree and includes the crime punished by another statute, the conclusion of an indictment therefor must be against the statute in the singular, and not against the statutes in the plural, since if the accused is guilty of the greater crime, the statute punishing it embraces the whole offense and merges the violation of the other, while if he did not commit the greater offense he violated only the statute against the lesser. State v. Stouderman, 6 La. Ann. 286.

68. U. S.—United States v. Trout, 4 Biss. 105, 28 Fed. Cas. No. 16,542; United States v. Gibert, 2 Sumn. 19, 25 Fed. Cas. No. 15,204; Kenrick v.

United States, 1 Gall. 268, 14 Fed. Cas. No. 7,713. Ind.—Carter v. State, 2 Ind. 617. Mass.—Com. v. Hitchings, 5 Gray 482; Com. v. Hooper, 5 Pick. 42. N. J.—Townley v. State, 18 N. J. L. 311, 324.

69. State v. Cassel, 2 Har. & G. (Md.) 407; State v. Abernathy, 44 N. C. 428; State v. Sandy, 25 N. C. 570 (now by statute in North Carolina a conclusion in the plural would not invalidate the indictment). See also State v. Cheatwood, 2 Hill (S. C.) 459.

[a] Where a statute defines an offense, makes it indictable and prescribes the punishment, an indictment for it is wholly founded on this statute, although it contains a reference to a former statute, giving a penalty for the same act, and should conclude in the singular. State v. Abernathy, 44 N. C. 428, holding conclusion in plural fatal defect.

70. See *supra*, VIII, A, 6, b.

71. See *supra*, VIII, A, 6, c.

72. See the title “Homicide.”

73. See the title “Nuisance.”

74. See the title “Perjury.”

75. See the title “Treason.”

76. 1 Chit. Cr. Law 245.

77. Ala.—Harrison v. State, 144 Ala. 20, 40 So. 568; McGuire v. State, 37 Ala. 161. La.—State v. Burns, 131 La. 396, 59 So. 823; State v. Thompson, 51 La. Ann. 1089, 25 So. 954; State v. Travis, 39 La. Ann. 356, 1 So. 817; State v. Russell, 33 La. Ann. 135. Miss.—Starling v. State, 90 Miss. 255, 43 So. 952, 13 Am. & Eng. Ann. Cas. 776, re-

if the indictment itself so concludes,⁷⁸ in many states, on the principle that each count in an indictment must be complete in itself, it is held

viewing authorities. **Ohio.**—*Olenendorf v. State*, 64 Ohio St. 118, 59 N. E. 892; *State v. Mulford*, 12 Ohio Dec. (N. P.) 724, 727 (although in practice they usually are). **Pa.**—*Com. v. Paxton*, 14 Phila. 665, 36 Leg. Int. 444. **Tenn.** *Rice v. State*, 3 Heisk. 215, 221. **Tex.** *Mercer v. State*, 52 Tex. Crim. 321, 106 S. W. 365; *Bink v. State*, 50 Tex. Crim. 445, 98 S. W. 863; *Manovitch v. State*, 50 Tex. Crim. 260, 96 S. W. 1; *Stebbins v. State*, 31 Tex. Crim. 294, 20 S. W. 552; *Alexander v. State*, 27 Tex. App. 533, 11 S. W. 628. **Vt.**—*State v. Amidon*, 58 Vt. 524, 2 Atl. 154. **Wis.**—*See Nichols v. State*, 35 Wis. 308.

[a] See also *Jones v. Van Zandt*, 5 How. (U. S.) 215, 229, 12 L. ed. 122 (wherein the court said that where "it is inserted at the end of a declaration or indictment, it does not, as a general rule, relate to the last preceding averments alone, but the whole subject-matter before alleged to constitute an offence. It is all that misconduct which is contrary to the statute, and not the concluding part of it only"); *State v. Beatty*, 61 N. C. 52 (holding that where the joining of two counts, one for an offense at common law and the other for a statutory offense, is permitted by statute, they ought not, upon that account, to each conclude against the statute).

[b] Where such conclusion is used at the end of both the first and second counts of an indictment, the indictment is not concluded at the end of the first count so as to nullify the second count. *State v. Mulford*, 12 Ohio Dec. (N. P.) 724; *Kubach v. State*, 1 Ohio N. P. (N. S.) 405, 14 Ohio Dec. N. P. 726, affirmed, 2 Ohio C. C. (N. S.) 133, 15 Ohio Cir. Dec. 488.

[c] The sustaining of a demurrer to the second count of an indictment takes that count out of an indictment, but does not take those words constituting the conclusion of the indictment out of the indictment. They remain, and apply to the first count of the indictment. *Starling v. State*, 90 Miss. 255, 43 So. 952, 13 Am. & Eng. Ann. Cas. 776.

[d] Where an indictment contained several counts, but only the last one contained the conclusion "against the

peace and dignity of the state," the acquittal of the accused on the first counts cured the defect in the failure to conclude such counts, if such was a defect; and where it did not appear that evidence had been introduced against the accused under the first counts which would have been incompetent under the last, such failure did not operate to prejudice of accused so as to justify a reversal of the conviction under the last count. *Ridenour v. State*, 38 Ohio St. 272. See *infra*, XVI.

78. Ala.—*Harrison v. State*, 144 Ala. 20, 26, 40 So. 568; *McGuire v. State*, 37 Ala. 161. **La.**—*State v. Thompson*, 51 La. Ann. 1089, 25 So. 954; *State v. Travis*, 39 La. Ann. 356, 1 So. 817. **Tex.** *Bink v. State*, 50 Tex. Crim. 445, 98 S. W. 863; *Alexander v. State*, 27 Tex. App. 533, 11 S. W. 628.

[a] So concluding, the formula is held to apply to each count of the bill. **La.**—*State v. Thompson*, 51 La. Ann. 1089, 25 So. 954. **Miss.**—*Starling v. State*, 90 Miss. 255, 43 So. 952, 13 Am. & Eng. Ann. Cas. 776. **Ohio.**—*Olenendorf v. State*, 64 Ohio St. 118, 59 N. E. 892.

[b] **Reason.**—In the leading case of *Starling v. State*, 90 Miss. 255, 266, 43 So. 952, 13 Am. & Eng. Ann. Cas. 776, the court, through Whitfield, C. J., says: "We are clearly of the opinion that the words 'against the peace and dignity of the state of Mississippi' are only required to appear, in the language of the constitution, at the conclusion of the indictment. It is not necessary that they should be repeated after each count. The language of the constitution is: 'All indictments shall conclude against the peace and dignity of the state.' No single count in an indictment containing more than one is the indictment. The indictment is the thing which contains all the counts. There may be many counts, but there can be but one indictment. The bill of indictment, in the language of the law, is a unit, is one complete thing, and it is this bill of indictment to which the constitution has reference in section 169. The bill of indictment in this case did conclude, as the constitution requires with the words 'against the

that each count must contain the requisite conclusion.⁷⁹ It is not necessary to make a separate conclusion to each charge in a single count in an indictment.⁸⁰

7. Signatures.⁸¹ — a. *Foreman of the Grand Jury.* — (I.) **Necessity for.** — It has been the rule from time immemorial that an indictment found by the grand jury has been signed by the foreman,⁸² and it is a good and safe rule.⁸³ But it was not required at common law that either the foreman or any of the members of the grand jury should sign their finding.⁸⁴ Nor is it now necessary that the foreman sign

peace and dignity of the state.' Those words, whenever they appear at the conclusion of an indictment, necessarily apply to every count in the indictment going before its conclusion, and it would be the merest tautology to repeat them at the end of each count. All that is meant, when it is said that each count must be complete in itself, is that each count must completely and accurately define the offense, giving all its essential constituent elements, embraced in that count; and, whenever a count in an indictment, does that, it has perfectly fulfilled its office. The words in this indictment, 'against the peace and dignity of the state,' do not belong to either count, technically considered. They belong to the conclusion of the whole indictment, as the constitution requires."

79. Ark.—*Williams v. State*, 47 Ark. 230, 1 S. W. 149; *State v. Hazle*, 20 Ark. 156; *State v. Cadle*, 19 Ark. 613, 622 (count in which proper conclusion is omitted may be quashed). **Mo.** *State v. Pemberton*, 30 Mo. 376; *State v. Ulrich*, 96 Mo. App. 689; *State v. Clevenger*, 25 Mo. App. 655. **S. C.** *State v. Strickland*, 10 S. C. 191. **Va.** *Early v. Com.*, 86 Va. 921, 11 S. E. 795; *Thompson v. Com.*, 20 Gratt. 724; *Com. v. Carney*, 4 Gratt. 546. **W. Va.**—*State v. McClung*, 35 W. Va. 280, 13 S. E. 654; *Lemons v. State*, 4 W. Va. 755, 6 Am. Rep. 293.

[a] See also *State v. Soule*, 20 Me. 19, and *State v. Wade*, 147 Me. 73, 47 S. W. 1070 (holding that though the last count contain the usual and correct conclusion, yet that one count, with a proper conclusion, cannot aid another without it); *State v. Gravely*, 66 W. Va. 375, 66 S. E. 503.

80. *State v. Russell*, 33 La. Ann. 135. And see: **Ky.**—*Boggs v. Com.*, 9 Ky. L. Rep. 342, 5 S. W. 307, holding that it is not necessary for the concluding

phrase to be appended to each specification of former conviction for felony. **Mo.**—*State v. Hendrickson*, 165 Mo. 262, 65 S. W. 550 (holding that an indictment charging two persons as principals, but one of them as a principal in the second degree only did not contain two counts necessitating a conclusion to each); *State v. Hopper*, 71 Mo. 425 (holding that a charge against accessories following the charge against the principal and preceding the conclusion does not constitute a separate and distinct count rendering the first charge bad for want of a proper conclusion). **W. Va.**—*State v. Gravely*, 66 W. Va. 375, 66 S. E. 503, holding that a charge interpolated in an indictment for murder, after the main charge and preceding the conclusion, that defendant had been before sentenced in the United States, to a period of confinement in the penitentiary for murder, does not constitute a separate and distinct count, nor render the indictment bad for want of a proper conclusion.

See also *State v. Robinson*, 236 Mo. 712, 139 S. W. 140.

81. As to signatures to information or accusation, see *infra*, VIII, B, 7; to complaint, see *infra*, VIII, B, 3.

82. *State v. Abbott*, 5 Penne. (Del.) 330, 63 Atl. 231. And see the following cases: **N. C.**—*State v. Calhoun*, 18 N. C. 374. **S. C.**—*State v. Creighton*, 1 Nott. & McC. 256. **Va.**—*Price v. Com.*, 21 Gratt. 846, 856. **W. Va.**—*State v. Hill*, 48 W. Va. 132, 35 S. E. 831.

83. *State v. Abbott*, 5 Penne. (Del.) 330, 63 Atl. 231.

[a] It is the proper and universally recognized practice (*Barlow v. State*, 127 Ga. 58, 56 S. E. 131), and is advisable. *McGulie v. State*, 17 Ga. 497, 511.

84. **Ga.**—*Barlow v. State*, 127 Ga. 58, 56 S. E. 131; *McGulie v. State*, 17

the indictment, in the absence of a positive law requiring it,⁸⁵ though upon this proposition there are authorities to the contrary.⁸⁶

Statutes, however, in many states require the signature of the foreman of the grand jury to the indorsement "a true bill."⁸⁷ Such

Ga. 497, 510; *McAllister v. State*, 2 Ga. App. 656, 58 S. E. 1110. **Ky.**—*Com. v. Ripperdon*, Litt. Sel. Cas. 194. **N. C.** *State v. Cox*, 28 N. C. 440; *State v. Calhoun*, 18 N. C. 374. **W. Va.**—*State v. Hill*, 48 W. Va. 132, 35 S. E. 831.

[a] In *Com. v. Ripperdon*, Litt. Sel. Cas. (Ky.) 194, it was said: "We are not, indeed, aware that at common law it was necessary to have a foreman, or that either of the grand jurors should sign their finding, whether it was in the affirmative or negative. A simple indorsement, that it was a true bill, or not a true bill, is all that was required, as we apprehend."

[b] **The English practice** (1) did not require the foreman to sign his name. 4 Bl. Com. 306; *State v. Sultan*, 142 N. C. 569, 54 S. E. 841; *State v. Calhoun*, 18 N. C. 374; *Price v. Com.*, 21 Gratt. (Va.) 846, 858. (2) It was sufficient, if the bill was delivered by the foreman in open court and read in his presence. *Rex v. Sidoli*, 1 Lewin 55.

85. **Del.**—*State v. Abbott*, 5 Penne. 330, 63 Atl. 231. **Ga.**—*McGuffie v. State*, 17 Ga. 497. **Ky.**—*Com. v. Ripperdon*, Litt. Sel. Cas. 194. **N. J.**—*State v. Shutts*, 69 N. J. L. 206, 54 Atl. 235; *State v. Magrath*, 44 N. J. L. 227. **N. C.** *State v. Mace*, 86 N. C. 668 (need not be signed by any one); *State v. Calhoun*, 18 N. C. 374. **S. C.**—*State v. Creighton*, 1 Nott. & McC. 256. **Va.**—*Price v. Com.*, 21 Gratt. 846, 858, reviewing authorities. **W. Va.**—*State v. Grove*, 61 W. Va. 697, 57 S. E. 296; *State v. Hill*, 48 W. Va. 132, 35 S. E. 831.

[a] Even where the indorsement "true bill" is required by statute, the foreman's signature thereon is not necessary, if not required by statute. *Harrell v. State*, 11 Ga. App. 407, 75 S. E. 507; *Com. v. Walters*, 6 Dana (Ky.) 291. As to requirement of indorsement "a true bill," see VIII, A, 8, c.

[b] Though not necessary, if made, it cannot vitiate the indictment. *Com. v. Ripperdon*, Litt. Sel. Cas. (Ky.) 194.

[c] **Presentment.**—(1) A presentment need not be signed by all the grand jury. *State v. Cox*, 28 N. C. 440. But see *Martin v. State*, 127 Tenn. 324,

155 S. W. 129. (2) That all do not sign, where required, does not invalidate it, where no objection is urged to any member returning it. *McC Campbell v. State*, 116 Tenn. 98, 93 S. W. 100, *distinguishing State v. Baker*, 4 Humph. (Tenn.) 12.

86. **U. S.**—*United States v. Plummer*, 3 Cliff. 28, 27 Fed. Cas. No. 76,056. **Mass.**—*Com. v. Stone*, 105 Mass. 469; *Com. v. Read*, Thach. Cr. Cas. 180; *Com. v. Sargent*, Thach. Cr. Cas. 116. **N. H.** *State v. Freeman*, 13 N. H. 488; *State v. Squire*, 10 N. H. 558. **Pa.**—*Com. v. Dieffenbaugh*, 3 Pa. Co. Ct. 299.

[a] Where a trial had been commenced, and it was then discovered that the indictment was not signed by the foreman of the grand jury, it was held that no further proceedings could be had on it, although the counsel were willing to proceed. *Com. v. Sargent*, Thach. Cr. Cas. (Mass.) 116.

87. See the following statutes and cases: **Ala.**—Code, 1907, §7300; *Whitley v. State*, 166 Ala. 42, 52 So. 203; *Bilbo v. State*, 1 Ala. App. 74, 55 So. 927. **Alaska.**—*Carter's Ann. Codes*, 1900, C. C. P. §29. **Ariz.**—*Rev. St.*, 1913, §927. **Ark.**—*Kirby's Dig.*, §2224; *McFall v. State*, 73 Ark. 327, 84 S. W. 479; *State v. Agnew*, 52 Ark. 275, 12 S. W. 563. **Cal.**—*Penal Code*, §940. **Colo.**—*Board of County Comrs. v. Graham*, 4 Colo. 201. **Fla.**—*Gen. St.*, 1906, §3960; *Alden v. State*, 18 Fla. 187; *Collins v. State*, 13 Fla. 651, 661. **Idaho.**—*Rev. Codes*, 1908, §7665. **Ill.**—*Hurd's Rev. St.*, 1913, ch. 78, §17; *People v. St. Clair*, 244 Ill. 444, 91 N. E. 573; *Gardner v. People*, 4 Ill. 83; *Goodman v. People*, 90 Ill. App. 533, 539. **Ind.**—*Burns' Ann. St.*, 1914, §1981; *Cole v. State*, 169 Ind. 393, 82 N. E. 796; *Cooper v. State*, 79 Ind. 206. **Ia.**—*Code*, 1897, §5274; *State v. Lightfoot*, 107 Iowa 344, 78 N. W. 41; *State v. Groome*, 10 Iowa 308. **Kan.**—*Gen. St.*, 1909, §6674. **Minn.**—*Rev. Laws*, 1905, §5295. **Mo.**—*Rev. St.*, 1909, §5090; *State v. Orrick*, 106 Mo. 111, 17 S. W. 176, 329; *State v. Burgess*, 24 Mo. 381; *State v. Howell*, 34 Mo. App. 86. **Mont.**—*Rev. Codes*, 1907, §9137. **Neb.**—*Rev. St.*,

statutes are directory only in some states;⁸⁸ though in others they are mandatory, and its omission is fatal.⁸⁹ By express provision of statute in one jurisdiction, however, the indictment is not invalid because not signed by the foreman.⁹⁰

1913, §9046; *Goldsberry v. State*, 92 Neb. 211, 137 N. W. 1116. **Nev.**—Rev. Laws, 1912, §7042, *Crim. Prac. Act*, §192. **N. M.**—Comp. Laws, 1897, §990. **N. Y.**—Code Crim. Proc., §263. **N. D.**—Rev. Codes, 1905, §9840. **Ohio.**—Page & Adams' Ann. Gen. Code, 1910, §13571. **Okl.**—Comp. Laws, 1909, §6687. **Ore.**—Lord's Laws, §1428; *State v. Belding*, 43 Ore. 95, 71 Pac. 330. **S. D.**—Comp. Laws, 1910, Code Crim. Proc., §213. **Tenn.**—Shannon's Code, §7055; *Martin v. State*, 127 Tenn. 324, 155 S. W. 129; *Bird v. State*, 103 Tenn. 343, 52 S. W. 1076. **Utah.**—Comp. Laws, 1907, §4723. **Wash.**—Rem. & Ball. Ann. Codes & St., §2042; *Watts v. Ter.*, 1 Wash. Ter. 409. **Wyo.**—Comp. St., 1910, §6114.

[a] In Texas, the general form of indictment prescribed by statute provides for the signature of the foreman of the grand jury at the end thereof. Penal Code, art. 458.

As to indorsement, see *infra*, VIII, A, 8, c.

[b] It is thus made the duty (1) of the foreman of the grand jury to sign the indorsement required, although he may not have approved the indictment. *State v. Lightfoot*, 107 Iowa 344, 78 N. W. 41 (2) This is true by express provision of the statute in one state. Minn. Rev. Laws, 1905, §5295.

[c] Even though the foreman is disqualified from participating in the proceedings of the grand jury, it is not objectionable that he signs the indorsement. *State v. Lightfoot*, 107 Iowa 344, 78 N. W. 41.

[d] Presumptions.—(1) A reviewing court will presume that the person, whose name appears on the indictment as foreman, was the duly appointed foreman (*Deitz v. State*, 123 Ind. 85, 23 N. E. 1086; *State v. Vaughn*, 132 Mo. App. 135, 112 S. W. 728). (2) though the appointment is not shown by the record (*State v. Vaughn*, 132 Mo. App. 135, 112 S. W. 728); (3) and that the recital in the transcript that another person was appointed foreman was a mistake of the clerk (*Deitz v. State*, 123 Ind. 85, 23 N. E. 1086), (4) or that the first foreman was dis-

charged, and the person named in the record appointed in his place. *Mohler v. People*, 24 Ill. 26. See also *Taylor v. State*, 121 Ga. 362, 49 S. E. 317. (5) Also that the judge whose duty it was to inspect the indictment knew who the foreman of the grand jury was at the time the indictment was returned. *Deitz v. State*, 123 Ind. 85, 23 N. E. 1086.

[e] Where the foreman is directed not to participate in the proceedings of the grand jury, "it must be presumed, in the absence of a showing to the contrary, that he obeyed the direction of the court; and the fact that he performed a statutory duty in signing the indorsement, after the investigation had been completed and the action to be taken determined, does not overcome that presumption." *State v. Lightfoot*, 107 Iowa 344, 78 N. W. 41.

88. *McFall v. State*, 73 Ark. 327, 84 S. W. 479; *State v. Agnew*, 52 Ark. 275, 12 S. W. 563 (both holding objection that signature omitted waived unless made before pleading).

89. *Coburn v. State*, 151 Ala. 100, 44 So. 58, 15 Am. & Eng. Ann. Cas. 249; *Johnson v. State*, 23 Ind. 32.

[a] "Until the bill is indorsed 'a true bill,' and signed and presented, it is not an indictment." Board of County Comrs. *v. Graham*, 4 Colo. 201.

90. Tex. Code Crim. Proc., art. 565 (providing that want of signature shall not be ground of exception); *State v. Flores*, 33 Tex. 444; *State v. Powell*, 24 Tex. 135; *Pinson v. State*, 23 Tex. 579, 584; *Day v. State*, 61 Tex. Crim. 114, 134 S. W. 215; *James v. State*, 52 Tex. Crim. 21, 105 S. W. 179; *Kehoe v. State* (Tex. Crim.), 89 S. W. 270, 13 Tex. Ct. Rep. 881; *Robinson v. State*, 24 Tex. App. 4, 5 S. W. 509; *Jones v. State*, 10 Tex. App. 552; *Campbell v. State*, 8 Tex. App. 84.

[a] The erasure of the name (1) of the person originally signing the indictment as foreman, and the substitution of another is therefore immaterial. *Watson v. State* (Tex. Crim.), 50 S. W. 340. (2) Nor is the fact that some one other than the foreman signs the

Several Counts. — It is not necessary that his signature appear at the end of each count.⁹¹

(II.) Sufficiency of. — It has been held that it is immaterial on what part of the indictment the foreman's signature appears.⁹² Nor will the manner of signing the indorsement invalidate it.⁹³

All that is required by the statutes is his usual signature.⁹⁴

It is not necessary for him to sign his full Christian name, but is sufficient if he uses the initials or abbreviations therefor.⁹⁵ While the better practice, it is not necessary as a matter of law that the fore-

latter's name ground of exception under such a statute. *State v. Flores*, 33 Tex. 444; *State v. Powell*, 24 Tex. 135; *James v. State*, 52 Tex. Crim. 21, 105 S. W. 179; *Witherspoon v. State*, 39 Tex. Crim. 65, 44 S. W. 164.

91. *State v. Wright*, 161 Mo. App. 597, 144 S. W. 175, statute requires only that the indictment which may contain one or a dozen counts shall be so signed.

92. *Taylor v. State*, 121 Ga. 362, 49 S. E. 317; *Blume v. State*, 154 Ind. 343, 56 N. E. 771; *State v. Bowman*, 103 Ind. 69, 2 N. E. 289.

93. *Barlow v. State*, 127 Ga. 58, 56 S. E. 131.

[a] **Signing in wrong place** not ground for quashal. *State v. Lewis*, 7 Ohio (N. P.) 533, 5 Ohio Dec. 552 (wherein foreman signed in place indicating he was clerk instead of foreman); *Adams v. State* (Tex. App.), 13 S. W. 1009 (placing of signature before conclusion not fatal, it being merely surplusage).

[b] **A variance in the spelling** of the foreman's name between his signature and the record or minutes of the trial is immaterial, if idem sonans. *McDaniel v. State*, 76 Ala. 1; *Jackson v. State*, 74 Ala. 26; *State v. Stedman*, 7 Port. (Ala.) 495. See also: **Mo.**—*State v. General Armstrong*, 167 Mo. 257, 267, 66 S. W. 961. **N. C.**—*State v. Calhoun*, 18 N. C. 374. **Tenn.**—*Green v. State*, 88 Tenn. 614, 633, 14 S. W. 430.

[c] Nor does a difference in the designation of foreman in the signature to the indorsement and the body of the indictment constitute reason for quashing the indictment. *Taylor v. State*, 121 Ga. 362, 49 S. E. 317.

94. *State v. Orrick*, 106 Mo. 111, 118, 17 S. W. 176, 329.

[a] **Mark.**—The foreman may sign such indorsement by his mark. The law does not say that, because the

foreman of a grand jury cannot write his name, the indictment found by the grand jury of which he is foreman shall not be good. *State v. Tinney*, 76 La. Ann. 460.

95. See the following cases: **Ala.**—*Germolgez v. State*, 99 Ala. 216, 13 So. 517; *Swain v. State*, 8 Ala. App. 26, 62 So. 446. **Ga.**—*Stodstill v. State*, 7 Ga. 2; *Harrell v. State*, 11 Ga. App. 407, 75 S. E. 507. **Ill.**—*People v. Danley*, 181 Ill. App. 80. **Ind.**—*Anderson v. State*, 26 Ind. 89; *Wassels v. State*, 26 Ind. 30; *Zimmerman v. State*, 4 Ind. App. 583, 31 N. E. 550 (use of initials instead of full Christian name does not invalidate it). **Ia.**—*State v. Groome*, 10 Iowa 308. **La.**—*State v. Granville*, 34 La. Ann. 1088; *State v. Folke*, 2 La. Ann. 744 (foreman need not sign his name at full length). **Me.**—*State v. Taggart*, 38 Me. 298. **Mass.**—*Com. v. Gleason*, 110 Mass. 66; *Com. v. Hamilton*, 15 Gray 480. **Miss.**—*Easterling v. State*, 35 Miss. 210, 2 Mor. St. Cas. 1086. **Mo.**—*State v. Orrick*, 106 Mo. 111, 118, 17 S. W. 176, 329. **N. Y.**—*People v. Peek*, 2 N. Y. Crim. 314. **N. C.**—*State v. Collins*, 14 N. C. 117. **Ohio.**—*State v. Henry*, 9 Ohio N. P. (N. S.) 254; *Geiger v. State*, 2 Ohio C. C. (N. S.) 174, 15 Ohio Cir. Dec. 742.

[a] Where an indictment or special presentment is returned into court as a "true bill," containing the names of as many as eighteen persons, written in the face thereof, as constituting the members of the grand jury who acted on it, and the minutes of the court show that these persons were the regularly impaneled grand jury for the term, a manifest clerical error made by the foreman in failing to write his full name on the back of the indictment, following the indorsement "a true bill," is immaterial. *Harrell v. State*, 11 Ga. App. 407, 75 S. E. 507.

man should describe himself as such.⁹⁶ But if he does describe himself as foreman, it is not necessary to add "of the grand jury."⁹⁷

The signature of a duly appointed foreman pro tem is sufficient.⁹⁸

The signature may be added at a term subsequent to that of the filing of the indictment.⁹⁹

b. *Prosecuting Attorney.*—(I.) *In General.*¹—At the common law, it was not necessary for the prosecuting officer to sign, or counter-sign, the indictment upon which a prosecution was conducted.² And now, while usually attached to the indictment,³ it forms no part of

96. See the following cases: **Ga.** Taylor v. State, 121 Ga. 362, 49 S. E. 317. **Ind.**—State v. Bowman, 103 Ind. 69, 2 N. E. 289, failure to add the descriptive word "foreman" should not be permitted to render the indictment bad. **Ky.**—Com. v. Walters, 6 Dana 291, under a statute requiring indorsement "a true bill," but not requiring signature of foreman thereto. **La.** State v. Sopher, 35 La. Ann. 975, sufficient that he signs his name to the finding without mentioning his capacity. **N. C.**—State v. Chandler, 9 N. C. 439. **Ohio.**—Whiting v. State, 48 Ohio St. 220, 27 N. E. 96. **Pa.**—See Com. v. Ferguson, 8 Pa. Dist. 120, amendable defect, if in fact a defect. **Vt.**—State v. Brown, 31 Vt. 602.

[a] **Reason.**—Being appointed by the court, it is presumed to know who the foreman is. Whiting v. State, 48 Ohio St. 220, 27 N. E. 96. And see State v. Brown, 31 Vt. 602.

[b] Where an indictment is signed by a juror, and it does not appear that he signed it as foreman, it is competent for the court to examine the records, to determine who was the foreman; and if such juror was the foreman, the indictment will be deemed good. Com. v. Read, Thach. Cr. Cas. (Mass.) 180.

[c] The letters "F. G. J." added to the subscription of the name of the foreman will be sufficient to indicate that he acted as foreman, where it appears from the record that the person signing was in fact the foreman, when the bill was found. State v. Chandler, 9 N. C. 439.

[d] **An error in spelling the word "foreman"** is not important, where pronunciation the same—idem sonans. State v. Karn, 16 La. Ann. 183, where in word spelled "fourman."

97. **U. S.**—United States v. Plumer, 3 Cliff. 28, 27 Fed. Cas. No. 16,056,

designation "foreman" refers to introductory clause of indictment and to record, as verifying legal inference that "foreman" means foreman of the grand jury. **La.**—State v. Valere, 39 La. Ann. 1060, 3 So. 186. **Mo.**—State v. Gilson, 114 Mo. App. 652, 90 S. W. 400.

See also People v. Peek, 2 N. Y. Crim. 314, affirmed, 96 N. Y. 650.

98. Com. v. Noonan, 15 Phila. (Pa.) 372.

[a] When it appears upon the face of an indictment that a named grand juror served as "foreman pro tem," and the finding of "true bill" was signed by him as such, the presumption is that the juror was properly serving as foreman. White v. State, 93 Ga. 47, 19 S. E. 49.

99. Bassham v. State, 38 Tex. 622.

As to amendments generally, however, see *infra*, XII.

1. As to necessity for signature of prosecuting attorney to information, see *infra*, VIII, B, 1, a.

2. See the following cases: **Ill.** Cross v. People, 66 Ill. App. 170. **Ind.** Vanderkarr v. State, 51 Ind. 91; M'Gregg v. State, 4 Blackf. 101. **Kan.** State v. Brown, 63 Kan. 262, 65 Pac. 213. **Me.**—State v. Reed, 67 Me. 127, 129. **Miss.**—Keithler v. State, 10 Smed. & M. 192, 235, 1 Mor. St. Cas. 403. **N. H.**—State v. Farrar, 41 N. H. 53. **Ohio.**—State v. Mulford, 12 Ohio Dec. (N. P.) 656; Jones v. State, 14 Ohio C. C. 35, 7 Ohio Cir. Dec. 305. **Va.**—Brown v. Com., 86 Va. 466, 10 S. E. 745.

3. **Ill.**—Cross v. People, 66 Ill. App. 170. **Me.**—State v. Reed, 67 Me. 127. **Mass.**—Com. v. Stone, 105 Mass. 469. **Miss.**—Keithler v. State, 10 Smed. & M. 192, 1 Mor. St. Cas. 403. **N. H.** State v. Farrar, 41 N. H. 53. **N. C.** State v. Mace, 86 N. C. 668. **S. C.** State v. Coleman, 8 S. C. 237.

[a] It is a formality in criminal

it,⁴ and in the absence of a statute requiring it, is in no manner essential to its validity.⁵ Nor do statutes in all states make it obligatory upon the district attorney to sign the indictment,⁶ nor prescribe, in case

procedure which, from its long use, it would be well to follow. *State v. Mulford*, 12 Ohio Dec. (N. P.) 656.

4. **U. S.**—*United States v. McAvoy*, 4 Blatchf. 418, 18 How. Pr. 380, 26 Fed. Cas. No. 15,654, “and is only necessary as evidence to the court that he is officially prosecuting the delinquents conformably to the duty imposed upon him by statute.” **N. C.** *State v. Mace*, 86 N. C. 668. **Ohio.** *State v. Mulford*, 12 Ohio Dec. (N. P.) 656; *Jones v. State*, 14 Ohio C. C. 35, 7 Ohio Cir. Dec. 305.

5. **U. S.**—*Ex parte Lane*, 135 U. S. 443, 10 Sup. Ct. 760, 34 L. ed. 219; *United States v. McAvoy*, 4 Blatchf. 418, 18 How. Pr. 380, 26 Fed. Cas. No. 15,654. **Ala.**—*Teague v. State*, 144 Ala. 42, 40 So. 312; *Prince v. State*, 140 Ala. 158, 37 So. 171; *Cross v. State*, 78 Ala. 430; *Joyner v. State*, 78 Ala. 448; *Holley v. State*, 75 Ala. 14; *Boyett v. State*, 8 Ala. App. 93, 62 So. 984; *Brigman v. State*, 8 Ala. App. 400, 62 So. 980. **Ark.**—*Watkins v. State*, 37 Ark. 370; *Anderson v. State*, 5 Ark. 444. **Cal.**—*People v. Ashnauer*, 47 Cal. 98. **Idaho.**—*People v. Butler*, 1 Idaho 231. **Ill.**—*People v. Strauch*, 247 Ill. 220, 93 N. E. 126 (*affirming* 153 Ill. App. 544); *Cross v. People*, 66 Ill. App. 170. **Ia.**—*State v. Mathews*, 133 Iowa 398, 109 N. W. 616; *State v. Wilmoth*, 63 Iowa 380, 19 N. W. 249; *State v. Ruby*, 61 Iowa 86, 15 N. W. 848. **Ky.** *Sims v. Com.*, 12 Ky. L. Rep. 215, 13 S. W. 1079. **La.**—*State v. Williams*, 107 La. 789, 32 So. 172 (oversight of district attorney in not signing bill of indictment not fatal); *State v. Crenshaw*, 45 La. Ann. 496, 12 So. 628. **Me.** *State v. Pooler*, 105 Me. 224, 74 Atl. 119; *State v. Reed*, 67 Me. 127. **Mass.** *Com. v. Stone*, 105 Mass. 469. **Miss.** *Keithler v. State*, 10 Smed. & M. 192, 1 Mor. St. Cas. 403, *distinguishing* *Byrd v. State*, 1 How. 246, which is supposed to sustain a different doctrine, on the ground that the question was not involved and the remark was only made in argument (*obiter dicta*). **Mo.** *State v. Murphy*, 47 Mo. 274; *Thomas v. State*, 6 Mo. 457. **Neb.**—*Goldsherry v. State*, 92 Neb. 211, 137 N. W. 1116. **Nev.**—*State v. Salge*, 2 Nev. 321. **N. H.**

State v. Farrar, 41 N. H. 53. **N. C.** *State v. Mace*, 86 N. C. 668; *State v. Vincent*, 4 N. C. 493. **Ohio.**—*Jones v. State*, 14 Ohio C. C. 35, 7 Ohio Cir. Dec. 305; *State v. Mulford*, 12 Ohio Dec. (N. P.) 656, s. c., 12 Ohio Dec. (N. P.) 724. **S. C.**—*State v. Coleman*, 8 S. C. 237. **Tex.**—*Eppes v. State*, 10 Tex. 474; *Nelson v. State*, 51 Tex. Crim. 349, 101 S. W. 1012. **Utah.**—*People v. Lyman*, 2 Utah 30. **Va.**—*Brown v. Com.*, 86 Va. 466, 10 S. E. 745.

But see *State v. Amos*, 101 Tenn. 350, 47 S. W. 410; *State v. Meyers*, 85 Tenn. 203, 5 S. W. 377; *State v. Leckett*, 3 Heisk. (Tenn.) 274; *Teas v. State*, 7 Humph. (Tenn.) 174; *Staggs v. State*, 3 Humph. (Tenn.) 372; *Fout v. State*, 3 Hayw. (Tenn.) 98; *Hite v. State*, 9 Yerg. (Tenn.) 198; *Bennett v. State*, Mart. & Y. (Tenn.) 133.

[a] It is sufficient (1) if found by the grand jury and indorsed by their foreman (*Boyett v. State*, 8 Ala. App. 93, 62 So. 984; *Watkins v. State*, 37 Ark. 370), (2) the signature of the foreman of the grand jury to the indorsement “a true bill” being that which gives the indictment its validity. *Keithler v. State*, 10 Smed. & M. (Miss.) 192, 1 Mor. St. Cas. 403. As to indorsement by foreman, see *infra*, VIII, A, 8, c.

[b] The fact that a form prescribed by statute shows the signature of such officer does not make it essential in the absence of an express requirement of the statute that it shall be so signed. *State v. Ruby*, 61 Iowa 86, 15 N. W. 848.

[c] If such signature were essential to the validity of an indictment, the grand jury would be completely under the control of the prosecuting attorney. **Me.**—*State v. Reed*, 67 Me. 127. **Ohio.**—*State v. Mulford*, 12 Ohio Dec. (N. P.) 656. **Va.**—*Brown v. Com.*, 86 Va. 466, 10 S. E. 745.

[d] **Special Presentment.**—The signature of the solicitor-general to a special presentment is not essential to its validity. *Newman v. State*, 101 Ga. 534, 28 S. E. 1005.

6. **Idaho.**—*People v. Butler*, 1 Idaho 231. **Ill.**—*People v. Strauch*, 247 Ill. 220, 93 N. E. 126. **Ia.**—*State v. Mat-*

of his failure so to sign, that the same may be set aside.⁷ But, as indicated, in some states, the signature is a requirement prescribed by statute,⁸ and without which the indictment is a nullity.⁹

The omission of the signature even if necessary to the indictment is a formal defect, patent on its face, to be taken advantage of by demurrer or motion to quash before the jury are sworn.¹⁰ If it is not necessary that the indictment should be so signed, of course a useless signature does not vitiate it.¹¹

Who May Sign.—The indictment may be signed by an assistant or deputy prosecutor having authority to do so;¹² or it may be signed by

thews, 133 Iowa 398, 109 N. W. 616. **Ky.**—Sims v. Com., 12 Ky. L. Rep. 215, 13 S. W. 1079. **Tex.**—Nelson v. State, 51 Tex. Crim. 349, 101 S. W. 1012.

7. People v. Butler, 1 Idaho 231.

8. **Fla.**—Gen. St., 1906, §3060. **Ind.** Burns' Ann. St., 1914, §1981; State v. Buntin, 123 Ind. 124, 23 N. E. 1140; Taylor v. State, 113 Ind. 471, 16 N. E. 183; Hamilton v. State, 103 Ind. 96, 2 N. E. 299; Stout v. State, 93 Ind. 150; Vanderkarr v. State, 51 Ind. 91; Heacock v. State, 42 Ind. 393; Dukes v. State, 11 Ind. 557, 71 Am. Dec. 370. **Kan.**—Gen. Sts., 1909, §6674; State v. Bowles, 70 Kan. 821, 79 Pac. 726, 69 L. R. A. 176. **Mo.**—Rev. Sts., 1909, §5093; State v. Kinney, 81 Mo. 101; State v. Bruce, 77 Mo. 193. **Mont.** Rev. Codes, 1907, §9142. **Nev.**—Comp. Laws, 1900, §4200 (Crim. Pract. Act, §235). **N. Y.**—Code Crim. Proc., §276; People v. Foster, 60 Misc. 3, 112 N. Y. Supp. 706 (statute not mandatory). **Pa.**—Com. v. Brown, 23 Pa. Super. 470, under act of May 3, 1850, Pub. Laws 654. **Wyo.**—Comp. Sts., 1910, §6144.

And see generally the statutes of the several states.

9. Heacock v. State, 42 Ind. 393 (*distinguishing* M'Gregg v. State, 4 Blackf. (Ind.) 101, which states common-law rule); State v. Bruce, 77 Mo. 193. And see State v. Buntin, 123 Ind. 124, 23 N. E. 1140, wherein it is said: "This statute is imperative."

[a] Compare Hamilton v. State, 103 Ind. 96, 2 N. E. 299, wherein the court said: "Whether the failure of the prosecuting attorney to sign an indictment would constitute such a defect or imperfection as would tend to the prejudice of the substantial rights of the defendant upon the merits of the cause (R. S. 1881, section 1756) seems never to have been at any time fully considered by this court, and may

hence be regarded as still an open question in this state." Dukes v. State, 11 Ind. 557, 71 Am. Dec. 370, wherein the court said: "Indictments are found and returned by the grand jury. The prosecuting attorney acts as their adviser, and may as their scribe; and it is proper that he should sign indictments. The law makes it his duty to do so. But we do not think his signature essential to the validity of the indictment. His failure to sign it would not vitiate an indictment duly returned and authenticated by the grand jury."

10. State v. Crenshaw, 45 La. Ann. 496, 12 So. 628; Riflemaker v. State, 25 Ohio St. 395.

[a] **Waiver.**—Though such omission constitutes a defect, objection thereto is waived by pleading the general issue, without first moving to quash. Riflemaker v. State, 25 Ohio St. 395.

[b] **After Verdict.**—(1) The objection comes too late after verdict. Cross v. People, 66 Ill. App. 170. (2) Even though required, and omitted, the omission is not sufficient to authorize the setting aside of the judgment, it being cured by a statute providing that no indictment shall be deemed invalid by reason of any defect or imperfection which does not tend to the prejudice of the substantial rights of the defendant upon the merits. Jones v. State, 14 Ohio C. C. 35, 7 Ohio Cir. Dec. 305, under Rev. St., §7215. And see **U. S.**—Caha v. United States, 152 U. S. 211, 14 Sup. Ct. 513, 38 L. ed. 415. **Ill.**—Cross v. People, 66 Ill. App. 170. **N. Y.**—People v. Foster, 60 Misc. 3, 112 N. Y. Supp. 706.

11. State v. Vincent, 4 N. C. 493. And see Keithler v. State, 10 Smed. & M. (Miss.) 192, 235, 1 Mor. St. Cas. 403.

12. **U. S.**—Caha v. United States,

an acting prosecuting officer appointed by the court because of the absence or incapacity of the regular officer.¹³

152 U. S. 211, 221, 14 Sup. Ct. 513, 38 L. ed. 415, wherein the indictment was signed by the assistant United States district attorney instead of by the district attorney himself. *Ala.* *Cross v. State*, 78 Ala. 430. *Cal.*—See *People v. Etting*, 99 Cal. 577, 34 Pac. 237. *Ind.*—*Taylor v. State*, 113 Ind. 471, 16 N. E. 183; *Stout v. State*, 93 Ind. 150. *Ia.*—*State v. Mathews*, 133 Iowa 398, 109 N. W. 616. *Ia.*—*State v. Vance*, 32 La. Ann. 1177. *Mo.*—*State v. Hayes*, 16 Mo. App. 560; *State v. Higgins*, 16 Mo. App. 559. *Nev.*—*State v. Harris*, 12 Nev. 414, holding that even if the district attorney has no authority to appoint one his deputy with full powers, he could authorize him to draw up an indictment and sign his name to it, which was done in this case. *S. C.*—See *State v. Coleman*, 8 S. C. 237.

[a] *Pennsylvania*. — In *Com. v. Brown*, 23 Pa. Super. 470, 498, the signature of the district attorney was affixed to the indictment by his express direction, but he, in person laid the bill thus signed before the grand jury, and by other unequivocal acts avowed his individual and official responsibility therefor. The court said: "In view of these facts we are unable to conclude that the court erred in refusing to quash because the signature was not written with his own hand. At the same time we are not to be understood as commending the practice, much less as holding that the duty of signing bills of indictment, imposed upon district attorneys by the Act of May 3, 1850, P. L. 654, may be effectually performed by a clerk, or even a deputy, under a general authorization by the district attorney to sign his name. We overrule the assignment upon the special facts above set forth."

[b] Under the Tennessee code, an assistant to the district attorney cannot sign an indictment except in the presence and by the consent or direction of his principal, a general delegation of the functions of the office not being allowed under the constitution. *State v. Amos*, 101 Tenn. 350, 47 S. W. 410.

[c] While the better practice would

be for a deputy to sign the name of his principal, the fact that a deputy signs his own name as deputy prosecuting attorney does not render it fatally defective. *Taylor v. State*, 113 Ind. 471, 16 N. E. 183; *Knight v. State*, 84 Ind. 73.

[d] Where the indictment is verified by the signature of a deputy prosecuting attorney, it will be presumed upon appeal that some sufficient reason appeared to the court into which the indictment was returned for the absence of the name of the prosecuting attorney. *Taylor v. State*, 113 Ind. 471, 16 N. E. 183. But see *State v. Amos*, 101 Tenn. 350, 47 S. W. 410.

[e] If it were essential that a presentment be signed, it would be sufficient if the person signing it did so, either by special authority to sign in particular cases, or by a general authority to sign in all cases where the official signature was required. *Newman v. State*, 101 Ga. 534, 28 S. E. 1005.

13. *Ga.*—*Williams v. State*, 69 Ga. 11, 28. *Ind.*—*Choen v. State*, 85 Ind. 209. *Ia.*—*Wrockledge v. State*, 1 Iowa 167. *Mo.*—*State v. Moxley*, 102 Mo. 374, 14 S. W. 969, 15 S. W. 556; *State v. Swinney*, 25 Mo. App. 347. *Mont.* *Territory v. Layne*, 7 Mont. 225, 14 Pac. 705; *Territory v. Harding*, 6 Mont. 323, 12 Pac. 750. *S. C.*—*State v. Smalls*, 98 S. C. 297, 82 S. E. 421, not void because not signed by duly elected and qualified solicitor. *Tenn.*—*Harris v. State*, 100 Tenn. 287, 45 S. W. 438; *Turner v. State*, 89 Tenn. 547, 15 S. W. 838. *Tex.*—*State v. Johnson*, 12 Tex. 231; *Pierce v. State*, 12 Tex. 210; *Reynolds v. State*, 11 Tex. 120, following *Eppes v. State*, 10 Tex. 474.

See also *Temple v. State*, 127 Tenn. 429, 155 S. W. 388.

[a] *Presumptions*. — In *Isham v. State*, 1 Sneed (Tenn.) 111, the court said: "It must be presumed that the court would not permit any one to enter upon and discharge the important functions of this officer without the existence of some necessity and a regular appointment."

[b] Where an indictment is signed by one as "district-attorney pro tem," and the court below recognizes the official authority of such person, the

Authority of Attorney-General.—Where a statute authorizes the governor to require the attorney-general to appear and prosecute criminal proceedings in any county, and he is so required, he becomes prosecuting attorney of that county, and as such may sign indictments presented by the grand jury.¹⁴

If it is signed by one without authority the signature is mere surplusage and cannot vitiate it where no signature is necessary.¹⁵

(II.) **Form and Sufficiency.**¹⁶—It is not necessary that the signature of the officer should be placed at the end of the indictment;¹⁷ but it must be on it, and must show that it is intended to cover all the counts contained therein.¹⁸

A signing by the surname in full and the Christian name by its initial is a good signature of a prosecuting attorney.¹⁹ That the

supreme court will presume, in the absence of proof to the contrary, that such person was duly appointed so to act. *Pierce v. State*, 12 Tex. 210; *Eppes v. State*, 10 Tex. 474.

14. *State v. Bowles*, 70 Kan. 821, 79 Pac. 726, 69 L. R. A. 176 (followed in *State v. Campbell*, 70 Kan. 899, 79 Pac. 1133); *State v. Young*, 70 Kan. 900, 79 Pac. 1133.

[a] The district court of any county is obliged to take judicial notice of an executive order upon the attorney-general to appear and prosecute criminal proceedings there, and such authority need not be expressed on the face of an indictment which he signs. *State v. Bowles*, 70 Kan. 821, 79 Pac. 726, 69 L. R. A. 176.

[b] **An assistant attorney-general** similarly appointed has authority to sign an indictment, and such signature will be as effective as that of the county attorney. *State v. Crilly*, 69 Kan. 802, 77 Pac. 701, followed in *State v. Callawaert*, 69 Kan. 876, 77 Pac. 1135.

15. *Brigman v. State*, 8 Ala. App. 400, 62 So. 980; *State v. Mace*, 86 N. C. 668. And see *People v. Lyman*, 2 Utah 30.

[a] The fact that an indictment is signed by the defendant (1) as special solicitor does not render it subject to be stricken or quashed (*Brigman v. State*, 8 Ala. App. 400, 62 So. 980). (2) The mere presence of the defendant's name to the indictment cannot import anything more than that he, or some other person, wrote it there, and does not give use to a presumption that he, and not the person whose appointment is shown by the record, acted

as special solicitor in the proceedings of the grand jury, which resulted in the finding of the indictment. *Brigman v. State*, 8 Ala. App. 400, 62 So. 980.

[b] **Name of Former Prosecuting Officer.**—The signing or printing by mistake of the name of a person to it as prosecuting officer who is not such officer does not invalidate it, where the statute does not require such officer's signature. *Brown v. Com.*, 135 Ky. 635, 117 S. W. 281, 135 Am. St. Rep. 471, 21 Am. & Eng. Ann. Cas. 672.

16. For treatment of this same subject in connection with signature of foreman, see *supra*, VIII, A, 7, a, (II); of signature of prosecuting attorney to information, see *infra*, VIII, B, 7, d.

17. *State v. Lockett*, 3 Heisk. 274.

[a] It is sufficient if it appear on some part of the paper, provided it appear beyond doubt that the attestation relates to the indictment and every part thereof, and identifies the same as the act and accusation of the government, done through its sworn officer. The object of the signature is to give dignity and verity to the paper, as a public act, having the sanction of the government. *State v. Lockett*, 3 Heisk. (Tenn.) 274.

18. *State v. Lockett*, 3 Heisk. (Tenn.) 274.

[a] **Signature to Indorsement Not Sufficient.**—The official signature of the district attorney to an indorsement on an indictment directing what witnesses shall be summoned, does not cure the want of a signature to the indictment itself. *State v. Lockett*, 3 Heisk. (Tenn.) 274.

19. *Vanderkarr v. State*, 51 Ind. 91.

name of the prosecuting officer is printed or typewritten on the indictment, instead of being signed in pen and ink, does not render it insufficient.²⁰ The fact that such signature is preceded by the word "attest" works no detriment, the word being mere surplusage.²¹

Name of Office.—The signature of the prosecuting officer is sufficient without the name of his county or district appended thereto,²² and without his official title being attached to the signature.²³ Nor is an indictment rendered invalid by reason of a wrong statement as to the county or district,²⁴ or as to the title of the officer who signs it.²⁵

8. Indorsements.—a. *In General.*²⁶—The indorsements on the bill form no part of the indictment.²⁷

20. *Hamilton v. State*, 103 Ind. 96, 2 N. E. 299, 53 Am. Rep. 491; *Miller v. State*, 36 Tex. Crim. 47, 35 S. W. 391.

[a] When the name of the prosecuting attorney is found appended to an indictment, the presumption is that it was so appended by his authority. *Hamilton v. State*, 103 Ind. 96, 2 N. E. 299, 53 Am. Rep. 491.

21. *State v. Hilsabeck*, 132 Mo. 348, 360, 34 S. W. 38.

22. *Cal.*—*People v. Ashnauer*, 47 Cal. 98. *Mass.*—*Com. v. Beaman*, 8 Gray 497. *Mo.*—*State v. Campbell*, 210 Mo. 202, 109 S. W. 706, 14 Am. & Eng. Ann. Cas. 403; *State v. Holden*, 142 Mo. App. 502, 127 S. W. 399; *State v. Walker*, 129 Mo. App. 371, 108 S. W. 615 (*affirmed*, 221 Mo. 511, 108 S. W. 615, 120 S. W. 1198); *State v. Gilson*, 114 Mo. App. 652, 90 S. W. 400. *Tenn.* *State v. Brown*, 8 Humph. 89; *State v. Evans*, 8 Humph. 110; *State v. Elkins*, Meigs 109.

[a] Where both the caption and the body of the indictment state the county in which the indictment was found, that is sufficient to show that the district attorney who signed it, was acting as the district attorney for that county. *People v. Ashnauer*, 47 Cal. 98.

23. *Ind.*—See *Malone v. State*, 14 Ind. 219. *Ohio.*—*State v. Mulford*, 12 Ohio Dec. (N. P.) 724, wherein the prosecuting attorney signed his individual name at the bottom of the indictment. The court said: "This court will take judicial notice that T. is and was at the time the indictment was returned by the grand jury into this court, the prosecuting attorney of this

county." *Tenn.*—*Currey v. State*, 7 Baxt. 154.

24. *State v. Tannahill*, 4 Kan. 99. And see *State v. Salge*, 2 Nev. 321.

[a] **Erroneous County.**—Though an indictment found in "Jefferson county" was signed "A. S., county attorney for Jackson county," it was no ground for quashing the same, where the record showed that defendant admitted that A. S. was in fact, at the time of filing the indictment, county attorney of Jefferson county. *State v. Tannahill*, 4 Kan. 99.

25. *Ind.*—*Malone v. State*, 14 Ind. 219; *Baldwin v. State*, 12 Ind. 383. *Kan.*—*Craft v. State*, 3 Kan. *450. *Mo.*—*State v. Kinney*, 81 Mo. 101. *Nev.*—See *State v. Salge*, 2 Nev. 321. *Tenn.*—*State v. Myers*, 85 Tenn. 203, 5 S. W. 377 (*distinguishing Teas v. State*, 7 Humph. 174); *Greenfield v. State*, 7 Baxt. 18.

26. As to indorsements on information, see *infra*, VIII, B, 9; on complaint, see *infra*, VIII, C, 5.

27. See the following cases: *N. Y.* *Brotherton v. People*, 75 N. Y. 159. *N. C.*—*State v. Hollingsworth*, 100 N. C. 535, 6 S. E. 417. *W. Va.*—*State v. Thacker Coal & Coke Co.*, 49 W. Va. 140, 38 S. E. 539.

[a] The certificate of the foreman that a bill is "a true bill" is no part of the indictment, but is the statutory mode of authenticating it. *Brotherton v. People*, 75 N. Y. 159. See also *State v. Thacker Coal & Coke Co.*, 49 W. Va. 140, 38 S. E. 539, no part of indictment further than as a mark of identification. Compare *State v. McCourtney*, 6 Mo. 649, holding that the indorsement of the name of the prosecutor is part of the indictment.

b. *Nature of Offense.*—The nature of the offense charged in the indictment need not be indorsed upon it.²⁸ If, however, such indorsement is made²⁹ it will be regarded as surplusage;³⁰ and if, therefore, it is incorrect or even inconsistent with the indictment, it will not vitiate it, the court not being bound by it.³¹

Title of Case.—The statutes do not require that the title of the case shall be indorsed in full, or otherwise, on the indictment.³²

c. *Of Finding "A True Bill."*—(1.) *Necessity for.*—Under the common law, the indorsement "a true bill" was held to be essential to the validity of the indictment.³³ Though the common-law require-

28. *Fla.*—*Cherry v. State*, 6 *Fla.* 679. *Ky.*—*Com. v. English*, 6 *Bush* 431. *La.*—*State v. Pointdexter*, 117 *La.* 380, 41 *So.* 688; *State v. Valere*, 39 *La. Ann.* 1060, 3 *So.* 186; *State v. Mason*, 32 *La. Ann.* 1018 (holding dictum to contrary in *State v. Morrison*, 30 *La. Ann.* 817, unsupported by authority); *State v. Rohfrischt*, 12 *La. Ann.* 382; *State v. Smith*, 5 *La. Ann.* 340. *W. Va.*—*State v. Fitzpatrick*, 8 *W. Va.* 707.

29. This indorsement is generally made by the prosecuting officer as a mere memoranda, for the convenience of reference, and to distinguish it from other papers of a similar character. But it is, in fact, no part of the indictment. *Fla.*—*Cherry v. State*, 6 *Fla.* 679. *Ky.*—*Com. v. English*, 6 *Bush* 431. *La.*—*State v. De Hart*, 109 *La.* 570, 33 *So.* 605; *State v. Russell*, 33 *La. Ann.* 137; *State v. Rohfrischt*, 12 *La. Ann.* 382.

30. *Fla.*—*Cherry v. State*, 6 *Fla.* 679. *Va.*—*Thompson v. Com.*, 20 *Gratt.* 724, 730. *W. Va.*—*State v. Heaton*, 23 *W. Va.* 773, 779.

31. *U. S.*—*Williams v. United States*, 168 *U. S.* 382, 18 *Sup. Ct.* 92, 42 *L. ed.* 509; *Smith v. United States*, 208 *Fed.* 131, 125 *C. C. A.* 353; *Wechsler v. United States*, 158 *Fed.* 579, 86 *C. C. A.* 37 (all cases wherein district attorney had indorsed number of wrong statute upon indictment). *Ill.*—*Collins v. People*, 39 *Ill.* 233. *La.*—*State v. Smith*, 5 *La. Ann.* 340. *Miss.*—*State v. Tingle*, 103 *Miss.* 672, 60 *So.* 728. *Va.*—*Hall's Case*, 3 *Gratt.* 593. See *Thompson v. Com.*, 20 *Gratt.* 724, 730. *W. Va.*—*State v. Heaton*, 23 *W. Va.* 773, 779.

[a] So, where the indorsement was "indictment for robbery," (1) but in the allegations it was a good indictment for larceny, the defendants were properly required to plead. *Collins v.*

People, 39 *Ill.* 233. (2) And where the indictment was indorsed as charging the crime of embezzlement, whereas it charged the crime of seduction, it was not fatal on demurrer. *State v. Tingle*, 103 *Miss.* 672, 60 *So.* 728.

[b] Where the indictment in describing the offense followed the language of the statute, the fact that the indorsement on its back was not in the precise language of the statute did not vitiate it. *Humpeler v. People*, 92 *Ill.* 400.

32. *State v. Marion*, 14 *Mont.* 458, 36 *Pac.* 1044.

[a] An indictment is not open to the objection that it is not properly indorsed, because it is an indictment of two persons, and is indorsed with only the name of one of them; thus "*State of Montana v. Charles Marion, et al.*" *State v. Marion*, 14 *Mont.* 458, 36 *Pac.* 1044.

[b] The omission of a letter in the name of the accused in such an indorsement is not a good ground for motion in arrest of judgment, especially where name is properly stated in indictment proper. *State v. Duestoe*, 1 *Bay (S. C.)* 377.

33. *Arch. Cr. Pl.* 64; 4 *Bl. Com.* 305; 1 *Chit. Cr. Law* 322, 324; 2 *Hale P. C.* 161. And see the following cases: *U. S.*—*Frishie v. United States*, 157 *U. S.* 160, 15 *Sup. Ct.* 586, 39 *L. ed.* 657. *Ind.*—*Cole v. State*, 169 *Ind.* 393, 397, 82 *N. E.* 796. *Ky.*—*Com. v. Ripperdon*, *Litt. Sel. Cas.* 194. *Me.*—*Webster's Case*, 5 *Me.* 432. *N. C.*—*State v. McBroom*, 127 *N. C.* 528, 37 *S. E.* 193.

[a] "The indorsement is parcel of the indictment and the perfection of it." *King v. Ford*, *Yelv.* 99, 80 *Eng. Reprint* 68.

[b] "But this grew out of the practice which there obtained. The bills of indictment or formal accusa-

ment still prevails in some of the states having no statutes upon the subject,³⁴ the doctrine best sustained by reason and authority, in the absence of a mandatory statute, is that the indorsement may be dispensed with altogether, if the fact of the jury's finding appears in any other form in the record.³⁵ But it has been the universal practice as a matter of identification of the indictment,³⁶ and even though not required by statute, such indorsement should be made.³⁷ In the

tions of crime were prepared and presented to the grand jury who, after investigation, either approved or disapproved of the accusation, and indicated their action by the indorsement, 'a true bill' or 'ignoramus,' or sometimes, in lieu of the latter, 'not found,' and all the bills thus acted upon were returned by the grand jury to the court. In this way the indorsement became the evidence, if not the only evidence, to the court of their action." *Frisbie v. United States*, 157 U. S. 160, 15 Sup. Ct. 586, 39 L. ed. 657.

For discussion of English practice, see the following: **U. S.**—*Frisbie v. United States*, 157 U. S. 160, 15 Sup. Ct. 586, 39 L. ed. 657. **Ga.**—*Barlow v. State*, 127 Ga. 58, 56 S. E. 131. **Mo.** *State v. Burgess*, 24 Mo. 381, 69 Am. Dec. 433. **N. H.**—*State v. Freeman*, 13 N. H. 488. **N. J.**—*State v. Magrath*, 44 N. J. L. 227. **N. C.**—*State v. Calhoun*, 18 N. C. 374.

34. *Webster's Case*, 5 Me. 432, where the omission of the words "true bill" was held fatal, on the ground that the signature might only indicate the foreman's opinion.

35. **U. S.**—*Frisbie v. United States*, 157 U. S. 160, 15 Sup. Ct. 586, 39 L. ed. 657. **Ga.**—*Harrell v. State*, 11 Ga. App. 407, 75 S. E. 507; *McAllister v. State*, 2 Ga. App. 656, 58 S. E. 1110. **Ky.**—*Com. v. Ripperdon*, 1 Litt. Sel. Cas. 194. **Mass.**—*Com. v. Smyth*, 11 Cush. 473. **N. H.**—*State v. Freeman*, 13 N. H. 488, signature of foreman sufficient authentication thereof. **N. J.** *State v. Magrath*, 44 N. J. L. 227. **N. C.**—*State v. Sultan*, 142 N. C. 569, 54 S. E. 841, *overruling State v. McBroom*, 127 N. C. 528, 37 S. E. 193. **S. C.**—*State v. Creighton*, 1 Nott & McC. 256. **Va.**—*Crump v. Com.*, 98 Va. 533, 23 S. E. 760; *White v. Com.*, 29 Gratt. 824; *Price v. Com.*, 21 Gratt. 846 (order book of court proper evidence of that fact); *Thompson v. Com.*, 20 Gratt. 724. **W. Va.**—*State v. Grove*, 61 W. Va. 697, 57 S. E. 296;

State v. Thacker Coal & Coke Co., 49 W. Va. 140, 38 S. E. 539; *State v. Hill*, 48 W. Va. 132, 35 S. E. 831. **Can.** *Queen v. Townsend*, 28 Nova Scotia 468, 3 Can. Crim. Cas. 29, two judges dissenting.

[a] In this country the common practice is for the grand jury to investigate any alleged crime, no matter how or by whom suggested to them, and after determining that the evidence is sufficient to justify putting the party suspected on trial, to direct the preparation of the formal charge or indictment. Thus they return into court only those accusations which they have approved, and the fact that they thus return them into court is evidence of such approval, and the formal indorsement loses its essential character. *Frisbie v. United States*, 157 U. S. 160, 15 Sup. Ct. 586, 39 L. ed. 657.

[b] The only end that such indorsement could serve would be for the purpose of identification. The presentation in open court, the indorsement of the names of the witnesses on whose evidence it is found, the signature of the prosecuting attorney, and the record made by the court, is certainly sufficient identification where there is no fraud pretended or charged. *State v. Hill*, 48 W. Va. 132, 35 S. E. 831. See also *White v. Com.*, 29 Gratt. (Va.) 824.

[c] There is in the federal statutes no mandatory provision requiring such indorsement, and the matter must, therefore, be determined on general principles. *Frisbie v. United States*, 157 U. S. 160, 15 Sup. Ct. 586, 39 L. ed. 657.

36. *State v. Squire*, 10 N. H. 558; *State v. Thacker Coal & Coke Co.*, 49 W. Va. 140, 38 S. E. 539; *State v. Hill*, 48 W. Va. 132, 35 S. E. 831.

37. *Frisbie v. United States*, 157 U. S. 160, 15 Sup. Ct. 586, 39 L. ed. 657; *Barlow v. State*, 127 Ga. 58, 62, 56 S. E. 131 (wherein Judge Lumpkin re-

absence of a statutory requirement, a presentment need not be so endorsed, however.³⁸

Statutes in some states expressly require that the indictment, when found, must be indorsed a true bill,³⁹ and the indorsement signed by the foreman of the grand jury.⁴⁰ While these statutes are considered as merely directory in some states,⁴¹ and the indorse-

marked that it was the proper and universally recognized practice). See also *State v. Squire*, 10 N. H. 558.

38. *Martin v. State*, 127 Tenn. 324, 155 S. W. 129.

[a] "An indictment proceeds from the attorney-general to the grand jury, and 'is only signed by the foreman of the grand jury, and therefore, unless it appears from the record that the bill was returned by the jury into open court "a true bill," it cannot appear that it has been before them, and found by them. Not so in the case of a presentment. That is signed by all of the jurors, and we have thus an assurance that they acted on it and found the facts it presents.' *State v. Muzingo*, Meigs 112. Such indorsement, therefore, was not necessary." *Martin v. State*, 127 Tenn. 324, 155 S. W. 129.

[b] **Reason.**—The presentment, as distinguished from the indictment, is signed by all of the jurors, thus showing that they acted upon it and found the facts which it presents. *Martin v. State*, 127 Tenn. 324, 155 S. W. 129.

39. See the following: **Ala.**—Code, 1907, §7300; *Whitley v. State*, 166 Ala. 42, 52 So. 203; *Bilbo v. State*, 1 Ala. App. 74, 55 So. 927. **Alaska.**—Carter's Ann. Codes, 1900, C. C. P., §29. **Ariz.**—Rev. Sts., 1913, §927. **Ark.**—Kirby's Dig., §2224. **Cal.**—Penal Code, §940; *People v. Lawrence*, 21 Cal. 368. **Colo.**—Bd. of County Comrs. v. *Graham*, 4 Colo. 201. **Fla.**—Gen. St., 1906, §3960; *Alden v. State*, 18 Fla. 187; *Collins v. State*, 13 Fla. 651, 661; *Holton v. State*, 2 Fla. 476. **Idaho.**—Rev. Codes, 1908, §7665. **Ill.**—Hurd's Rev. St., 1913, ch. 78, §17; *People v. St. Clair*, 244 Ill. 444, 91 N. E. 573; *Gardner v. People*, 4 Ill. 83; *Goodman v. People*, 90 Ill. App. 533, 539. **Ind.**—Burns' Ann. St., 1914, §1981; *Cole v. State*, 169 Ind. 393, 82 N. E. 796; *Denton v. State*, 155 Ind. 307, 58 N. E. 74; *State v. Buntin*, 123 Ind. 124, 23 N. E. 1140; *Strange v. State*, 110 Ind. 354, 11 N. E. 357; *Cooper v. State*, 79

Ind. 206; *Johnson v. State*, 23 Ind. 32. **Ia.**—Code, 1897, §5274; *State v. Lightfoot*, 107 Iowa 344, 78 N. W. 41; *State v. Groome*, 10 Iowa 308. **Kan.**—Gen. St., 1909, §6674. **Ky.**—Oliver v. *Com.*, 95 Ky. 372, 25 S. W. 600; *Lewis v. Com.*, 20 Ky. L. Rep. 1104, 48 S. W. 977; *Com. v. Louisville*, etc. R. Co., 17 Ky. L. Rep. 562, 32 S. W. 132; *Sims v. Com.*, 12 Ky. L. Rep. 215, 13 S. W. 1079. **Minn.**—Rev. Laws, 1905, §5295. **Mo.**—Rev. St., 1909, §5090; *State v. Orrick*, 106 Mo. 111, 17 S. W. 176, 329; *State v. Burgess*, 24 Mo. 381, 69 Am. Dec. 433; *State v. Freeman*, 21 Mo. 481; *State v. Mertens*, 14 Mo. 94; *State v. Howell*, 34 Mo. App. 86. **Mont.**—Rev. Codes, 1907, §9137. **Neb.**—Rev. Sts., 1913, §9046; *Goldsberry v. State*, 92 Neb. 211, 137 N. W. 1116. **Nev.**—Rev. L., 1912, §7042 (Crim. Prac. Act, §192). **N. M.**—Comp. Laws, 1897, §990. **N. Y.**—Code Crim. Proc., §268. **N. D.**—Rev. Codes, 1905, §9840. **Ohio.**—Page & Adams' Ann. Gen. Code, 1910, §13,571. **Okla.**—Comp. Laws, 1909, §6687. **Ore.**—Lord's Laws, §1428; *State v. Belding*, 43 Ore. 95, 71 Pac. 330; *State v. McElvain*, 35 Ore. 365, 58 Pac. 525. **S. D.**—Comp. Laws, 1910, C. C. P., §213. **Tenn.**—Shannon's Code, §7055; *Martin v. State*, 127 Tenn. 324, 155 S. W. 129; *Bird v. State*, 103 Tenn. 343, 52 S. W. 1076; *Gunkle v. State*, 6 Baxt. 625. **Utah.**—Comp. Laws, 1907, §4723. **Vt.**—Pub. Sts., 1906, §2222. **Wyo.**—Comp. St., 1910, §6144.

[a] The purpose to be subserved by requiring an indictment to be indorsed in the manner indicated was evidently to certify to the court the conclusion reached by at least the requisite number of the grand jurors who must concur therein before it is returned. *State v. Belding*, 43 Ore. 95, 71 Pac. 330.

40. See *supra*, VIII, A, 7, a.

41. *State v. Agnew*, 52 Ark. 275, 12 S. W. 563; *State v. Axt*, 6 Iowa 511; *Wau-kon-chaw-neek-kaw v. United States*, Morris (Iowa) 332.

[a] **Missouri.**—(1) This requirement is directory merely, and cannot

ment is not essential to the legality and sufficiency of the indictment,⁴² in other states, the indorsement is essential to the validity of the indictment, the statute being considered as mandatory.⁴³

Several Counts.—It is not necessary that each count of the indictment shall be so indorsed.⁴⁴

(II.) Sufficiency of.—It is sufficient if the indorsement is in form a substantial representation of the findings actually made by the grand

prevail after a trial and conviction (*State v. Burgess*, 24 Mo. 381, 69 Am. Dec. 433), (2) though it constitutes a valid objection upon motion to quash made before trial. *State v. Murphy*, 47 Mo. 274; *State v. Burgess*, 24 Mo. 381, 69 Am. Dec. 433; *State v. Mertens*, 14 Mo. 94.

42. **Cal.**—*People v. Lawrence*, 21 Cal. 368. **Ia.**—*State v. Axt*, 6 Iowa 511; *Wau-kon-chaw-neek-kaw v. United States*, Morris 332. **Ore.**—See *State v. Belding*, 43 Ore. 95, 71 Pac. 330, not a jurisdictional prerequisite. **Tex.** *Thomas v. State*, 8 Tex. App. 344.

[a] It is only evidence of the finding of the indictment, and the object of the statute in requiring it is simply to secure the authenticity and genuineness of the instrument. This end is equally attained when the indictment is presented by the grand jury in open court, and is filed by the clerk with other records. *People v. Lawrence*, 21 Cal. 368.

[b] In *People v. Lawrence*, 21 Cal. 368, the courts said: "We are aware that the decisions in England are different; that there the want of the indorsement is fatal to the indictment. The reason is obvious. There the indictment is drawn and presented to the grand jury before any investigation is had upon the accusation. When the deliberation is closed, the jury return the result of their deliberations by the indorsement on the indictment: 'A true bill,' or 'Not a true bill,' or 'Not found.' In this state the investigation is had in the first instance upon the complaint, made either by the public prosecutor, or by private persons, or upon the declaration of one of the grand jurors (Crim. Prac. Act, sec. 213), and it is only after the jury have come to a conclusion against the party accused that the preparation of an indictment is required from the district attorney. The conclusion of the jury is evidenced by the presentation to the court of an indictment, or by a re-

turn of the papers from the committing magistrate, if any have been delivered to them, with an indorsement that the charge is dismissed. (*Id.* sec. 230.) If no papers from the committing magistrate have been in their hands, their judgment upon the complaint is indicated by the fact that no indictment is returned. In some of our sister states, also, the indorsement, 'a true bill' is held essential to the validity of the indictment, but the decisions in this respect have arisen from an adherence to the English rule, even after the English practice had gone out of use."

43. **Ala.**—*Whitley v. State*, 166 Ala. 42, 52 So. 203; *Coburn v. State*, 151 Ala. 100, 44 So. 58; *Bilbo v. State*, 1 Ala. App. 74, 55 So. 927. **Colo.**—*Bd. of County Comrs. v. Graham*, 4 Colo. 201, "Until the bill is indorsed 'a true bill,' and signed and presented, it is not an indictment." **Fla.**—*Alden v. State*, 18 Fla. 187; *Collins v. State*, 13 Fla. 651, 661. **Ill.**—*Gardner v. People*, 4 Ill. 83; *Nomaque v. People*, 1 Ill. 145, 12 Am. Dec. 157. **Ind.**—*Denton v. State*, 155 Ind. 307, 58 N. E. 74; *State v. Buntin*, 123 Ind. 124, 23 N. E. 1140 (omission of indorsement, even though indictment be signed by foreman, renders it bad); *Strange v. State*, 110 Ind. 354, 11 N. E. 357; *State v. Bowman*, 103 Ind. 69, 2 N. E. 289; *Cooper v. State*, 79 Ind. 206. **Ky.**—*Lewis v. Com.*, 20 Ky. L. Rep. 1104, 48 S. W. 977; *Com. v. Louisville*, etc. R. Co., 17 Ky. L. Rep. 562, 32 S. W. 132, 164 (both following *Oliver v. Com.*, 95 Ky. 372, 25 S. W. 600); *Com. v. Walters*, 6 Dana 290. **La.**—*State v. Logan*, 161 La. 254, 28 So. 912; *State v. Morrison*, 30 La. Ann. 817. **Neb.**—*Goldsberry v. State*, 92 Neb. 211, 137 N. W. 1116.

[a] The record on appeal must affirmatively disclose that fact. *Denton v. State*, 155 Ind. 307, 58 N. E. 74.

44. *State v. Wright*, 161 Mo. App. 597, 144 S. W. 175, statutes require only that the indictment which may

jury.⁴⁵ Neither the position of the indorsement on the indictment,⁴⁶ nor the relative position of the signature of the foreman thereto,⁴⁷ nor the manner of his signing the indorsement,⁴⁸ will invalidate it.

Though the indorsement should be made by the foreman himself,⁴⁹

contain one or a dozen counts shall be so indorsed.

45. *Barlow v. State*, 127 Ga. 58, 56 S. E. 131; *Dixon v. State*, 4 Greene (Iowa) 381.

[a] **Illustrations.**—An indorsement "true bill" has been held sufficient, omitting the article "a." **Del.**—*State v. Abbott*, 5 Penne. 330, 63 Atl. 231. **Neb.**—*Martin v. State*, 30 Neb. 507, 46 N. W. 621. **Tenn.**—*State v. Elkins*, Meigs 109. **Vt.**—*State v. Davidson*, 12 Vt. 300.

[b] An indorsement "a bill" (1) has been declared to be in effect an indorsement that "a true bill" was found (*Sparks v. Com.*, 9 Pa. 354), (2) as has an entry of "a thru bill," *State v. Williams*, 47 La. Ann. 1609, 18 So. 647.

[c] "**A True Gun.**"—Where an indictment for burning a stable belonging to a man named Gunn was found, and the foreman endorsed on the back of it "a true gun," and this was regularly returned as being a finding of a "true bill," the irregularity of the entry was held not to invalidate it. *White v. Com.*, 29 Gratt. (Va.) 824.

For other cases holding indorsements sufficient, see: **Ala.**—*McKee v. State*, 82 Ala. 32, 2 So. 451; *Wesley v. State*, 52 Ala. 182. **Cal.**—*People v. Henninger*, 20 Cal. App. 79, 128 Pac. 352. **Mo.**—*McDonald v. State*, 8 Mo. 283; *Spratt v. State*, 8 Mo. 247. **N. Y.**—*People v. Peck*, 2 N. Y. Crim. 314, *affirmed*, 96 N. Y. 650.

And see *State v. Jolly*, 7 Iowa 15.

[d] **Special Presentment.**—Where a special presentment had the name of the foreman of the grand jury, with his official designation as such, signed on the back of it, and below such signature were the printed words "special presentment," this was a sufficient indorsement to show that the grand jury found such special presentment. *Barlow v. State*, 127 Ga. 58, 56 S. E. 131.

46. See the following cases: **Ga.**—*Barlow v. State*, 127 Ga. 58, 56 S. E. 131. **Hawaii.**—*Territory v. Johnson*, 16 Hawaii 743. **Ind.**—*Blume v. State*, 154

Ind. 343, 56 N. E. 771, indictment would be good even if words were written elsewhere than on the back of the bill. **Kan.**—*State v. Jones*, 2 Kan. App. 1, 42 Pac. 392. **Mo.**—*State v. Howell*, 34 Mo. App. 86, not insufficient, if made on any part of indictment.

[a] Indorsement at foot of indictment (1) immediately succeeding last count therein sufficient within meaning of statutes (*State v. Jones*, 2 Kan. App. 1, 42 Pac. 392. And see *State v. Howell*, 34 Mo. App. 86), (2) or rules of court relating thereto. *Territory v. Johnson*, 16 Hawaii 743.

[b] In *Burgess v. Com.*, 2 Va. Cas. 483, the indorsement was not upon the indictment but upon an envelope in which it was folded. This was sufficient after verdict.

47. See the following cases: **Ala.**—*Parris v. State*, 175 Ala. 1, 57 So. 857. **Ga.**—*Barlow v. State*, 127 Ga. 58, 56 S. E. 131. **Ill.**—*Goodman v. People*, 90 Ill. App. 533, 539. **Ind.**—*Blume v. State*, 154 Ind. 343, 56 N. E. 771; *State v. Bowman*, 103 Ind. 69, 2 N. E. 289. **Ky.**—*Overshiner v. Com.*, 2 B. Mon. 344.

[a] That the name of the foreman (1) follows words descriptive of his office instead of preceding them does not affect the validity of the indictment (**Ala.**—*Parris v. State*, 175 Ala. 1, 57 So. 857. **Ill.**—*Goodman v. People*, 90 Ill. App. 533, 539. **Mo.**—*State v. Hogan*, 31 Mo. 342), (2) nor does the fact that his signature precedes the indorsement affect it. *State v. Bowman*, 103 Ind. 69, 2 N. E. 289.

As to necessity for signature of foreman to indorsement, see *supra*, VIII, A, 7, a, (I).

48. *Barlow v. State*, 127 Ga. 58, 56 S. E. 131.

As to sufficiency of signature, see *supra*, VIII, A, 7, a, (II).

49. Though the practice is reprehensible, and not to be indulged, the indictment is not invalidated by reason of the making of the endorsement by the clerk of the grand jury, in the presence of, and by the direction of the foreman. The signature is, in fact, the act of the foreman himself in such case,

if he in fact subscribes his name to an indorsement, the requirements of the statutes are complied with whether such indorsement is printed on the back of the indictment,⁵⁰ or written thereon by someone other than himself.⁵¹

The indorsement applies to both of two defendants jointly indicted.⁵²

(III.) **Effect of.**—The required indorsement is evidence that the indictment was duly found⁵³ by a legal grand jury.⁵⁴ It is also the proper evidence that it was found by the required number of grand jurors.⁵⁵

d. *Not Found.*—In those jurisdictions where bills of indictment are drawn subsequently to the investigation of the grand jury, there are no bills which are indorsed “not found.”⁵⁶ But in jurisdictions where a bill of indictment is sent to the grand jury for adoption or rejection, if it is not found “a true bill,” it should be returned with

the clerk merely acting as his amenuensis in the matter. *Benson v. State*, 18 Ala. 544.

[a] It may be made by a foreman pro tem, however. *State v. Collins*, 6 Baxt. (Tenn.) 151. See also *White v. State*, 93 Ga. 47, 19 S. E. 49; *Com. v. Noonan*, 15 Phila. (Pa.) 372, 38 Leg. Int. 184.

[b] It should be presumed, in the absence of a showing to the contrary, that the indorsement upon the indictment is that of the foreman, appointed by the court, and acting as such. *State v. Orrick*, 106 Mo. 111, 118, 17 S. W. 176.

50. **Fla.**—*Tilly v. State*, 21 Fla. 242. **Ga.**—*Barlow v. State*, 127 Ga. 58, 56 S. E. 131. **Ill.**—*People v. St. Clair*, 244 Ill. 444, 91 N. E. 573. **Kan.**—*State v. Harlan*, 71 Kan. 887, 81 Pac. 480. **Ohio.**—*Wagner v. State*, 42 Ohio St. 537; *State v. Williamson*, 7 Ohio Dec. (Reprint) 618, 4 Wkly. L. Bul. 279.

51. **Ga.**—*Barlow v. State*, 127 Ga. 58, 56 S. E. 131. **La.**—*State v. Duncan*, 8 Rob. 562. **Mo.**—*State v. Elliott*, 98 Mo. 150, 11 S. W. 566, indorsement made by prosecuting attorney, except signature of foreman who signed his name in a blank left for that purpose.

52. *Thurmond v. State*, 55 Ga. 598.

[a] Where the indictment is against three, the grand jury's action, “Not found” as to two, and “A true bill” as to the other, may be indorsed on the bill, without affording any cause of complaint to the accused. *State v. Aucoin*, 50 La. Ann. 49, 23 So. 104.

53. *Oliver v. Com.*, 95 Ky. 372, 25 S. W. 600 (indorsement is the only legal and competent evidence that the

paper filed is an indictment legally found); *State v. McElvain*, 35 Ore. 365, 58 Pac. 525.

[a] “The only evidence of the authenticity of an indictment, which is required by the statute, is the indorsement of the foreman of the grand jury.” *Hubbard v. State*, 72 Ala. 164.

[b] The facts that it is indorsed, “a true bill,” signed by the foreman, and properly filed, are evidence that it has been found by the grand jury. *State v. Beebe*, 17 Minn. 241; *State v. McCartney*, 17 Minn. 76.

54. *Dutell v. State*, 4 Greene (Iowa) 125; *Harriman v. State*, 2 Greene (Iowa) 270.

[a] But when the records of a county show that the grand jurors were not legally selected, and had no authority to act, it is evidence of a higher grade, and shows that the indictment could not have been found, exhibited, and indorsed by legal authority. *Dutell v. State*, 4 Greene (Iowa) 125.

55. See the following cases: **Fla.** *English v. State*, 31 Fla. 340, 356, 12 So. 689. **Ind.**—*Guy v. State*, 37 Ind. App. 691, 77 N. E. 855. **Kan.**—*Laurant v. State*, 1 Kan. 313. **Mass.**—*Com. v. Smyth*, 11 Cush. 473; *Turns v. Com.*, 6 Mete. 224, 233. **Wash.**—*Watts v. Territory*, 1 Wash. Ter. 409; *McAllister v. Territory*, 1 Wash. Ter. 360.

[a] It raises a presumption, though not a conclusive one, that every member of the grand jury concurred in the finding of the bill. *English v. State*, 31 Fla. 340, 356, 12 So. 689; *State v. McNeill*, 93 N. C. 552.

56. See **U. S.**—*Frisbie v. United States*, 157 U. S. 160, 15 Sup. Ct. 586,

an indorsement "not a true bill" or "not found,"⁵⁷ by express provision of statute in some states.⁵⁸ The effect of such indorsement is to dismiss the charge, and it cannot be again inquired into by the grand jury, unless the court so orders, under some statutes.⁵⁹

39 L. ed. 657. **N. J.**—*State v. Magrath*, 44 N. J. L. 227, all the bills which the grand jury bring into court with them are such as have been found by them. **Can.**—*Queen v. Townsend*, 28 Nova Scotia 468, 477, 3 Can. Crim. Cas. 29.

57. *Barlow v. State*, 127 Ga. 58, 56 S. E. 131, wherein the court said: "In Georgia bills are returned, whether the finding is 'a true bill' or 'no bill.' While there is no direct statute on the subject of the return, such has been the practice, and this is recognized in the Penal Code, §930, where it is declared that 'Two returns of 'no bill' by grand juries, on the same charge or accusation, shall be a bar to any future prosecution for the same offense, either under the same or another name, unless such returns have been procured by the fraudulent conduct of the person charged, on proof of which, or of newly discovered evidence, the judge may allow a third bill to be presented, found, and prosecuted.' If the practice were, as in some jurisdictions, to make no return of bills of indictment except where accusations are approved as true, this section would have no application, and there would be no means of determining that there had been two returns of 'no bill.'"

[a] **Historical.**—"The mode in which the grand jury formerly returned the result of their inquiries to the court, was, by indorsing on the back of the bill, if thrown out 'ignoramus,' or 'we know nothing of it,' intimating, that though the accusation might possibly be true, no facts had appeared in evidence to warrant that conclusion; . . . But, at the present day, the indorsement is in English absolutely; if found, 'a true bill,' and if rejected 'not a true bill,' or which is the better way, 'not found,' in which case the party is discharged without further answer." 1 Chit. Cr. Law 324. See also *Com. v. Smyth*, 11 Cush. (Mass.) 473.

[b] Where the indictment considered by the grand jury charges several offenses of a similar character, vary-

ing only in degree, a finding of "true bill" as to one of those of lesser degree is equivalent to a finding of "no bill" as to the higher grade. *Williams v. State*, 13 Ga. App. 83, 78 S. E. 854.

[c] If a bill is indorsed "a true bill," by mistake, instead of "not a true bill," such fact may be shown by affidavit or otherwise, and upon proper motion the indictment should be quashed. *State v. Horton*, 63 N. C. 595.

58. See the following: **Cal.**—Penal Code, §941 (same as New York); *Ex parte Clarke*, 54 Cal. 412. **Colo.**—Bd. of County Comrs. *v. Graham*, 4 Colo. 201. **Fla.**—Gen. St., 1906, §3960; *Alden v. State*, 18 Fla. 187. **Mo.**—Rev. St., 1909, §5091. **Mont.**—Rev. Codes, 1907, §9138, foreman must certify that no true bill was found. **Nev.**—Rev. Laws, 1912, §7043, same as New York. **N. Y.** Code Crim. Proc., §269, requires return of papers with indorsement to effect that the charge is dismissed. **N. D.** Rev. Codes, 1905, §9841, similar to New York. **Okla.**—Comp. L., 1909, §6688, similar to New York. **Ore.**—Lord's Laws, §1432. **S. D.**—Code Crim. Proc., §214, similar to New York. **Tenn.** Shannon's Code, §7056. **Utah.**—Comp. Laws, 1907, §4724, similar to New York. **Vt.**—Pub. St., 1906, §2222. **Wash.**—Rem. & Ball. Ann. Codes & St., §2047; *Lybarger v. State*, 2 Wash. 552, 27 Pac. 449, 1029.

59. Lord's Ore. Laws, §1433; Rem. & Ball. Ann. Wash. Codes & St., §2048; *Lybarger v. State*, 2 Wash. 552, 560, 27 Pac. 449, 1029.

[a] Such statutes are not intended to confer any right upon the defendant, but simply to expedite the business of the court, subject to the direction of the court. *Lybarger v. State*, 2 Wash. 552, 560, 27 Pac. 449, 1029.

[b] Even in the absence of statute, it has been held that a bill returned "not a true bill" cannot be reconsidered by the same grand jury, but a new one should be sent. *State v. Brown*, 81 N. C. 568.

c. *Name of Prosecutor or Informer.*—(I.) *Necessity for.*—It was not necessary at common law,⁶⁰ nor in the absence of statute is it now necessary,⁶¹ that the name of the prosecutor or informer should be written at the foot of the indictment or indorsed thereon. The statutes, however, sometimes require such an indorsement or writing,⁶² or in

60. *United States v. Mundell*, 6 Call 245, 1 Hughes 415, 27 Fed. Cas. No. 15,834.

61. See the following cases: **U. S.** *United States v. Mundell*, 6 Call 245, 1 Hughes 415, 27 Fed. Cas. No. 15,834, not necessary that name of prosecutor in courts of United States should be written at foot of indictment. **Ark.** *State v. Stanford*, 20 Ark. 145. **Ky.** *Com. v. Patterson*, 2 Mete. 374, requirement dispensed with by act of 1816, except in cases relating to trespasses upon person or property of individuals. **Mo.**—*State v. Rogers*, 37 Mo. 367 (not necessary in cases of felony, rules of criminal practice requiring it only in cases of trespass against person or property of another not amounting to a felony); *State v. Bean*, 21 Mo. 267 (not necessary to indictment for keeping a bawdy house where no statute requires it). **N. M.**—*Tenorio v. Ter.*, 1 N. M. 279. **Tex.**—*Barkman v. State*, 41 Tex. Crim. 105, 52 S. W. 73, s. c., 52 S. W. 69.

[a] A special presentment need not have the name of any person endorsed upon it as prosecutor, in the absence of any statute requiring it. *Hudgins v. State*, 136 Ga. 699, 71 S. E. 1065.

62. See the following: **U. S.**—*United States v. Mundell*, 6 Call 245, 1 Hughes 415, 27 Fed. Cas. No. 15,834; *United States v. Lloyd*, 4 Cranch C. C. 464, 26 Fed. Cas. No. 15,615; *United States v. Helriggle*, 3 Cranch C. C. 179, 26 Fed. Cas. No. 15,344 (under early Virginia statute); *Rex v. Lukens*, 1 Dall. 5, 1 L. ed. 13. **Ala.**—*Blackman v. State*, 98 Ala. 77, 13 So. 316; *Hubbard v. State*, 72 Ala. 164; *State v. Hughes*, 1 Ala. 655. **Ark.**—*State v. Scott*, 25 Ark. 107; *State v. Harrison*, 19 Ark. 565; *State v. Brown*, 10 Ark. 104; *Gabe v. State*, 6 Ark. 540. **Fla.**—*Towle v. State*, 3 Fla. 202. **Ill.**—*Hurd's Rev. St.*, 1913, ch. 38, §409; *Vezain v. People*, 40 Ill. 397. **Ia.**—*Code*, 1897, §5275. **Ky.** *Com. v. Patterson*, 2 Mete. 374; *Com. v. Hutcheson*, 1 Bibb 355. **Miss.**—*Kirk v. State*, 13 Smed. & M. 406, 1 Mor. St. Cas. 480; *Moore v. State*, 13 Smed.

& M. 259; *Peter v. State*, 3 How. 423, 1 Mor. St. Cas. 124; *Cody v. State*, 3 How. 27, 1 Mor. St. Cas. 107. **Mo.** *State v. Joiner*, 19 Mo. 224; *Williams v. State*, 9 Mo. 270; *State v. McCourtney*, 6 Mo. 649. **Ohio.**—*Page & Adams' Ann. Gen. Code*, 1910, §13,572. **Ore.** *Lord's Laws*, §1580. **Pa.**—*In re Memorial, etc. of Citizens' Assn.*, 8 Phila. 478. **Tenn.**—*Shannon's Code*, §7058; *State v. Kittrell*, 7 Baxt. 167; *State v. Dillon*, 1 Head 389; *Moyers v. State*, 11 Humph. 40; *Medaris v. State*, 10 Yerg. 239. **Va.**—*Code*, 1904, §3991; *Porterfield v. Com.*, 91 Va. 801, 22 S. E. 352; *Thompson v. Com.*, 88 Va. 45, 13 S. E. 304. **Wash.**—*Rem. & Ball. Ann. Codes & Sts.*, §2044. **W. Va.** *Code*, 1913, §5551.

And see generally the statutes of the several states.

[a] "It is a requirement of the law, that the name of the prosecutor shall be indorsed on the indictment, or that the names of the witnesses upon whose testimony it was found, other than the party injured, shall be stated, and that a statement of the fact shall be made at the end of the indictment; . . ." *State v. Scott*, 25 Ark. 107. As to requirement of indorsement of names of witnesses, see *infra*, VIII, A, 8, f.

[b] The object of such statutes is to impose a salutary restraint upon the getting up of indictments, by requiring those who are mainly instrumental in procuring the indictment, to indorse their name as prosecutor, and subjecting them to the payment of costs under certain contingencies. *Williams v. State*, 9 Mo. 270. See also *State v. Briggs*, 68 Iowa 416, 27 N. W. 358; *State v. Loftis*, 3 Head (Tenn.) 500; *Moyers v. State*, 11 Humph. (Tenn.) 40. In *State v. Briggs, supra*, the court said the indorsement "is required to be made to enable the court to tax the costs against the prosecutor, if it should be satisfied that the prosecution was malicious or without probable cause."

As to liability of prosecuting witness

lieu thereof, a statement which brings the indictment within the exceptions to the requirement, if there be any.⁶³ If no prosecutor appears, the words "no prosecutor" must be indorsed thereon, under some statutes.⁶⁴

Whether Requirement Directory or Mandatory.—Such statutes are merely directory, not mandatory, under some authorities, and a failure to observe the requirement will not invalidate the indictment,⁶⁵ but upon this proposition there are authorities to the contrary, under which the omission is fatal where timely objection is made.⁶⁶

for costs generally, see 5 STANDARD PROC. 782.

[c] **Statutes Not Penal.**—Wortham v. Com., 5 Rand. (Va.) 669, 672.

63. *State v. Joiner*, 19 Mo. 224. See also *State v. Elliott*, 10 West. L. J. 409, 1 Ohio Dec. (Reprint) 572. In this last case, the statute involved provided that in case the indictment was found upon testimony sworn, and sent to the grand jury by order of the court, such fact should be indorsed thereon instead of indorsing the name of the prosecutor. Such an indorsement was made on the indictment. It was held, however, that such indorsement does not prima facie establish that the indictment was found upon testimony sworn and sent to the grand jury, but such fact must be established by proof aside from the indictment and such indorsement.

[a] Where the statute provided that "no indictment . . . shall be preferred, unless the name of the prosecutor be indorsed thereon, except . . . or on the testimony of some witness, other than the party injured, . . ." a statement, that the indictment was found on the testimony of A. B., et al., persons whose property was not injured, indorsed on the back thereof was a sufficient compliance with the statute, and the indictment was, therefore, not subject to quashal because the name of the prosecutor was not indorsed. *State v. Scott*, 25 Ark. 107.

64. See *Blackman v. State*, 98 Ala. 77, 13 So. 316 (under Code, 1886, §4354), and generally the statutes.

65. *Ala.*—*Hubbard v. State*, 72 Ala. 164; *Ashworth v. State*, 63 Ala. 120; *State v. Hughes*, 1 Ala. 655. *Ia.*—*State v. Briggs*, 68 Iowa 416, 27 N. W. 358. *Va.*—*Porterfield v. Com.*, 91 Va. 801, 22 S. E. 352; *Dever v. Com.*, 10 Leigh 685. *Wyo.*—*Territory v. Anderson*, 1 Wyo. 20.

66. See the following: *U. S.*—*United*

States v. Shackelford, 3 Cranch C. C. 287, 27 Fed. Cas. No. 16,261; *United States v. Lloyd*, 4 Cranch C. C. 467, 26 Fed. Cas. No. 15,616; *United States v. Hollinsberry*, 3 Cranch C. C. 645, 26 Fed. Cas. No. 15,380; *United States v. Helriggle*, 3 Cranch C. C. 179, 26 Fed. Cas. No. 15,344; *United States v. Carr*, 2 Cranch C. C. 439, 25 Fed. Cas. No. 14,729 (all under early Virginia statute). *Fla.*—*Towle v. State*, 3 Fla. 202, requirement of the statute is a positive requisition and indictment without indorsement invalid and may be quashed on motion. *Ky.*—*Com. v. Gore*, 3 Dana 474 (giving security for costs does not cure omission); *Allen v. Com.*, 2 Bibb 210; *Com. v. Hutcheson*, 1 Bibb 355. *Miss.*—*Kirk v. State*, 13 Smed. & M. 406, 1 Mor. St. Cas. 480; *Moore v. State*, 13 Smed. & M. 259; *Peter v. State*, 3 How. 433, 1 Mor. St. Cas. 124; *Cody v. State*, 3 How. 27, 1 Mor. St. Cas. 107. *Mo.*—*State v. Joiner*, 19 Mo. 224; *State v. McCartney*, 6 Mo. 649. *Tenn.* *State v. Tankersly*, 6 Lea 582; *State v. Gossage*, 2 Swan 263 (must be such indorsement, except there be some statute changing the law as to a particular offense, or class of offenses); *Moyers v. State*, 11 Humph. 40; *Medaris v. State*, 10 Yerg. 239.

[a] "Before he (defendant) can be called upon to plead, he is entitled to have the name of the prosecutor endorsed upon the back of the bill." *In re Memorial, etc. of Citizens' Assn.*, 8 Phila. (Pa.) 478.

[b] **Time for Taking Objection.** (1) There is a conflict in the latter authorities as to the time for taking the objection, some holding the omission fatal on motion to quash timely made (*U. S.*—*United States v. Hollinsberry*, 3 Cranch C. C. 645, 26 Fed. Cas. No. 15,380. *Ill.*—*Vezain v. People*, 40 Ill. 397, objection should be made before trial, by motion to quash. *Tenn.*

Limitations on Requirement. — The statutory requirement is generally limited, however, to offenses committed against the person or property of the informer,⁶⁷ and does not apply to offenses committed against the public at large,⁶⁸ nor prevent the prosecuting officer from pre-

Rodes v. State, 10 Lea 414), (2) or on plea in abatement (**Rodes v. State**, 10 Lea [Tenn.] 414), (3) or by introducing the indictment in evidence on the trial (**Rodes v. State**, 10 Lea. [Tenn.] 414), (4) but not on motion in arrest of judgment (**United States v. Lloyd**, 4 Cranch C. C. 464, 26 Fed. Cas. No. 15,615; **United States v. Jamesson**, 1 Cranch C. C. 62, 26 Fed. Cas. No. 15,466), (5) the objection after verdict being too late (**Ill.**—**Vezain v. People**, 40 Ill. 397, objection too late on error. **Ky.**—**Hayden v. Com.**, 10 B. Mon. 125. **Tenn.**—**Rodes v. State**, 10 Lea 414, wherein the court said: "The reason for the latter conclusion is that the indorsement of the prosecutor is for the benefit of the defendant, and if he chooses not to take advantage of the omission by motion to quash the indictment, by plea in abatement, or by introducing the act in evidence on the trial, he waives the benefit. He cannot be permitted to experiment with the court by trying his case on the merits, and after being found guilty, then rely upon a matter which was intended for his benefit in case he was innocent. And this reason equally applies whether there was in fact a prosecutor, and the omission to indorse his name was intentional, or whether there was no prosecutor at all. He must assert his right before it has been shown to the court, by a trial on the merits, that it was of no consequence to the defendant whether there was a prosecutor or not"), (6) though here again some hold it fatal even on writ of error or appeal. **Kirk v. State**, 13 Smed. & M. (Miss.) 406, 1 Mor. St. Cas. 480.

[c] In Tennessee, (1) before the Act of 1851-2, it was held that the omission might be taken advantage of at any time by motion to discharge the prisoner, or to quash the indictment, or after verdict, to set the same aside. **Wattingham v. State**, 5 Sneed (Tenn.) 64; **Medaris v. State**, 10 Yerg. (Tenn.) 239; **State v. Vance**, 1 Over. (Tenn.) 481. (2) But now by statute, it is provided that the objection must be

taken before verdict. **Rodes v. State**, 10 Lea (Tenn.) 414; **State v. Tankersly**, 6 Lea (Tenn.) 582, both under statute providing that it shall not be cause for arrest of judgment, or a reversal thereof that the indorsement be omitted from the indictment.

[d] **Death of the prosecutor** no ground for quashal of indictment or discharge of defendant. **Com. v. Cunningham**, 5 Litt. (Ky.) 292; **State v. Loftis**, 3 Head (Tenn.) 500.

67. See the following cases: **U. S.** **United States v. Mundell**, 6 Call 245, 1 Hughes 415, 27 Fed. Cas. No. 15,834. **Ark.**—**State v. Stanford**, 20 Ark. 145; **State v. Harrison**, 19 Ark. 565; **State v. Brown**, 10 Ark. 104. **Ky.**—**Com. v. Patterson**, 2 Mete. 374; **Hayden v. Com.**, 10 B. Mon. 125. **Mo.**—**State v. Rogers**, 37 Mo. 367 (not amounting to a felony); **State v. Roberts**, 11 Mo. 510 (prosecutor is necessary only in cases of trespass to private property).

[a] A statute which only requires the indorsement on an indictment charging a trespass against the person or property of another has no application to an indictment charging the maiming, beating and torturing of an animal belonging to defendant. **State v. Goss**, 74 Mo. 592, under 2 Wag. St. 1084, §22.

68. See the following cases: **Ark.** **State v. Stanford**, 20 Ark. 145; **State v. Brown**, 10 Ark. 104; **Gabe v. State**, 6 Ark. 540. **Ky.**—**Hayden v. Com.**, 10 B. Mon. 125. **Mo.**—**State v. Dickerson**, 24 Mo. 365; **State v. Allen**, 22 Mo. 318; **State v. Roberts**, 11 Mo. 510. **N. H.** **State v. Robinson**, 29 N. H. 274. In this last case, the court said: "As to the omission of the name of a prosecutor, which is third cause of exception, there seems to have been no occasion to name one, since, more than a year having expired after the commission of the offense, the right of such prosecutor to any part of the fine or penalty was barred by the statute limitation. The prosecution is purely a public one, and no prosecutor need be named in such case, even if it be necessary in those cases in which he has an

ferring an indictment ex officio,⁶⁹ or the grand jury from finding one of their own accord,⁷⁰ without the indorsing of any one as prosecutor or informer. It is sometimes limited simply to misdemeanors.⁷¹ Even a statute providing that no indictment shall be preferred without a prosecutor is not without exceptions.⁷²

interest, as to which we give no opinion."

[a] **Illustrations.**—(1) Thus, it is not necessary that the name of a prosecutor or informer be indorsed upon the indictment in a prosecution under the statute for carrying concealed weapons (*State v. Stanford*, 20 Ark. 145, though he is entitled to half the fine), (2) or for passing counterfeit coin (*Gabe v. State*, 6 Ark. 540), (3) or for a trespass upon public property (*State v. Brown*, 10 Ark. 104; *State v. Roberts*, 11 Mo. 510, school lands), (4) or for resisting an officer (*State v. Dickerson*, 24 Mo. 365), (5) or in cases of stabbing (*Hayden v. Com.*, 10 B. Mon. (Ky.) 125), (6) or for disturbing the peace (*State v. Moles*, 9 Mo. 694), (7) or for a riot (*Com. v. Bybee*, 5 Dana (Ky.) 219), (8) though in this last instance it has been held necessary on indictment for a riot, charging a trespass against person or property of a person. *McWaters v. State*, 10 Mo. 167; *State v. McCourtney*, 6 Mo. 649.

[b] Nor is it necessary where a justice is indicted for misdemeanor in office. *State v. Allen*, 22 Mo. 318.

69. *United States v. Mundell*, 6 Call 245, 1 Hughes 415, 27 Fed. Cas. No. 15,834; *In re Memorial*, etc. of Citizens' Assn., 8 Phila. (Pa.) 478.

[a] "The law admits no departure from it (the rule requiring indorsement) excepting when the district attorney, acting in his official capacity, sends in a bill to the grand jury. That officer then becomes in effect the prosecutor—a responsibility assumed in few instances, and then only for sufficient reasons." *In re Memorial*, etc. of Citizens' Assn., 8 Phila. (Pa.) 478.

70. *United States v. Mundell*, 6 Call 245, 1 Hughes 415, 27 Fed. Cas. No. 15,834.

[a] Such indorsement (1) is not necessary where the indictment is found upon the evidence of a witness sent to the grand jury, either at their request, or by direction of the court. *United States v. Shackelford*, 3 Cranch C. C. 287, 27 Fed. Cas. No. 16,261;

United States v. Sandford, 1 Cranch C. C. 323, 27 Fed. Cas. No. 16,221; *United States v. Lloyd*, 4 Cranch C. C. 467, 26 Fed. Cas. No. 15,616; *Wortham v. Com.*, 5 Rand. (Va.) 669. (2) Nor is it necessary where founded upon a presentment made upon knowledge of two or more of the grand jurors. *United States v. Shackelford*, 3 Cranch C. C. 287, 27 Fed. Cas. No. 16,261; *United States v. Dulany*, 1 Cranch C. C. 510, 25 Fed. Cas. No. 14,999; *State v. McCann*, Meigs (Tenn.) 91.

[b] An indorsement that "this indictment is preferred upon the testimony of the party injured, who was summoned on presentation, and by order of the grand jury," signed by the prosecuting attorney, does not imply that the indictment was preferred on the information of any of the grand jury, and is not a compliance with the statute, which requires the endorsement of a prosecutor in certain cases. *State v. Denton*, 14 Ark. 343.

71. Page & Adams' Ann. Ohio Gen. Code, §13,572; *Pickett v. State*, 22 Ohio St. 405; *Thompson v. Com.*, 88 Va. 45, 13 S. E. 304 (Virginia code does not require indorsement on indictment for felony, but only for a misdemeanor).

[a] Where the statute declares that a prosecutor's name shall be indorsed on every indictment for a trespass, not amounting to a felony, a trespass, which amounted to a felony at common law, but which does not amount to a felony under statute cannot be excluded from its operation. *State v. Hurt*, 7 Mo. 321.

72. In Tennessee (1) under the statute as first enacted, no indictment could be preferred by the grand jury without a prosecutor; but to this provision various exceptions were afterwards made by subsequent statutory amendments (*Rodes v. State*, 10 Lea 414; *State v. Dillon*, 1 Head 389), (2) providing that a prosecutor is dispensed with, and the district attorney may file bills of indictment without a prosecutor in certain cases, and among others is enumerated, "a charge of

(II.) **Time for Making.** — Such indorsement must be made before the indictment goes to the grand jury,⁷³ or at least before the bill is found and returned;⁷⁴ and cannot be made thereafter.⁷⁵

violating the laws against tippling." *Neideiser v. State*, 6 Baxt. 499, holding offense of retailing liquor on Sunday comes within definition of tippling, and indictment charging same need not be indorsed. (3) An early exception existed in favor of indictments for selling liquor to a slave in violation of the statutes. *State v. Gossage*, 2 Swan 263.

[a] In *Dove v. State*, 3 Heisk. (Tenn.) 348, the indictment was marked, "no prosecutor" necessary, evidently because there was the return of a jury of inquest, which was one of the cases excepted from the requirement that the indictment be indorsed. It was insisted that, as there was no indorsement, it was error not to arrest the judgment. The court said: "But it is immaterial whether the return of the jury inquest was a valid or an invalid return. If the former, no prosecutor was necessary; if the latter, the omission to mark a prosecutor was cured by section 5242 of the code," which provides that one indicted and tried on the merits shall not be entitled to an arrest of judgment because of such omission.

[b] **Order of Court.**—(1) The statute in Tennessee expressly dispenses with a prosecutor and authorizes the district attorney to file a bill without the usual indorsement: "Upon an order of the circuit or criminal court to file an indictment officially; which may be made when it appears to the court that an indictable offense has been committed, and that no one will be prosecutor." *Shannon's Tenn. Code*, §7059; *Rodes v. State*, 10 Lea 414; *Lawless v. State*, 4 Lea 173; *State v. Kittrell*, 7 Baxt. 167. (2) The power thus conferred upon the trial courts is in its very nature discretionary, and not subject ordinarily to revision. *Rodes v. State*, 10 Lea 414. See *Lawless v. State*, 4 Lea 173.

[c] **Requisites of Order.**—(1) It is not necessary that the order recite that it appears to the court that an indictable offense has been committed (*State v. Kittrell*, 7 Baxt. (Tenn.) 167), (2) and that no one will be prosecutor (*Bennett v. State*, 8 Humph. (Tenn.)

118, 123, it will be presumed that this fact was properly made known to the court before the order was made). (3) Nor is it essential that the order should state the person on whom the offense was committed (*State v. Kittrell*, *supra*), (4) or show that it was made upon an examination of witnesses as directed by statute, the presumption being that the court did its duty in this respect. *Lawless v. State*, 4 Lea (Tenn.) 173; *Bennett v. State*, 8 Humph. (Tenn.) 118, 123; *Simpson v. State*, 4 Humph. (Tenn.) 456.

[d] **Time for Making Order.**—(1) It would seem that the court should make such order before the return of the indictment. The failure of the grand jury to reconsider the indictment after an order of the court directing the attorney general to prosecute officially cannot be taken advantage of except upon objection properly made before a trial on the merits. *Parham v. State*, 10 Lea (Tenn.) 498; *Rodes v. State*, 10 Lea (Tenn.) 414. (2) In *Parham v. State*, 10 Lea (Tenn.) 498, the order was not made until after the return of the indictment. Entries on the record were held to raise the presumption that after the making of such order, the grand jury again retired and returned the indictment properly indorsed.

[e] **Those indictments not coming within the exceptions**, still require a competent prosecutor. *State v. Dillon*, 1 Head (Tenn.) 389; *State v. Gossage*, 2 Swan (Tenn.) 263.

73. **U. S.**—*United States v. Shackelford*, 3 Cranch C. C. 287, 27 Fed. Cas. No. 16,261. **Ky.**—*Allen v. Com.*, 2 Bibb 210. **Miss.**—*Moore v. State*, 13 Smed. & M. 259. **Tenn.**—*Moyers v. State*, 11 Humph. 40.

74. *State v. McCartney*, 6 Mo. 649, followed in *McWaters v. State*, 10 Mo. 167.

75. See the following cases: **Ky.** *Allen v. Com.*, 2 Bibb 210, cannot be made after indictment found. **Miss.** *Moore v. State*, 13 Smed. & M. 259, after trial and verdict. **Mo.**—*State v. McCartney*, 6 Mo. 649, cannot be made pending motion to quash. **N. C.**—*State v. Hodson*, 74 N. C. 151, after nolle

(III.) **Who May and Who May Not Be Indorsed.**⁷⁶ — The indorsement of an incompetent prosecutor is, in legal effect, the same as if no indorsement at all was made.⁷⁷ Accordingly it is necessary to determine who may and who may not be a prosecutor.⁷⁸

A prosecutor, within the meaning of the statutory provisions, is one who appears before the grand jury, and has his name entered as prosecutor and undertakes the prosecution of a particular case, subject to the burdens and penalties which that office and undertaking impose.⁷⁹ It does not include one who merely complains and makes known to the grand jury that a particular offense has been committed by a particular person, and asks that the complaint be investigated and acted upon,⁸⁰ or who is summoned by the grand jury to give evidence on the indictment.⁸¹ It is not indispensable that the informer or prosecutor should have personal knowledge of the facts necessary to convict the defendant.⁸²

More particularly, an infant may be indorsed as a prosecutor under such statutes,⁸³ though their spirit and purpose are better accomplished

pros. too late. **Tenn.**—*Moyers v. State*, 11 Humph. 40, prosecutor cannot be added after indictment given to grand jury and found by them.

[a] The name of the husband of a woman cannot be substituted for that of the woman after the indictment has been returned. *Moyers v. State*, 11 Humph. (Tenn.) 40.

76. As to who is prosecuting witness liable for costs, see generally 5 STAND-ARD PROC. 784.

77. *State v. Tankersly*, 6 Lea (Tenn.) 582.

78. See *State v. Tankersly*, 6 Lea (Tenn.) 582, and generally the cases cited *infra*, this section.

79. *Blackman v. State*, 98 Ala. 77, 13 So. 316.

80. *Blackman v. State*, 98 Ala. 77, 13 So. 316. And see *Ashworth v. State*, 63 Ala. 120, holding that the name of the owner of stock complaining of an injury thereto, pursuant to a statutory provision that no indictment shall be found in such case except upon complaint of the owner of the stock, need not be indorsed on the indictment as prosecutor merely because he makes such complaint.

[a] "It is not required that the person who makes the information to set the machinery of the law in motion should be the prosecutor marked on the indictment, or be a witness sworn for the commonwealth on the trial." *Com. v. Barr*, 25 Pa. Super. 609.

81. *Com. v. Hutcheson*, 1 Bibb (Ky.) 355; *Wortham v. Com.*, 5 Rand. (Va.) 669 (one compelled to be an informer cannot be considered a prosecutor). And see *United States v. Lloyd*, 4 Cranch C. C. 467, 26 Fed. Cas. No. 15,616; also *Rex v. Lukens*, 1 Dall. (U. S.) 5, 1 L. ed. 13, wherein the court said: "It often happens that all the witnesses necessary to support a public prosecution are brought unwillingly to give evidence; and the act could never intend there should be a prosecutor indorsed, unless there was really a prosecutor existing, for the words in the act are, *the prosecutor*. And as no person in the present case is proved to be active in carrying on the prosecution, the defendant must plead to the indictment without any indorsement."

82. *Com. v. Barr*, 25 Pa. Super. 609. [a] "If he is able to swear that he is informed of them and believes the facts stated in the information to be true is all that has ever been required to justify a magistrate in issuing a warrant for the arrest of the alleged criminal." *Com. v. Barr*, 25 Pa. Super. 609.

[b] It is no cause for quashing an indictment that the prosecutor in a former indictment was not the same as the prosecutor in the pending indictment. *Allgood v. State*, 87 Ga. 668, 13 S. E. 569.

83. *State v. Dillon*, 1 Head (Tenn.) 389, citing *Beasley v. State*, 2 Yerg.

by the indorsement of the father.⁸⁴ It has been held, however, that in the absence of a statute a married woman cannot be indorsed as prosecutrix,⁸⁵ and that the husband is not a competent prosecutor against his wife.⁸⁶ The indictment will not be dismissed, though the prosecutor be insolvent, if the court would ex officio have directed a prosecution to be instituted.⁸⁷ The foreman of the grand jury may be marked as prosecutor.⁸⁸

The court has no right to order one, against whom an offense is alleged to have been committed, indorsed as prosecutor after the finding of the indictment, without his consent, by express provision of statute in one state.⁸⁹ Before sending the indictment to the grand jury, however, a discretion resides in the prosecuting officer to indorse as prosecutor whomsoever he may think fit.⁹⁰

(IV.) **Sufficiency of Indorsement.**—The object of statutes providing simply for the indorsement of the name of the prosecutor is attained as well and readily by the indorsement being made on the inside as on the back of the indictment.⁹¹ Merely writing the name on the in-

(Tenn.) 481, holding that an infant's property is liable for costs to satisfy a fine and costs adjudged against him.

84. Though the statute contemplates that the injured party shall be endorsed as prosecutor, upon an indictment for a trespass, yet where the injured party is an infant or a married woman, the spirit and purpose of the statute are better accomplished by permitting the name of the father or husband to be indorsed as prosecutor. *State v. Harrison*, 19 Ark. 565.

85. *Wattingham v. State*, 5 Sneed (Tenn.) 64; *Moyers v. State*, 11 Humph. (Tenn.) 40 (the reason assigned being that she is wholly irresponsible, in law, either for costs or damages, and not amenable for false imprisonment or malicious prosecution). See also *State v. Tankersly*, 6 Lea (Tenn.) 582.

86. *State v. Tankersly*, 6 Lea (Tenn.) 582.

[a] **Reason.**—The test as to whether one is a competent prosecutor "seems to be that the party prosecuting shall be liable for costs, and also that he shall be liable to action by the party prosecuted, for false imprisonment or malicious prosecution. It would hardly be maintained that the wife can sue, at law, her husband to recover damages for either false imprisonment or malicious prosecution. The husband, therefore, cannot become a prosecutor on an indictment against his wife." *State v. Tankersly*, 6 Lea (Tenn.) 582.

[b] If his name is so indorsed to

an indictment against her, it is equivalent to having no prosecutor indorsed thereon. *State v. Tankersly*, 6 Lea (Tenn.) 582.

[c] That husband may be prosecutor against wife's paramour for adultery, see *Com. v. Barr*, 25 Pa. Super. 609.

87. *Com. v. Hill*, 9 Leigh (Va.) 601.

88. *King v. State*, 5 How. (Miss.) 730.

89. *State v. Crosset*, 81 N. C. 579; *State v. Hodson*, 74 N. C. 151; *State v. Darr*, 63 N. C. 516; *State v. Lupton*, 63 N. C. 483 (all under early North Carolina statute, providing that no person should be made a prosecutor after the finding of the bill, unless he had been notified to show cause why he should not be made the prosecutor of record).

90. Subject, however, to the interference of the court, in cases where the exercise of such a power may operate injuriously to an individual. *State v. English*, 5 N. C. 435.

[a] It is not necessary that one, indorsed as a prosecutor, should have given directions to the prosecuting officer to prepare the indictment, or that he should have authorized him in express terms to indorse his name. If it be done with his consent, without any disclaimer on his part, and if he furnished the testimony in part upon which the indictment was found, it is sufficient. *Barr v. State*, 74 Ga. 499.

[b] **Governor as Prosecutor.**—*State v. English*, 5 N. C. 435.

91. *Williams v. State*, 9 Mo. 270. In

dietment, without any memorandum showing the purpose for which it is written, is not a sufficient indorsement.⁹²

The prosecutor is sufficiently designated as such by the abbreviation "pros." after his name.⁹³ The statutes sometimes, in express terms, require that the title or profession,⁹⁴ as well as the place of residence,⁹⁵ of the prosecutor, shall be added to the indorsement of his name, their omission being fatal.⁹⁶

f. *Names of Witnesses for Prosecution.*⁹⁷ — (I.) **Necessity and Object.** Statutes in some jurisdictions expressly require the names of the witnesses, on whose evidence the indictment is found, to be stated at the foot of or indorsed thereon.⁹⁸ Independently of any statute, however,

this case, the court said: Indeed, "it is most convenient and proper so to make it. It being the universal practice, so far as we have knowledge, to make the indorsement on the inside of the indictment, we would not feel authorized to change that practice, unless the point had been distinctly ruled otherwise."

[a] Of course, the statutes generally provide that the name of the prosecutor shall be written at the foot of or indorsed on the indictment, and not simply for such indorsement. See *supra*, VIII, A, e, (I).

92. *Medaris v. State*, 10 Yerg. (Tenn.) 239.

[a] **Sufficient Memorandum.** "Where the name of a person, preceded by the words 'good for costs,' is found indorsed upon an indictment for a misdemeanor, when presented to the court as a true bill by the grand jury, such name so indorsed will, when nothing appears to the contrary, be presumed to be that of the prosecuting witness. It is not error to overrule a motion to quash such indictment on the ground that the person whose name is indorsed does not affirmatively appear to have been the prosecuting witness." *Munson v. State*, 20 Ohio St. 232.

93. *McGuire v. State*, 6 Baxt. (Tenn.) 621, wherein the court said: "It would, perhaps, have been as well to have written the word 'prosecutor' in full, but the abbreviation in the place, and in the connection in which it is placed, could have had no other meaning, and we cannot arrest the judgment for a deficit of this character."

94. *Com. v. Gore*, 3 Dana (Ky.) 474; *Com. v. Dever*, 10 Leigh (Va.) 685; and generally the statutes.

95. *Com. v. Gore*, 3 Dana (Ky.) 474.

96. *Com. v. Gore*, 3 Dana (Ky.) 474; not cured by security for costs required of, and given by, prosecutor. Compare *Com. v. Dever*, 10 Leigh (Va.) 685, wherein it was held by the general court, that the statute requiring the title or profession of the prosecutor to be written at the foot of the indictment was only directory to the officers of the court, and, therefore, that the failure to comply with the requisition of the statute in that case was no ground for quashing the indictment.

97. As to requirement of indorsement on information, see *infra*, VIII, B, 9, c.

98. **U. S.**—*Barrington v. Missouri*, 205 U. S. 483, 488, 27 Sup. Ct. 582, 51 L. ed. 890, citing Missouri statute. **Alaska.**—*Carter's Ann. Codes*, 1900, C. C. P., §30. **Ariz.**—*Rev. St.*, 1913, §930. **Ark.**—*Kirby's Dig.*, §2225; *State v. Johnson*, 33 Ark. 174. **Cal.**—*Penal Code*, §943; *People v. Breen*, 130 Cal. 72, 62 Pac. 408; *People v. Crowley*, 56 Cal. 36. **Idaho.**—*Rev. Codes*, 1908, §7668; *State v. Barber*, 13 Idaho 65, 88 Pac. 418. **Ill.**—*Hurd's Rev. St.*, 1913, ch. 78, §17; *People v. Bladek*, 259 Ill. 69, 102 N. E. 243; *Bartley v. People*, 156 Ill. 234, 40 N. E. 831; *Andrews v. People*, 117 Ill. 195, 7 N. E. 265; *Scott v. People*, 63 Ill. 508. **Ind.**—*Burns' Ann. St.*, 1914, §1983 (names of all material witnesses must be indorsed upon the indictment); *Cameron v. State*, 37 Ind. App. 381, 76 N. E. 1021. **Ind. Ter.**—*Leffridge v. United States*, 6 Ind. Ter. 305, 97 S. W. 1018, under *Mansf. Ark. Dig.* §2103. **Ia.**—*Code*, 1897, §5276; *State v. Hasty*, 121 Iowa 507, 90 N. W. 1115; *State v. Lewis*, 96 Iowa 286, 65 N. W. 295; *State v. Miller*, 95 Iowa 368, 64 N. W. 288; *State v. Story*, 76 Iowa 262, 41 N. W. 12;

State *v.* Little, 42 Iowa 51; Ray *v.* State, 1 Greene 316, 48 Am. Dec. 379. **Ky.**—Crim. Code, §120 (names of all witnesses who were examined must be indorsed); *Slaughter v. Com.*, 152 Ky. 128, 153 S. W. 46; *Hendrickson v. Com.*, 146 Ky. 742, 143 S. W. 433; *Porter v. Com.*, 145 Ky. 548, 140 S. W. 643; *Underwood v. Com.*, 119 Ky. 384, 84 S. W. 310; *Com. v. Glass*, 107 Ky. 160, 52 S. W. 18; *Sutton v. Com.*, 97 Ky. 308, 30 S. W. 661. **Mich.**—Howell's Mich. Stats., 1913, §15064; *People v. Hammond*, 132 Mich. 422, 428, 93 N. W. 1084; *Hill v. People*, 26 Mich. 496. **Mo.** Rev. St., 1909, §5097 (names of all material witnesses); *State v. Myers*, 198 Mo. 225, 245, 94 S. W. 242; *State v. Barrington*, 198 Mo. 23, 68, 95 S. W. 235; *State v. Steifel*, 106 Mo. 129, 17 S. W. 227; *State v. Roy*, 83 Mo. 268; *State v. Nugent*, 71 Mo. 136, 144; *State v. McChesney*, 16 Mo. App. 259, 267. **Mont.**—Rev. Codes, 1907, §9140; *State v. Calder*, 23 Mont. 504, 59 Pac. 903. **Nev.**—Comp. Laws, 1900, §4194 (Crim. Prac. Act, §229); *State v. Hamilton*, 13 Nev. 386. **N. M.**—Comp. Laws, 1897, §993. **N. Y.**—Code Crim. Proc., §271; *People v. Glen*, 173 N. Y. 395, 66 N. E. 112; *People v. Shea*, 147 N. Y. 78, 101, 41 N. E. 505. **N. C.**—*State v. Hollingsworth*, 100 N. C. 535, 6 S. E. 417; *State v. Hines*, 84 N. C. 810. **N. D.** Rev. Codes, 1905, §9843. **Okla.**—Comp. Laws, 1909, §6691; *Cook v. State*, 6 Okla. Crim. 477, 120 Pac. 1038; *Colbert v. State*, 4 Okla. Crim. 500, 113 Pac. 558; *Vance v. Ter.*, 3 Okla. Crim. 208, 217, 105 Pac. 307. **Ore.**—Lord's Laws, §1429. **S. D.**—Comp. Laws, 1910, C. C. P. §216; *State v. Church*, 6 S. D. 89, 60 N. W. 143; *State v. Stevens*, 1 S. D. 480, 47 N. W. 546. **Tenn.**—Shannon's Code, §7057. **Tex.**—Code Crim. Proc., art. 432; *Steele v. State*, 1 Tex. 142; *Raleigh v. State* (Tex. Crim.), 168 S. W. 1050; *Luster v. State*, 63 Tex. Crim. 541, 141 S. W. 209; *Skinworth v. State*, 8 Tex. App. 135. **Utah.**—Comp. Laws, 1907, §4725. **Va.**—Code, 1904, §3984; *Clopton v. Com.*, 109 Va. 813, 63 S. E. 1022; *Porterfield v. Com.*, 91 Va. 801, 22 S. E. 352; *Shelton v. Com.*, 89 Va. 450, 16 S. E. 355. **Wash.**—Rem. & Ball. Ann. Codes & St., §2043; *State v. Kulbe*, 67 Wash. 21, 120 Pac. 510. **W. Va.**—Code, 1913, §5544; *State v. Shores*, 31 W. Va. 491, 7 S. E. 413, 13 Am. St. Rep. 875; *State v. Enoch*, 26 W. Va. 253.

And see generally the statutes.

[a] A presentment by a grand jury, upon the knowledge of any of its members, or upon the testimony of witnesses, should be indorsed with the names of such grand jurors and witnesses. N. C. Rev., 1905, §3241.

[b] Under the Iowa code, in connection with the requirement that the names of the witnesses examined before the grand jury shall be indorsed on the indictment, is the further provision that the "minutes of the evidence of each witness examined before the grand jury, taken by the clerk of the grand jury, must be presented with the indictment to the court." *State v. Hasty*, 121 Iowa 507, 90 N. W. 1115; *State v. Miller*, 95 Iowa 368, 64 N. W. 288; *State v. Cross*, 95 Iowa 629, 64 N. W. 614; *State v. Cook*, 92 Iowa 483, 61 N. W. 185; *State v. Little*, 42 Iowa 51.

[c] It is not necessary that the minutes of the evidence of the witnesses examined before the grand jury be attached to the indictment, but only that they be presented with it, and filed by the clerk. *State v. Cross*, 95 Iowa 629, 64 N. W. 614.

[d] The minutes returned are conclusive on whether all witnesses examined are indorsed and neither affidavits of the jurors nor admissions by the county attorney are receivable to contradict them. *State v. Miller*, 95 Iowa 368, 64 N. W. 288; *State v. Little*, 42 Iowa 51.

[e] The minutes of a preliminary examination, taken in the manner authorized by law, and certified to by the justice of the peace, are sufficiently authenticated to authorize the grand jury to act upon them, and to indorse the names of these witnesses upon the indictment. *State v. Wise*, 83 Iowa 596, 50 N. W. 59.

[f] It has been held that the fact that the transcript of the evidence of the examination before the magistrate, instead of a minute thereof made by the clerk of the grand jury, was returned with the indictment, is not prejudicial to defendant, where the grand jury acted on such transcript. *State v. Turner*, 114 Iowa 426, 87 N. W. 287.

[g] In Pennsylvania, only those witnesses whose names have been indorsed on the bill by the district attorney can be sworn by the grand jury. *Com. v. Tomli*, 21 Pa. Dist. 1016; *Com. v. Garhart*, 21 Pa. Dist. 827 (both under Act of March 31, 1860, P. L. 427).

the practice has long been in vogue,⁹⁹ though it was not required by the common law,¹ and there are no statutes requiring it in some jurisdictions.²

Whether Statutes Mandatory or Directory.—The names of the witnesses are not part of the indictment,³ and it has been held that they are not a part of the record.⁴ Nevertheless, these statutes are mandatory in some jurisdictions,⁵ and a total disregard of the requirement is fatal, upon timely objection on that ground.⁶ There is respectable

[h] An inadvertent omission of the district-attorney in this respect is a formal defect, and therefore amendable. *Com. v. Garhart*, 21 Pa. Dist. 827.

[i] In Canada and England, the law provides for the indorsement of the names of witnesses upon the indictment, and for the initialing by the foreman of "the name of each witness sworn by him and examined touching such bill of indictment." *Crim. Code, Canada*, 1910, §876; *Imperial Act*, 1 & 2 Vict., ch. 37. And see *O'Connell v. Reg.*, 11 C. & F. 155, 8 Eng. Reprint 1061; *Reg. v. Buchanan*, 12 Man. 190, 18 C. L. T. 293, 1 Can. Crim. Cas. 442; *Rex v. Holmes*, 9 Brit. Col. 294.

99. *State v. Hawks*, 56 Minn. 129, 140, 57 N. W. 455. And see *Padgett v. State*, 64 Fla. 389, 395, 59 So. 946 (customary to do so); also *State v. Kent*, 5 N. D. 516, 534, 67 N. W. 1052, 35 L. R. A. 518.

[a] This is usually done in this country by the prosecuting attorney, and in England by the clerk of the assizes. *State v. Hawks*, 56 Minn. 129, 140, 57 N. W. 455.

[b] "The practice in England was to endorse the names of the witnesses intended to be examined before the grand jury, upon the bill when it was prepared, and the witnesses so endorsed were sworn in open court, and the bill, with the names of the witnesses upon it, was sent to the grand jury, and the witnesses were called before them, and examined. 1 Arch. Cr. Pr. & Pl. 98." *State v. Johnson*, 33 Ark. 174.

1. **U. S.**—*United States v. Shepard*, 1 Abb. 431, 27 Fed. Cas. No. 16,273. *Fla.* *Padgett v. State*, 64 Fla. 389, 395, 59 So. 946. **Mich.**—*Hill v. People*, 26 Mich. 496, for any purpose connected with the trial. **Mo.**—*State v. Myers*, 198 Mo. 225, 245, 94 S. W. 242. **Mont.**—*State v. Calder*, 23 Mont. 504, 59 Pac. 903.

[a] It is purely a statutory matter.

Padgett v. State, 64 Fla. 389, 395, 59 So. 946.

2. **U. S.**—*United States v. Shepard*, 1 Abb. 431, 27 Fed. Cas. No. 16,273, no act of congress requiring it. **Ala.**—*Parker v. State*, 125 Ala. 86, 27 So. 780; *O'Brien v. State*, 91 Ala. 25, 8 So. 560. **Fla.**—*Padgett v. State*, 64 Fla. 389, 395, 59 So. 946. **Miss.**—*King v. State*, 5 How. 730. **Neb.**—*Donnelly v. State*, 86 Neb. 345, 125 N. W. 618; *Ballard v. State*, 19 Neb. 609, 28 N. W. 271. **Okla.** *Fisher v. United States*, 1 Okla. 252, 31 Pac. 195.

3. *State v. Johnson*, 33 Ark. 174. But see *Lawrence v. Com.*, 86 Va. 573, 10 S. E. 840, wherein the court said: "The law requires that these names shall be written at the foot of the indictment. To render it complete this must be done, and when done these constitute an essential part of the indictment; . . ."

4. *Gardner v. People*, 4 Ill. 83; *Harriman v. State*, 2 Greene (Iowa) 284 (and need not be transcribed in making out a transcript of the record for the supreme court on writ of error).

5. **Cal.**—*People v. Freeland*, 6 Cal. 96. **Idaho.**—*State v. Barber*, 13 Idaho 65, 88 Pac. 418. **Ill.**—*People v. Bladdek*, 259 Ill. 69, 102 N. E. 243; *Andrews v. People*, 117 Ill. 195, 7 N. E. 265. **Mo.** *State v. Roy*, 83 Mo. 268. **N. D.**—*State v. Pancoast*, 5 N. D. 516, 67 N. W. 1052, 35 L. R. A. 518. **Okla.**—*Cook v. State*, 6 Okla. Crim. 477, 120 Pac. 1038, refusal of court to require prosecuting officer to indorse the names of such witnesses upon the indictment before proceeding to trial constitutes reversible error. **S. D.**—*State v. Isaacson*, 8 S. D. 69, 65 N. W. 430; *State v. Church*, 6 S. D. 89, 60 N. W. 143; *State v. Stevens*, 1 S. D. 480, 47 N. W. 546. **Can.**—*King v. Belanger*, 6 Can. Crim. Cas. 295, requirement that foreman initial names of witnesses examined imperative.

6. **Cal.**—*People v. Breen*, 130 Cal.

authority, however, holding that such statutes are merely directory, and that a failure to comply therewith neither invalidates the indict-

72, 62 Pac. 408. Ill.—*Andrews v. People*, 117 Ill. 195, 7 N. E. 265; *McKinney v. People*, 7 Ill. 540, 552. Ia.—*State v. Beal*, 94 Iowa 39, 62 N. W. 657. Mo. *State v. Barrington*, 198 Mo. 23, 70, 95 S. W. 235 (unless the prosecuting attorney offers to supply such omission); *State v. Grady*, 84 Mo. 220; *State v. Roy*, 83 Mo. 268, *overruling State v. Patterson*, 73 Mo. 695 and *State v. Nugent*, 71 Mo. 136, so far as in conflict. Ore.—*State v. Pool*, 20 Ore. 150, 25 Pac. 375. S. D.—*State v. Isaacson*, 8 S. D. 69, 65 N. W. 430; *State v. Stevens*, 1 S. D. 480, 47 N. W. 546. See *State v. Matejousky*, 22 S. D. 30, 115 N. W. 96. See also *State v. Story*, 76 Iowa 262, 41 N. W. 12.

[a] Where the names of some of the witnesses are indorsed, but some are purposely withheld by the prosecution with a view of taking unfair advantage of the defendant, the court will be warranted in promptly quashing the indictment or requiring the prosecuting attorney to supply the omission. *State v. Barrington*, 198 Mo. 23, 70, 95 S. W. 235.

[b] Where the names of the material witnesses are indorsed prior to a motion to quash, the motion is properly denied. *State v. Patterson*, 73 Mo. 695. And see *State v. Roy*, 83 Mo. 268, which approved *State v. Patterson*, *supra*, in this respect only.

[c] **Motion After Plea Too Late.** Although the statute is mandatory, the objection is too late when made after pleading and going to trial. *Sutton v. Com.*, 97 Ky. 308, 30 S. W. 661; *State v. Isaacson*, 8 S. D. 69, 65 N. W. 430.

[d] If a motion made against the indictment on this ground is refused, the fact should be preserved by a bill of exceptions; otherwise it will be presumed that the names of the witnesses were indorsed as required by statute. *McKinney v. State*, 7 Ill. 540, 552.

[e] **Federal Question.**—The decision of a state court that the statute has been complied with is not open to revision in the supreme court of the United States, since it is not a federal question. *Barrington v. Missouri*, 205 U. S. 483, 27 Sup. Ct. 582, 51 L. ed. 866.

7. U. S.—See *United States v. Shep-*

ard, 1 Abb. 431, 27 Fed. Cas. No. 16,273 wherein the court said: "The Michigan statute does require the names to be indorsed on the indictment; but if the state statute governed our proceedings we should regard this provision as directory, and the omission as not affecting the validity of the indictment or information." Fla.—See *Padgett v. State*, 64 Fla. 389, 395, 59 So. 946. Ky. *Hendrickson v. Com.*, 146 Ky. 742, 143 S. W. 433; *Dowell v. Com.*, 32 Ky. L. Rep. 1344, 108 S. W. 847 (they are directory, and ought to be complied with). Minn.—*State v. Hawks*, 56 Minn. 129, 140, 57 N. W. 455. N. C.—*State v. Hollingsworth*, 100 N. C. 537, 6 S. E. 417; *State v. Hines*, 84 N. C. 810. Tex. *Steele v. State*, 1 Tex. 142; *Luster v. State*, 63 Tex. Crim. 541, 141 S. W. 209; *Walker v. State*, 19 Tex. App. 176; *Hart v. State*, 15 Tex. App. 202, 49 Am. Rep. 188. Va.—*Clopton v. Com.*, 109 Va. 813, 63 S. E. 1022; *Porterfield v. Com.*, 91 Va. 801, 22 S. E. 352; *Shelton v. Com.*, 89 Va. 450, 16 S. E. 355; *Com. v. Williams*, 5 Gratt. 702. W. Va. *State v. Shores*, 31 W. Va. 491, 7 S. E. 413, 13 Am. St. Rep. 875; *State v. Enoch*, 26 W. Va. 253. Can.—*Rex v. Holmes*, 9 Brit. Col. 294; *Reg. v. Buchanan*, 12 Man. 190, 196, 18 C. L. T. 293, 1 Can. Crim. Cas. 442; *Reg. v. Townsend*, 28 Nova Scotia 468, 3 Can. Crim. Cas. 29. Eng.—*O'Connell v. Reg.*, 11 Cl. & F. 155, 8 Eng. Reprint 1061, all of last cases holding requirement that foreman "write his initials against the name of each witness sworn by him and examined touching such bill of indictment" directory and not imperative.

[a] "It is a direction to him (the foreman) to do an act that does not require the concurrence of the grand jury. It may be done without their knowledge and consent; it is not a constituent part of the indictment itself, nor of the finding of the grand jury, no more so than an indorsement made by the clerk when it was received that it was in open court. Should it be held that it is essential to the indictment that the indorsement should be made, the consequence would be that the foreman of the grand jury could, by accident or design, destroy the validity of an indictment after it had been duly found,

ment,⁸ nor prevents the introduction of the witnesses whose names do

by omitting to indorse the names of all the witnesses on it, and this he could do if opposed to the return, without the knowledge of the rest of the jury. That such could have been the intention of the law would require the clearest and most unequivocal language to justify the conclusion. Such, however, was not the intention and such are not the legal consequences of the indorsement. We have said, that it is merely directory to the foreman, and several conclusions doubtlessly influenced the legislature in the enactment of the law. It afforded the prosecuting attorney a convenient reference on the trial of the names of the witnesses to prove the offenses charged. It enabled the accused, by knowing the names of the witnesses, not only to make his objection to their competency, but to prepare for discrediting them should they not be worthy of credit. This had become more necessary, since by the change of the law the witnesses were not sworn in open court, but by the foreman of the grand jury; and we have no doubt but that the accused had a right to insist on the names of the witnesses being indorsed, before he could be required to plead; and it would seem if any of them were incompetent, that he ought to be allowed the benefit of excepting to such want of competency, because the finding of the grand jury ought to be on legal testimony." *Steele v. State*, 1 Tex. 112.

[b] The defendant may move to require the prosecuting attorney to indorse the names of the witnesses, where they are omitted. *Jacobs v. State*, 35 Tex. Crim. 410, 34 S. W. 110. And see *Holmes v. State* (Tex. Crim.), 156 S. W. 1172.

[c] In Kentucky, (1) the case of *Sutton v. Com.*, 97 Ky. 308, 30 S. W. 661, seems to have regarded the code as mandatory, it holding that the absence of the indorsement affords a ground for quashing the indictment, if a motion to that effect and for that reason is made by the defendant in proper time. (2) But in *Com. v. Glass*, 107 Ky. 160, 53 S. W. 18, it was held that where the name of a witness is omitted from oversight, or from the fact that he is not regarded as a material witness, it is no ground for

quashing the indictment, especially where the names of other witnesses appear on the indictment. (3) And in *Hendrickson v. Com.*, 146 Ky. 742, 143 S. W. 433, and *Dowell v. Com.*, 32 Ky. L. Rep. 1344, 108 S. W. 847, it was held that the statute is directory.

[d] **Motion To Quash Not Reviewable.**—Under a statute providing that the decision of the lower court upon a motion to set aside an indictment shall not be subject to exception, the decision of the court upon a motion to set aside the indictment upon the ground that the names of all the witnesses are not indorsed thereon is not subject to exception, and cannot be reviewed upon appeal. *Slaughter v. Com.*, 152 Ky. 128, 153 S. W. 46; *Hendrickson v. Com.*, 146 Ky. 742, 143 S. W. 433.

8. Ark.—*State v. Brewer*, 33 Ark. 176. Minn.—*State v. Hawks*, 56 Minn. 129, 140, 57 N. W. 455. N. Y.—*People v. Glen*, 173 N. Y. 395, 404, 66 N. E. 112; *People v. Shea*, 147 N. Y. 78, 41 N. E. 505, 10 N. Y. Crim. 1, (not ground for new trial). N. C.—*State v. Sultan*, 142 N. C. 569, 54 S. E. 841; *State v. Hollingsworth*, 100 N. C. 537, 6 S. E. 417 (constitutes neither a ground for a motion to quash or in arrest of judgment); *State v. Hines*, 84 N. C. 810. Tex.—*Steele v. State*, 1 Tex. 142; *Holmes v. State* (Tex. Crim.), 157 S. W. 487; *Luster v. State*, 63 Tex. Crim. 541, 141 S. W. 209; *Walker v. State*, 19 Tex. App. 176. Va.—*Clopton v. Com.*, 109 Va. 813, 63 S. E. 1022; *Com. v. Williams*, 5 Gratt. 702. W. Va.—*State v. Shores*, 31 W. Va. 491, 7 S. E. 413, 13 Am. St. Rep. 875; *State v. Enoch*, 26 W. Va. 253.

[a] The indorsement is not essential to the validity of the indictment, and the failure to make the indorsement cannot raise a presumption that no witnesses were sworn or examined where the statute expressly provides for the making of such indorsement, upon the application of a defendant, whenever it has been omitted. *People v. Glen*, 173 N. Y. 395, 404, 66 N. E. 112.

[b] Though such failure is not cause for setting aside or quashing the indictment, as it may be important for defendant, in preparing for trial, to know the names of the witnesses on whose testimony it was found, the

not appear indorsed on the indictment in the manner prescribed by law.⁹

The object of the indorsement is to inform both the people and the accused of the names of the witnesses upon whose testimony the indictment is based, and thereby give them both an opportunity to secure these witnesses at the trial.¹⁰

(II.) **Particular Names Indorsed.**—Whether considered mandatory or merely directory, the requirement of these statutes is confined strictly to the names of those upon whose evidence the indictment is found.¹¹

court should, on his application require a list of the witnesses to be furnished him. *State v. Johnson*, 33 Ark. 174. See *Com. v. Knapp*, 9 Pick. (Mass.) 496, 20 Am. Dec. 491.

9. See the title "**Competency**," 3 ENCY. OF EV. 241 et seq.

[a] The only consequence of the omission of the indorsement is, that the state cannot obtain a continuance on account of the absence of a witness from the trial. *Short v. State*, 63 Ind. 376, 383, wherein it was contended that the testimony of a witness, whose name was not indorsed, should have been stricken out.

10. *People v. Breen*, 130 Cal. 72, 62 Pac. 408; *People v. Quinn*, 127 Cal. 542, 59 Pac. 987. And see *Ark.*—*State v. Johnson*, 33 Ark. 174. *Cal.*—*People v. Northey*, 77 Cal. 618, 629, 19 Pac. 865; *People v. Crowey*, 56 Cal. 36; *People v. Freeland*, 6 Cal. 96. *Ill.*—*Bartley v. People*, 156 Ill. 234, 40 N. E. 831; *Scott v. People*, 63 Ill. 508. *Ky.*—*Hendrickson v. Com.*, 146 Ky. 742, 143 S. W. 433; *Dowell v. Com.*, 32 Ky. L. Rep. 1344, 108 S. W. 847. *Minn.*—*State v. Hawks*, 56 Minn. 129, 140, 57 N. W. 455. *Mo.*—*State v. Steifel*, 106 Mo. 129, 17 S. W. 227. *Okla.*—*Cook v. State*, 6 Okla. Crim. 477, 120 Pac. 1038; *Colbert v. State*, 4 Okla. Crim. 500, 113 Pac. 558. *S. D.*—*State v. Phelps*, 5 S. D. 480, 59 N. W. 471; *State v. Stevens*, 1 S. D. 480, 47 N. W. 546. *Wash.*—*State v. Kulbe*, 67 Wash. 21, 120 Pac. 510; *State v. Everitt*, 14 Wash. 574, 45 Pac. 150.

[a] "In our practice the putting of the names of the witnesses who were examined before the grand jury on the indictment, serves several useful purposes: It furnishes information to the Clerk in issuing subpoenas for the State; to the Prosecuting Attorney in calling witnesses at the trial, and it advises the accused of the names of the witnesses upon whose testimony the

indictment was found, which may be important to him in preparing for trial." *State v. Johnson*, 33 Ark. 174.

[b] The object is twofold: First, to prevent malicious accusations being made by unknown and secret prosecutors; and second, and chiefly, that the accused may to some extent be informed what witnesses he will have to confront at the trial. *State v. Hawks*, 56 Minn. 129, 140, 57 N. W. 455.

[c] "The statute requiring the names of all material witnesses to be indorsed on the indictment is a most just and humane provision. It is right that when a citizen's liberty or life is endangered that he should know the names of the witnesses by whom the charge is to be made good. By so knowing he can prepare his defense." *State v. Steifel*, 106 Mo. 129, 17 S. W. 227.

[d] *Compare Smith v. State*, 165 Ala. 50, 51 So. 610, wherein the court said: "It seems that it would need no discussion to show that the names of the witnesses for the state, written upon the back of the indictment, constitute no part of the indictment; and there is no law requiring that a list of these be served upon defendant or counsel appearing for him. These names are written upon the indictment for the benefit of the state, in order that the clerk of the court may be sure to summon the right witnesses for the state in each case, and not for the purpose of putting the defendant on notice of what witnesses the state will use." That indorsement is not required in this, as well as a few other states, see *supra*, this section.

11. *Ill.*—*People v. Bladek*, 259 Ill. 69, 102 N. E. 243; *Andrews v. People*, 117 Ill. 195, 7 N. E. 265. *Ia.*—*State v. Miller*, 95 Iowa 368, 64 N. W. 288; *State v. Lewis*, 96 Iowa 286, 65 N. W. 295; *State v. Little*, 42 Iowa 51 (names of witnesses giving no material testi-

They do not require the indorsing of the names of persons who have no knowledge, and give no evidence touching the matter under investigation, merely because they are called before the grand jury and inquired of in reference thereto.¹² Nor do they require that the names of all witnesses who will be called to testify on the trial of the accused shall be noted on the indictment,¹³ such as the names of witnesses whose testimony is made permissible or necessary in rebuttal by reason of the evidence of the defendant.¹⁴

Though the defendant testifies before the grand jury, his name need not be inserted at the foot or indorsed upon the indictment.¹⁵

Presumption.—It must be presumed, from the fact that the names of witnesses are indorsed, that the indictment was found, in part at least, upon their testimony,¹⁶ and that the grand jury, in making the

mony need not be indorsed). **Minn.** State *v. Hawks*, 56 Minn. 129, 140, 57 N. W. 455. **Okla.**—*Cochran v. United States*, 14 Okla. 108, 76 Pac. 672, *affirmed*, 147 Fed. 206, 77 C. C. A. 432 (prosecution required only to indorse names of witnesses who testify in chief to some fact tending to establish the defendant's guilt, or necessary to make out a case against him).

[a] Where, in the investigation by a grand jury (1) of a charge against one person, evidence is elicited which proves that another person is guilty of the same or another crime, the jury may, on such evidence, indict the latter person without recalling and re-examining the witnesses, and in such case it would be its duty to indorse the names of the witnesses on the indictment. State *v. Beebe*, 17 Minn. 241. (2) But it is not required to indorse or enter the names of witnesses who, while other charges were being investigated, may have given evidence material upon the charge alleged in the indictment, unless the grand jury found the indictment, in whole or in part, on such evidence. State *v. Hawks*, 56 Minn. 129, 140, 57 N. W. 455.

12. State *v. Little*, 42 Iowa 51. And see State *v. Lewis*, 96 Iowa 286, 292, 65 N. W. 255.

[a] **Witness Refusing To Testify.** Though a witness be called before the grand jury and sworn, if he refuses to testify, his name is properly omitted from the back of the indictment. *Gilmore v. People*, 87 Ill. App. 128.

13. *Andrews v. People*, 117 Ill. 195, 7 N. E. 265.

14. See the following cases: **Fla.** Padgett *v. State*, 64 Fla. 389, 396, 59

So. 946. **Ill.**—*Bulliner v. People*, 95 Ill. 394. **Ia.**—State *v. Whitnah*, 129 Iowa 211, 217, 105 N. W. 432; State *v. McClintic*, 73 Iowa 663, 35 N. W. 696; State *v. Ruthven*, 58 Iowa 121, 12 N. W. 235; State *v. Parish*, 22 Iowa 284; State *v. Gillick*, 10 Iowa 98. **Okla.**—*Cochran v. United States*, 14 Okla. 108, 76 Pac. 672, *affirmed*, 147 Fed. 206, 77 C. C. A. 432; *Bigfeather v. State*, 7 Okla. Crim. 364, 123 Pac. 1026.

And see 3 ENCY. OF EV. 242.

[a] Such witnesses are not contemplated by the statutes. *Cochran v. United States*, 14 Okla. 108, 76 Pac. 672, *affirmed*, 147 Fed. 206, 77 C. C. A. 432.

15. *People v. Page*, 116 Cal. 386, 392, 48 Pac. 326; *People v. Northey*, 77 Cal. 618, 19 Pac. 865, 20 Pac. 129; State *v. Kulbe*, 67 Wash. 21, 120 Pac. 510.

[a] Where defendant is compelled to be a witness against himself before a grand jury, it is the imperative duty of the court to quash the indictment found against him, although his name is not indorsed thereon as a witness. State *v. Gardiner*, 88 Minn. 130, 92 N. W. 529.

16. *People v. Bladec*, 259 Ill. 69, 102 N. E. 243; State *v. O'Day*, 89 Mo. 559, 1 S. W. 759. And see *Com. v. Gordon*, 1 Cranch C. C. (U. S.) 48.

[a] Where the names of several witnesses were noted on an indictment by the foreman of the grand jury, the presumption is, in the absence of any contrary showing, that they were the witnesses, and the only witnesses upon whose evidence the indictment was found. *Andrews v. People*, 117 Ill. 195, 7 N. E. 265.

[b] The fact that the names of witnesses are not indorsed or entered

indorsement, complied fully with the mandate of the statute.¹⁷

(III.) *Time of Making.*—Statutes providing for this indorsement generally specify that it should be made before the indictment is presented to the court.¹⁸ It is well settled, however, that the court has authority at the trial to allow such indorsement, even where none was made to start with.¹⁹

(IV.) *Names of Additional Witnesses.*—The prosecuting officer may indorse the names of additional witnesses on the indictment after it is returned into court.²⁰ Indeed, statutes expressly provide that the court may, at any time, direct the indorsement of this class of witnesses.²¹ But, independently of such statutes, it is within the discretion

on the indictment is conclusive that the grand jury did not take such evidence into account in finding "a true bill." *State v. Hawks*, 56 Minn. 129, 140, 57 N. W. 455.

[c] From the fact that there is noted or indorsed on the indictment, "See, for other witnesses, off. C and P", no presumption can arise that witnesses other than those whose names are noted testified before the grand jury. *Andrews v. People*, 117 Ill. 195, 7 N. E. 265.

17. *State v. O'Day*, 89 Mo. 559, 1 S. W. 759.

18. See the statutes cited *supra*, note 98.

[a] The validity of an indictment is in no way affected by the fact that it is presented on one day, but not having the names of the state's witnesses endorsed thereon is not entered, but by order of the court returned to the grand jury for that reason, and again presented a day later. *State v. McNamara*, 100 Mo. 100, 13 S. W. 938.

19. *State v. Berkley*, 109 Mo. 665, 19 S. W. 192.

[a] It is no objection that such indorsement is made by the successor in office of the prosecuting officer originally drawing the indictment. *State v. Berkley*, 109 Mo. 665, 19 S. W. 192.

20. *Germolgez v. State*, 99 Ala. 216, 13 So. 517.

[a] The fact that, after a copy of the indictment was furnished to the defendant, the prosecuting attorney indorsed upon it the names of additional witnesses for the state affects neither the indictment nor the copy furnished the defendant, this indorsement being a mere memorandum of the prosecuting attorney. *Dobson v. State* (Ark.), 17 S. W. 3.

21. Okla. Comp. Laws, 1909, §6691; *Hawkins v. State*, 7 Okla. Crim. 385, 123 Pac. 1024; *Vance v. Ter.*, 3 Okla. Crim. 208, 218, 105 Pac. 307 (after jury impaneled).

[a] When new witnesses are found, (1) or for other good reasons appearing to the court (and it need not state them) it may, at any time, permit the names of such witnesses to be indorsed on the indictment by simply complying with the statute. *Cochran v. State*, 14 Okla. 108, 76 Pac. 672, *affirmed*, 147 Fed. 206, 77 C. C. A. 432. (2) This right seems to be limited to felony cases less than capital, however. *Bigfeather v. State*, 7 Okla. Crim. 364, 123 Pac. 1026, holding that in felony cases less than capital the names of additional witnesses may be indorsed at any time, within the discretion of the court, and this discretion will not be reviewed upon appeal unless the record shows that it was abused. And see *Hawkins v. State*, 7 Okla. Crim. 385, 123 Pac. 1024.

[b] The statute with reference to indorsing the names of additional witnesses upon an indictment or information in misdemeanor cases has no application to felony cases. *Star v. State*, 9 Okla. Crim. 210, 131 Pac. 542.

[c] The trial court, however, should see to it that the right of the prosecution to indorse the names of additional witnesses is not abused, and should grant or refuse leave to indorse, in furtherance of justice. *Cochran v. United States*, 14 Okla. 108, 76 Pac. 672, *affirmed*, 147 Fed. 206, 77 C. C. A. 432.

[d] When such indorsement is to be made, the proper practice is to serve a written notice, containing such names as are to be indorsed, upon the defendant or his counsel. *Colbert v. State*, 4

of the court to allow such indorsement at any time, even after the trial has begun.²² And in any case, the accused cannot complain unless it appears that such indorsement was an abuse of such discretion.²³

(V.) **Sufficiency of Indorsement.**—The statutes do not prescribe who shall make the indorsement, and, so long as it is made by one who represents the state it is sufficient.²⁴ The foreman has discharged his duty when he sees that the proper indorsement is made,²⁵ and whether he writes the names himself, or has it done by the prosecuting attorney or some member of the grand jury other than himself, is a matter of no consequence.²⁶ The purpose of the requirement is notice to the accused,²⁷ and it is as well given when written on one part of the paper upon which the indictment is drawn as on another.²⁸

Okl. Crim. 500, 113 Pac. 558. And see *Vance v. State*, 3 Okla. Crim. 208, 105 Pac. 307.

22. *State v. Dowd*, 39 Kan. 412, 18 Pac. 483; *State v. Teissedre*, 30 Kan. 476, 2 Pac. 650; *State v. Cook*, 30 Kan. 82, 1 Pac. 32; *State v. Lowe*, 6 Kan. App. 110, 50 Pac. 912; *State v. Jones*, 2 Kan. App. 1, 42 Pac. 392.

[a] **Continuance.**—It is also within the discretion of the court to grant or refuse a continuance requested by defendant on account of the indorsing of such names. *State v. Jones*, 2 Kan. App. 1, 42 Pac. 392.

[b] If the accused is surprised at the allowance of permission to indorse the names of additional witnesses, his motion for a continuance should set up the facts constituting his surprise and what evidence, if any, he can produce if the case is continued to rebut the testimony of such additional witnesses. *Star v. State*, 9 Okla. Crim. 210, 131 Pac. 542.

23. **Colo.**—*Boykin v. People*, 22 Colo. 496, 45 Pac. 419, cannot complain where he was not surprised by such indorsement. **Kan.**—*State v. Lowe*, 6 Kan. App. 110, 50 Pac. 912; *State v. Jones*, 2 Kan. App. 1, 42 Pac. 392. **Okla.**—*Hyde v. Ter.*, 8 Okla. 69, 56 Pac. 851 (unless it clearly appears that it was prejudicial to the substantial rights of the defendant); *Colbert v. State*, 4 Okla. Crim. 500, 113 Pac. 558; *Cavett v. Ter.*, 1 Okla. Crim. 493, 503, 98 Pac. 890, 102 Pac. 646.

[a] **Illustrations.**—(1) Permitting the indorsement of additional witnesses on the same day, but prior to the commencement of the trial was not error in *State v. Doyle*, 107 Mo. 36, 17 S. W.

751. (2) Nor did the court abuse its discretion in allowing the indorsement of the name of the complaining witness, who had sworn to the facts stated in the charge, after the jury was impaneled and sworn. *State v. Dowd*, 39 Kan. 412, 18 Pac. 483.

24. *State v. Jones*, 2 Kan. App. 1, 42 Pac. 392.

25. *Bartley v. People*, 156 Ill. 234, 40 N. E. 831.

[a] **Signature of Foreman.**—It is not objectionable that the foreman does not sign the certificate that the "witnesses marked X" were sworn and examined, under a statute curing defects in form. *State v. Long*, 143 N. C. 670, 57 S. E. 349.

26. *Bartley v. People*, 156 Ill. 234, 40 N. E. 831.

[a] The object of the statute is as well accomplished when their names are written by the prosecuting attorney as when they are in the handwriting of the foreman. The indorsement is the act of the foreman, no matter who does the writing. *Bartley v. People*, 156 Ill. 234, 40 N. E. 831.

[b] But the duty of indorsing the names of witnesses upon an indictment is not imposed upon the prosecuting attorney, except as it is made his duty to attend upon the grand jury and prepare indictments. Accordingly, no indorsement by the prosecuting attorney is proper after the indictment is filed. *People v. Hammond*, 132 Mich. 422, 428, 93 N. W. 1084.

27. See *supra*, VIII, A, 8, f, (I).

28. *Scott v. People*, 63 Ill. 508, wherein the names of the witnesses on behalf of the prosecution were indorsed on the indictment, just under the name

The statutes are fully complied with when it appears from the indictment that the witnesses' names are indorsed upon it.²⁹ A misnomer of the witness neither invalidates the indictment,³⁰ nor requires

of the prosecuting attorney. The court said: "The statute has made it the duty of the foreman to note on the indictment the names of the witnesses upon whose evidence the same shall have been found. In this case the statute was strictly pursued, as the names of the witnesses were noted on the indictment. The manner in which they were noted gave notice to the accused as effectually as if they had been written on any other part of the instrument."

29. *Bartley v. People*, 156 Ill. 234, 40 N. E. 831.

[a] A statement, indorsed on an indictment, that it was found on the testimony of several persons, naming them, whose property was not injured, and signed by the prosecuting attorney, though not a literal is a substantial compliance with a statute requiring that the name of the prosecutor shall be indorsed on the indictment, or that the names of the witnesses upon whose testimony it was found, other than the party injured, shall be stated, and that a statement of the fact shall be made at the end of the indictment. *State v. Scott*, 25 Ark. 107.

[b] Where the indorsement set out the names of the witnesses, with a check-mark opposite two of them, the omission of the check-mark in the certificate that "witnesses whose names are marked thus . . . were sworn and examined," is an informality cured by a statute curing defects in form, where there is no evidence that these witnesses were not sworn. *State v. Sultan*, 142 N. C. 569, 54 S. E. 841.

[c] Though the practice is for the clerk to indorse the names of the witnesses to be examined, that the indorsement is not signed by the clerk is not fatal to the indictment. *Bennett v. State*, 2 Yerg. (Tenn.) 472.

30. In *People v. Quinn*, 127 Cal. 542, 59 Pac. 287, the name of the witness G. W. Ogden was held sufficiently indorsed as — Ogden, where the defendant immediately after the indictment knew who was meant by the name as indorsed.

[a] In *People v. Crowey*, 56 Cal. 36, the real name of the witness was Gottlieb Diefenbach, and was indorsed on the indictment F. Diefenbach. It appeared that he gave his name to the grand jury as F. Diefenbach, and it also appeared "that there was probably but one person of the name of Diefenbach in the county of Napa (when the indictment was found), or even in the state." It was held that the lower court did not err in denying a motion to set aside the indictment.

[b] In *State v. Phelps*, 5 S. D. 480, 59 N. W. 471, it was held that where it affirmatively appeared by the record that a defendant was neither surprised, misled, nor prejudiced, a motion to quash an indictment on the ground that the name of a witness called and examined before the grand jury was not indorsed thereon was properly overruled, when the name "Dr. F.," by mistake, was written instead of "M. F.," and the evidence offered by defendant conclusively showed that the witness was a physician, and had for many years been known and addressed as "Dr." or "Doc," and that both he and his counsel clearly understood who was designated by the indorsement.

[c] The fact that a witness whose name appears to be indorsed on the indictment has no real existence does not invalidate the indictment. *State v. McChesney*, 16 Mo. App. 259, 267, reversed on other grounds in 90 Mo. 120, 1 S. W. 841.

[d] **Alteration of Indorsement.**—The fact that the name of a witness for the state, on the back of the indictment, was erased and the word "dead" written opposite the erased name, and that the indictment in this condition was given to the jury, does not constitute reversible error, especially where it does not appear when the erasure was made and the word "dead" written, or that, by the exercise of due diligence, the condition of the indictment could not have been discovered by the defendant or his counsel and the attention of the court called to it during the progress of the trial. *Martin v. State*, 5 Ga. App. 606, 63 S. E. 605.

the exclusion of his testimony, where the defendant is not thereby surprised or prejudiced.³¹

(VI.) **Competency and Calling.** — A treatment of the subjects of the competency of witnesses not indorsed,³² and of compelling the calling of witnesses whose names are indorsed,³³ can be found in another work.

B. **INFORMATION OR ACCUSATION.**³⁴ — 1. **In General.** — Statutes of many states prescribe the form of the information or accusation to be used therein.³⁵ But if there is no statute prescribing the form of the information, it is entirely governed by the common law.³⁶ It is in its structure similar to an indictment.³⁷ It may consist of different counts.³⁸

Where the pleading alleges all the facts necessary to constitute the crime sought to be charged, it is not defective merely because the word "information" is not used in the body of the instrument.³⁹

2. **Caption.** — While it is best for an information to have a correct caption,⁴⁰ yet its absence⁴¹ or errors in it,⁴² are not fatal to the information, since it constitutes no part of it.⁴³

31. 3 ENCY. OF EV. 242.

32. See the title "Competency," 3 ENCY. OF EV. 241, et seq.

33. See the title "Witnessess," 14 ENCY. OF EV. 568.

34. As to formal requisites of the indictment, see *supra*, VIII, A.

As to formal requisites of complaint or information in justice or police courts, see *infra*, VIII, C.

35. Cal.—Penal Code, §951; *People v. Biggins*, 65 Cal. 564, 4 Pac. 570. Colo.—Mills' Ann. St., 1912, §2086. Fla.—Gen. St., 1906, §3881, prescribing beginning of information and verification. Ga.—Smith v. State, 63 Ga. 90, requisites of accusation under early Georgia Code (Code, 1873, §299). Mo. Rev. St., 1909, §5059. Mont.—Rev. Codes, 1907, §9148. Wis.—St., 1898, §4657.

And see generally the statutes of the several states.

36. *King v. State*, 17 Fla. 183; *State v. Severine*, 2 S. D. 238, 49 N. W. 1056.

37. *King v. State*, 17 Fla. 183.

[a] "It is in its structure similar to an indictment, omitting the formal commencement and conclusion, and is not presented to the court upon the oath of the grand jury, but the facts are suggested to the court by the authorized officer on the part of the state, and may be filed without application to or leave of the court." *King v. State*, 17 Fla. 183.

[b] An information presented at the

request of the grand jury, and indorsed "A true bill" by the foreman, does not thereby become an indictment. *Texas, etc. R. Co. v. State*, 41 Ark. 488.

38. *Knox v. State*, 164 Ind. 226, 73 N. E. 255, 108 Am. St. Rep. 291. And see *Diehl v. State*, 157 Ind. 549, 62 N. E. 51.

39. *People v. Baker*, 100 Cal. 188, 34 Pac. 649, 38 Am. St. Rep. 276.

40. *Cox v. State*, 3 Okla. Crim. 129, 104 Pac. 1074, 105 Pac. 369.

[a] It is placed on an information for convenience and for the purpose of ready identification. *Caples v. State*, 3 Okla. Crim. 72, 104 Pac. 493, 26 L. R. A. (N. S.) 1033.

41. *Cox v. State*, 3 Okla. Crim. 129, 104 Pac. 1074, 105 Pac. 369.

42. *Cox v. State*, 3 Okla. Crim. 129, 104 Pac. 1074, 105 Pac. 369; *Caples v. State*, 3 Okla. Crim. 72, 104 Pac. 493, 26 L. R. A. (N. S.) 1033 (omission of word "the" before words "State of Oklahoma" not fatal).

[a] Surplusage may be rejected. *State v. Smouse*, 49 Iowa 634.

43. *Cox v. State*, 3 Okla. Crim. 129, 104 Pac. 1094, 105 Pac. 369; *Caples v. State*, 3 Okla. Crim. 72, 104 Pac. 493, 26 L. R. A. (N. S.) 1033.

[a] It is surplusage, pure and simple, and neither adds to nor takes from the charge. *Cox v. State*, 3 Okla. Crim. 129, 104 Pac. 1074, 105 Pac. 369; *Caples v. State*, 3 Okla. Crim. 72, 104 Pac. 493, 26 L. R. A. (N. S.) 1033.

Like the caption to an indictment,⁴¹ it states the venue,⁴² the title of the action,⁴³ and the title of the court in which the information is filed, including the time and place where it is held.⁴⁷

Nature of Offense.—The nature of the crime charged in the information need not be designated in the caption; if designated, such designation is immaterial and purposeless,⁴⁸ and the facts stated in the body of the pleading must determine the crime of which the defendant stands charged and for which he must be tried.⁴⁹

44. See *supra*, VIII, A, 3, c.

45. See *State v. Taylor*, 167 Mo. App. 104, 150 S. W. 1126, holding that "it is not necessary to state any venue in the body of any indictment or information; but the county or other jurisdiction named in the margin thereof shall be taken to be the venue for all the facts stated in the body of the same."

46. See *Rivers v. State*, 144 Ind. 16, 42 N. E. 1021 (holding an irregularity in failing to give title of cause not fatal under a statute providing that no information shall be set aside for any defect which does not tend to prejudice defendant's substantial rights upon the merits); *Malone v. State*, 14 Ind. 219 (holding defect in title not ground of quashal).

47. A statement of the title of the court (1) to which the information is presented is sufficient, without naming the county (*State v. Mathis*, 21 Ind. 277), (2) the omission being a technical error or defect which does not affect the substantial rights of the defendant, where it otherwise appears, and therefore, to be disregarded by the court. *People v. Biggins*, 65 Cal. 564, 4 Pac. 570.

[a] That the information recites that it is presented in the "count court" instead of "county court" does not render it invalid, this being clearly a typographical error, and there being but one court, the "county court," in which an information can be filed. *Whitley v. State* (Tex. Crim.), 56 S. W. 69.

[b] That the court is described as a superior court of the "state" when it is a superior court of the "county" is not fatal on motion in arrest of judgment. *State v. Costello*, 29 Wash. 366, 69 Pac. 1099.

[c] An entire omission to state the name of the court is not fatal, under a statute providing that no information

(shall be set aside for mistake in the name of the court, or any other defect which does not tend to prejudice defendant's substantial rights upon the merits. *Rivers v. State*, 144 Ind. 16, 42 N. E. 1021. And see *State v. Butler*, 26 N. D. 231, 144 N. W. 238; *State v. Brennan*, 2 S. D. 384, 50 N. W. 625.

[d] A misstatement of the term of court (1) does not vitiate the information, where the information shows its presentation in the proper court (*Smith v. State*, 51 Tex. Crim. 645, 104 S. W. 899). (2) Nor does it constitute ground for reversing a judgment of conviction, where the record proper shows that the information was filed in open court, during a term thereof. *Williams v. State*, 42 Fla. 205, 27 So. 898.

[e] **Place Where Held.**—The omission of the name of the place in the county where the court in which the information is filed, there being more than one place for the holding of such court, does not invalidate the information, nor operate to the prejudice of the defendants. *State v. Bland*, 91 Kan. 160, 136 Pac. 947.

[f] **In Texas**, "one of the statutory requisites of an information is 'that it shall appear to have been presented in a court having jurisdiction of the offense set forth.' Code Crim. Proc., art. 430, subdiv. 2. . . . This requisite, like all others, must be made to appear by direct affirmative allegation." *Bowen v. State*, 28 Tex. App. 498, 13 S. W. 787, holding information wherein it does not appear, except inferentially, in what court the same was presented, or that it was presented in any court, defective.

48. *United States v. Lim San*, 17 Phil. Isl. 273, 278.

49. *State v. Wyatt*, 76 Iowa 328, 41 N. W. 31; *United States v. Lim San*, 17 Phil. Isl. 273, 278.

[a] The designation of the crime by name in the caption of the information

3. Showing Presentment by Prosecuting Officer.—The information must show, with sufficient certainty, that it is presented by the prosecuting officer, as informant.⁵⁰ But it is not required that the name of the prosecuting officer be given in the body of the instrument,⁵¹ and a typographical error in the statement thereof does not

from the facts alleged in the body of that pleading is a conclusion of law. *United States v. Lim San*, 17 Phil. Isl. 273, 279.

[b] **Usurpation of Judicial Function.**—The designation by the prosecuting officer of the crime in the information by its technical name is a usurpation of the powers of the court and, if binding, would be in effect an adjudication by him of the crime of which the accused must be convicted, if he were to be convicted of any offense. *United States v. Lim San*, 17 Phil. Isl. 273.

50. *Adams v. State*, 47 Tex. Crim. 35, 81 S. W. 963; *Arbuthnot v. State*, 38 Tex. Crim. 509, 34 S. W. 269, 43 S. W. 1024; *Johnson v. State*, 17 Tex. App. 230; *Thompson v. State*, 15 Tex. App. 39; *Prophit v. State*, 12 Tex. App. 233.

As to who may present, see *supra*, II.

[a] The language of the information on this subject was sufficient in *Arbuthnot v. State*, 38 Tex. Crim. 509, 34 S. W. 269, 43 S. W. 1024.

[b] That the word "affiant" (1) is used where the words "prosecuting attorney" should be employed is not objectionable on motion in arrest, where the whole information taken together clearly and unmistakably shows that the charge was preferred by the proper officer. *Billings v. State*, 107 Ind. 54, 6 N. E. 914, 7 N. E. 763, 57 Am. Rep. 77. (2) Nor does it constitute a valid objection where made for the first time on an assignment of error questioning the jurisdiction of the court. *Sturm v. State*, 74 Ind. 278. (3) It would seem that a motion to quash based upon such ground should be sustained, however. See *Sturm v. State*, 74 Ind. 278.

[c] Where the commencement of the first count showed that the prosecuting officer made the charge, as informant, the fact that the second count recited that B. who was the prosecuting witness, "further swears" did not necessarily mean that the information was not the official statement of the prosecuting attorney, so as to render it subject to a motion to quash. Objec-

tion, at most, amounted to mere informality, in no way prejudicing substantial rights of defendant upon the merits. *Fisher v. State*, 2 Ind. App. 365, 28 N. E. 565.

[d] **Georgia.**—(1) An accusation, which corresponds to the information, may declare that "the state of Georgia charges," etc., and need not employ the formula that "the prosecutor, in the name and behalf of the citizens of Georgia, charges," etc. *Dickson v. State*, 62 Ga. 583. (2) But the use of the latter formula instead of the former does not subject the accusation to demurrer. *Mitchell v. State*, 126 Ga. 84, 54 S. E. 931.

51. *Mimms v. State*, 46 Tex. Crim. 339, 81 S. W. 965; *Williams v. State*, 44 Tex. Crim. 235, 70 S. W. 213; *State v. Pratt*, 54 Vt. 484.

[a] All that is required is, (1) that it shall sufficiently appear that the prosecution is by the prosecuting officer of the county. *State v. Pratt*, 54 Vt. 484. (2) It is immaterial whether the name of the solicitor or the name of the maker of the affidavit, upon which the accusation is founded, is formally employed to designate the accuser, who in the name and behalf of the citizens of the state of venue charges the accused with the offense set out in the accusation. Either form may be adopted. *Flanders v. State*, 9 Ga. App. 820, 72 S. E. 286.

[b] Failure of the prosecuting attorney to write his full name in body of information does not mislead the defendant or prejudice his rights upon the merits. *State v. Brock*, 186 Mo. 457, 85 S. W. 595, 105 Am. St. Rep. 625, where he used initial of his Christian name.

[c] Where the name of the prosecuting officer is given in the beginning of an information containing more than one count, the failure to give the name of such officer in the beginning of the second and third counts is not a substantial objection. *State v. Looker*, 54 Kan. 227, 38 Pac. 288.

render the information fatally defective.⁵² It is not necessary that the prosecuting officer in presenting an information shall allege his title to the office,⁵³ and his compliance with all the prerequisites to his right to perform its duties.⁵⁴ Nor is it necessary for him to state that he informs under his "oath" of office.⁵⁵

4. Showing Authority by Which Prosecuted.—The caption or commencement should show the authority by which the case is prosecuted,⁵⁶ by express provision of statute in one state.⁵⁷ But it is not essential, by the weight of authority, that it contain a recital in terms that the prosecution is in the name and by the authority of the state, it being sufficient if the record shows such fact.⁵⁸

52. *Mimms v. State*, 46 Tex. Crim. 339, 81 S. W. 965 (wherein old blank in which name of B, as county attorney, was inadvertently used instead of C, then county attorney, and whose signature appeared thereto); *Adams v. State*, 47 Tex. Crim. 35, 81 S. W. 963 (similar to *Mimms v. State*, *supra*).

[a] Where the information in its first count recited that it was presented by the county attorney, the omission of the word "attorney" in such recital, in the second count was not fatal. *Caskey v. State* (Tex. Crim.), 50 S. W. 703.

53. *State v. Ballance*, 207 Mo. 607, 616, 106 S. W. 60.

54. *State v. Ballance*, 207 Mo. 607, 616, 106 S. W. 60.

[a] Where the prosecuting attorney alleged "that upon his own knowledge, information and belief and under his oath of office as such prosecuting attorney now here informs the court," this was sufficient. *State v. Ballance*, 207 Mo. 607, 616, 106 S. W. 60.

55. *State v. Webster*, 206 Mo. 558, 570, 105 S. W. 705; *State v. Platner*, 196 Mo. 128, 93 S. W. 403; *State v. Sickles*, *Brayt.* (Vt.) 132.

[a] Where an information is duly sworn in an affidavit by the prosecuting attorney, who takes oath that he is the prosecuting attorney and that the information is true, it is sufficient without reciting that the averments were made on the oath of the prosecuting attorney. *State v. Pepoon*, 62 Wash. 635, 114 Pac. 449.

56. Fla.—*State v. Gleason*, 12 Fla. 190. Ill.—*Gould v. People*, 89 Ill. 216; *Parris v. People*, 76 Ill. 274; *People v. Martin*, 180 Ill. App. 578, following cases cited *supra*. N. D.—*State v. Hazledahl*, 2 N. D. 521, 52 N. W. 315, 16 L.

R. A. 150. Wyo.—*Vines v. State*, 19 Wyo. 255, 116 Pac. 1013.

[a] "The omission to state, either directly in the information or indirectly by means of entitling it in an action, that the prosecution of the case is carried on in the name of the state and by its authority, is nothing less than a plain violation of the explicit mandate of the state constitution," which requires that all prosecutions shall be carried on in the name and by the authority of the state. *State v. Hazledahl*, 2 N. D. 521, 52 N. W. 315, 16 L. R. A. 150.

[b] **Several Counts.**—The averment of authority need not be repeated at length in subsequent counts, but may be referred to as "in the name and by the authority aforesaid." *Vines v. State*, 19 Wyo. 255, 116 Pac. 1013. And see *Chase v. State*, 50 Wis. 510, 7 N. W. 376.

[c] Where it is alleged in the caption of an information that the prosecution is in the name and by the authority of the state of W, and the authority is averred in a second and in subsequent counts as in "the name and by the authority aforesaid," the dismissal of the first count does not render the subsequent counts insufficient for failing to allege that the prosecution was in the name and by the authority of the state. *Vines v. State*, 19 Wyo. 255, 116 Pac. 1013.

57. Tex. Code Crim. Proc., art. 466 (information must commence "in the name and by the authority of the state"); *Treadaway v. State*, 61 Tex. Crim. 546, 135 S. W. 147; *Saine v. State*, 14 Tex. App. 144.

58. Ind.—*Snodgrass v. State*, 13 Ind. 292. Mont.—*State v. Barry*, 45 Mont. 582, 124 Pac. 774. Okla.—*Gragg v. State*, 3 Okla. Crim. 409, 106 Pac. 350;

5. Showing Jurisdictional Prerequisites.—The existence of the facts or conditions which the statutes enumerate as prerequisites to the right to prosecute by information need not be set forth in the information itself,⁵⁹ by express provision of statute in some states.⁶⁰ Accordingly, though it may be the better practice to state that the information is based upon the affidavit or complaint of some person,⁶¹

Caples v. State, 3 Okla. Crim. 72, 104 Pac. 493, 26 L. R. A. (N. S.) 1033 (wherein the court in reviewing the authorities suggests that, as a matter of good pleading, it would be well for indictments and informations to begin with these words); *Arie v. State*, 1 Okla. Crim. 666, 100 Pac. 23, 33. S. D. *State v. Carlisle*, 30 S. D. 475, 490, 139 N. W. 127.

[a] It is sufficient when the caption entitles the case as the State of Venue against the defendants, naming them. *State v. Devine*, 6 Wash. 587, 34 Pac. 154. And see *State v. Bednar*, 18 N. D. 484, 121 N. W. 614, 20 Am. & Eng. Ann. Cas. 458, following *State v. Kerr*, 3 N. D. 523, 58 N. W. 27. See also *Alderman v. State*, 24 Neb. 97, 38 N. W. 36, wherein the caption of the information was: "The State of Nebraska," and the prosecution was conducted in the name of the state of Nebraska; this was held to be sufficient compliance with the constitutional requirement that "all prosecutions shall be conducted in the name of the state of Nebraska."

[b] It is not objectionable that the information runs in the name of the county as well as the state; the name of the county is mere surplusage. *State v. Murphy*, 49 Mo. App. 270.

[c] In Texas, however, it is imperative that there be a recital in exact conformity to the constitutional and statutory provision. *Saine v. State*, 14 Tex. App. 144, holding commencement "In the name and by the authority of the state," omitting the words "of Texas," fatally defective.

[d] There is a difference between the constitutional requirement and the statutory requirement in that the statute requires the word "the" before the word "authority." The information is sufficient, however, although the word "the" be omitted, since it conforms to the constitutional requirement. *Monroe v. State*, 56 Tex. Crim. 441, 120 S. W. 479.

59. *State v. Melvern*, 32 Wash. 7, 72 Pac. 489; *State v. Boyce*, 24 Wash. 514, 64 Pac. 719; *State v. Rosener*, 8 Wash. 42, 35 Pac. 357; *State v. Munson*, 7 Wash. 239, 34 Pac. 932. And see generally the cases throughout this section.

60. Thus, in Indiana, the statute provides that it shall not be necessary in an information or an affidavit, which by the later statutes has been substituted for the information, to state the reason why the proceeding is by information or affidavit instead of indictment. *Burns' Ann. St. (Ind.)* 1914, §2042; *State v. Duggins*, 146 Ind. 427, 45 N. E. 603; *Wright v. State*, 144 Ind. 210, 43 N. E. 10; *Hobbs v. State*, 133 Ind. 404, 32 N. E. 1019, 18 L. R. A. 774; *Nichols v. State*, 127 Ind. 406, 26 N. E. 839; *Elder v. State*, 96 Ind. 162; *Powers v. State*, 87 Ind. 97; *Hodge v. State*, 85 Ind. 561; *State v. Frain*, 82 Ind. 532; *Blake v. State*, 18 Ind. App. 280, 47 N. E. 942.

[a] Formerly, the rule was otherwise in Indiana, however. See the following cases: *Iter v. State*, 74 Ind. 188; *State v. Henderson*, 74 Ind. 23; *Burroughs v. State*, 72 Ind. 334; *Lindsey v. State*, 72 Ind. 39; *Davis v. State*, 69 Ind. 130; *Cobb v. State*, 27 Ind. 133; *Walker v. State*, 23 Ind. 61; *Broadhurst v. State*, 21 Ind. 333; *Brown v. State*, 20 Ind. 221; *Bailow v. State*, 20 Ind. 220; *Welch v. State*, 19 Ind. 450; *Roberts v. State*, 19 Ind. 180; *Wilson v. State*, 19 Ind. 179; *Hartman v. State*, 18 Ind. 153, 81 Am. Dec. 351; *Kreigh v. State*, 17 Ind. 495; *Justice v. State*, 17 Ind. 56; *McCarty v. State*, 16 Ind. 310.

61. *Mitchell v. State*, 126 Ga. 84, 54 S. E. 931.

[a] But where it appears on the face of the record that an affidavit was made by a named person, and immediately following it, the same person, as prosecutor, charged and accused the defendant with the offense described in the affidavit, the accusation was not demurrable because it did not in express terms state that it was based on the

no allegation of that fact is necessary.⁶² Nor need it state that it is made by a "credible resident of the county."⁶³ Nor must the information show on its face that it was filed by leave of court,⁶⁴ or that it was filed when the court was in session,⁶⁵ or that the grand jury was not in session.⁶⁶

Preliminary Examination.—Since the want of a preliminary examination is matter in defense or abatement,⁶⁷ it is not necessary, according to the great weight of authority, that the information should set forth the fact of a preliminary examination having been held,⁶⁸ or a waiver

affidavit. *Mitchell v. State*, 126 Ga. 84, 54 S. E. 931.

62. **U. S.**—United States *v. Moller*, 16 Blatchf. 65, 26 Fed. Cas. No. 15,794, need not show that a preliminary complaint has been made. *Ind. Stifel v. State*, 163 Ind. 628, 72 N. E. 600; *Blake v. State*, 18 Ind. App. 280, 47 N. E. 942 (not necessary to state that affidavit was made by a competent and reputable person). **Ohio.**—Weisbrodt *v. State*, 50 Ohio St. 192, 33 N. E. 603. **Tex.**—Murphy *v. State* (Tex. Crim.), 164 S. W. 1; *Sandoloski v. State* (Tex. Crim.), 143 S. W. 151; *Johnson v. State*, 17 Tex. App. 231; *Warren v. State*, 17 Tex. App. 209 (if made, it may be treated as surplusage).

[a] But see *State v. Schnettler*, 181 Mo. 173, 185, 79 S. W. 1123 (wherein the court said: "When an information is supported by the affidavit of some person competent to testify in the case, the statute requires that the affidavit shall be filed with the information, and it is made the duty of the prosecuting attorney to file an information, as soon as practicable upon said affidavit. . . . If, as the statute says, it shall be the duty of the prosecuting attorney to file an information upon the affidavit, and then file the affidavit with the information, the latter should show upon its face, when such is the case, that it is predicated upon the affidavit filed with it; otherwise how is the defendant to know who his accusers are, the prosecuting attorney, or some other person? The very object of the statute in requiring the prosecuting attorney to file an information upon the affidavit, and to file it with the information, was to avoid this difficulty, by predicated the information upon the affidavit and showing upon its face that such is the case"); *State v. McCoy*, 140 Mo. App. 395, 124 S. W. 78.

[b] Where such an averment is

made, the fact that it describes the affidavit as that of H and another, whereas it was that of H alone, is not fatal. *State v. Moore*, 67 Mo. App. 320.

63. *Weir v. Allen*, 47 Iowa 482, not jurisdictional.

64. *State v. De Serrant*, 33 La. Ann. 979 (sufficient that minutes of court shows such fact); *State v. Spotted Hawk*, 22 Mont. 33, 43, 55 Pac. 1026.

65. *State v. Duggins*, 146 Ind. 427, 45 N. E. 603.

66. *State v. Duggins*, 146 Ind. 427, 45 N. E. 603; *Wright v. State*, 144 Ind. 210, 43 N. E. 10; *State v. Lewis*, 31 Wash. 515, 72 Pac. 121; *State v. Boyce*, 24 Wash. 514, 64 Pac. 719; *State v. Anderson*, 5 Wash. 350, 31 Pac. 969.

67. **Colo.**—*Brown v. People*, 20 Colo. 161, 36 Pac. 1040. **Del.**—*State v. Moore*, 2 Penne. 299, 46 Atl. 669. **Mich.**—*Washburn v. People*, 10 Mich. 372, 382. **Okla.**—*McDaniel v. State*, 8 Okla. Crim. 209, 132 Pac. 358; *Hughes v. State*, 7 Okla. Crim. 117, 122 Pac. 554; *Williams v. State*, 6 Okla. Crim. 373, 118 Pac. 1006; *Blair v. State*, 4 Okla. Crim. 359, 111 Pac. 1003; *Wood v. State*, 3 Okla. Crim. 553, 107 Pac. 937; *Caples v. State*, 3 Okla. Crim. 72, 104 Pac. 493, 26 L. R. A. (N. S.) 1033, following *Canard v. State*, 2 Okla. Crim. 505, 103 Pac. 737, 881, 139 Am. St. Rep. 949. **Wis.**—*Peterson v. State*, 45 Wis. 535.

And see generally the title "Preliminary Examination."

68. **U. S.**—United States *v. Moller*, 16 Blatchf. 65, 26 Fed. Cas. No. 15,794. **Cal.**—*People v. Shubrick*, 57 Cal. 565. **Colo.**—*Brown v. People*, 20 Colo. 161, 36 Pac. 1040. **Del.**—*State v. Moore*, 2 Penne. 299, 46 Atl. 669. **Idaho.**—*State v. Farris*, 5 Idaho 666, 51 Pac. 772. **Kan.**—*State v. Geer*, 48 Kan. 752, 30 Pac. 236; *State v. Finley*, 6 Kan. 366; *State v. Barnett*, 3 Kan. 250, 87 Am. Dec. 471. **Mich.**—*Washburn v. People*, 10 Mich. 372, 384, in cases where the

thereof by the defendant,⁶⁹ although such facts must exist in order to authorize its filing.⁷⁰ But it would be better practice to aver the same,⁷¹ or a waiver thereof,⁷² and as indicated, it has been held that such must be done.⁷³

6. **Conclusion.** — a. *Necessity for.* — At common law an information was required to conclude as an indictment.⁷⁴ But now, in the absence of a statute expressly requiring it, the information need not conclude either "against the peace and dignity of the state,"⁷⁵ or "contrary to

defendant is not a fugitive from justice. **Mo.**—*State v. Green*, 229 Mo. 642, 129 S. W. 700; *State v. Heath*, 221 Mo. 565, 121 S. W. 149; *Buckley v. Hall*, 215 Mo. 93, 99, 114 S. W. 954; *State v. McKee*, 212 Mo. 138, 110 S. W. 729; *State v. Jeffries*, 210 Mo. 302, 319, 109 S. W. 614; *Ex parte McLaughlin*, 210 Mo. 657, 109 S. W. 626. **Okla.**—*McDaniel v. State*, 8 Okla. Crim. 209, 127 Pac. 358; *Hughes v. State*, 7 Okla. Crim. 117, 122 Pac. 554; *Williams v. State*, 6 Okla. Crim. 373, 118 Pac. 1006; *Davis v. State*, 4 Okla. Crim. 508, 113 Pac. 220; *Blair v. State*, 4 Okla. Crim. 359, 111 Pac. 1003; *Wood v. State*, 3 Okla. Crim. 553, 107 PPac. 937; *Caples v. State*, 3 Okla. Crim. 72, 104 Pac. 493, 26 L. R. A. (N. S.) 1033, *following* *Canard v. State*, 2 Okla. Crim. 505, 103 Pac. 737, 881, 139 Am. St. Rep. 949, reviewing authorities. **Wash.**—*State v. Lewis*, 31 Wash. 515, 72 Pac. 121; *State v. Boyce*, 24 Wash. 514, 64 Pac. 719; *State v. Anderson*, 5 Wash. 350, 31 Pac. 969. **Wis.**—*Peterson v. State*, 45 Wis. 535.

[a] The leading case in this line of authorities is *Washburn v. People*, 10 Mich. 372.

[b] **Presumption.**—When an information is filed by the prosecuting officer, the presumption of law is that it is legal; that the defendant has had his preliminary examination or waived the same. *Blair v. State*, 4 Okla. Crim. 359, 111 Pac. 1003; *Canard v. State*, 2 Okla. Crim. 505, 103 Pac. 737, 881, 139 Am. St. Rep. 949.

[c] **Surplusage.**—Such allegation, where made, is wholly foreign and irrelevant to the information, and will be treated as surplusage. *Davis v. State*, 4 Okla. Crim. 508, 113 Pac. 220; *Blair v. State*, 4 Okla. Crim. 359, 111 Pac. 1003.

69. **Kan.**—*State v. Geer*, 48 Kan. 752, 30 Pac. 236; *State v. Finley*, 6 Kan. 366; *State v. Barnett*, 3 Kan. 250,

87 Am. Dec. 471. **Mich.**—*Washburn v. People*, 10 Mich. 372, 384. **Okla.**—*Davis v. State*, 4 Okla. Crim. 508, 113 Pac. 220; *Caples v. State*, 3 Okla. Crim. 72, 104 Pac. 493, 26 L. R. A. (N. S.) 1033; *Canard v. State*, 2 Okla. Crim. 505, 103 Pac. 737, 881, 139 Am. St. Rep. 949. **Wash.**—*State v. Anderson*, 5 Wash. 350, 31 Pac. 969.

70. *Davis v. State*, 4 Okla. Crim. 508, 113 Pac. 220; *Canard v. State*, 2 Okla. Crim. 505, 103 Pac. 737, 881, 139 Am. St. Rep. 949.

As to necessity for preliminary examination as prerequisite to filing an information, see *supra*, IV, B, 1, b.

71. *State v. Farris*, 5 Idaho 666, 51 Pac. 772.

72. *State v. Farris*, 5 Idaho 666, 51 Pac. 772.

73. *McCarty v. State*, 16 Ind. 310. But the rule is now changed in Indiana by express provision of statute. See *supra*, this section.

[a] In **Utah**, by express provision of statute, the information must recite the fact of the commitment or binding over of the defendant by a magistrate. Comp. Laws, 1907, §4695; *State v. Sheffield*, 146 Pac. 306.

74. *State v. Ulrich*, 96 Mo. App. 689, 70 S. W. 933; 2 Chit. Cr. Law 6.

As to conclusion of an indictment, see *supra*, VIII, A, 6.

75. **Ala.**—*Simpson v. State*, 111 Ala. 6, 20 So. 572; *Thomas v. State*, 107 Ala. 61, 17 So. 941. **Neb.**—*Bolln v. State*, 51 Neb. 581, 71 N. W. 444. **S. D.** *State v. Carlisle*, 30 S. D. 475, 489, 139 N. W. 127; *State v. Hellekson*, 13 S. D. 242, 83 N. W. 254. **Wis.**—*Murphy v. State*, 108 Wis. 111, 83 N. W. 1112; *Nichols v. State*, 35 Wis. 308.

[a] Although the statute form of an information concludes with the formula under consideration, its use is not indispensable to the validity of the information. *Nichols v. State*, 35 Wis. 308.

the form of the statute."⁷⁶ Constitutional or statutory provisions, however, sometimes require that the information conclude, "contra formam statuti,"⁷⁷ and "against the peace and dignity of the state."⁷⁸ A misplacement of either phrase would be a defect in or imperfection in form, which could not tend to the prejudice of the substantial rights of the defendant upon the merits, and should not affect the sufficiency of the information.⁷⁹

Special conclusions are sometimes required in informations charging particular offenses,⁸⁰ as for example murder.⁸¹

Several Counts.—Each count in an information need not conclude with the formal conclusion,⁸² though upon this proposition there is, as in the case of the indictment, authority to the contrary.⁸³ The

76. *People v. Arms*, 165 Ill. App. 394; *People v. Moore*, 161 Ill. App. 56.

[a] **Omission Cured by Statute.**—The information is not invalidated by its omission by express provision of statute in some states. *Snodgrass v. State*, 13 Ind. 292; *Edwards v. People*, 39 Mich. 760.

77. See the statutes, and *People v. Fowler*, 88 Cal. 136, 25 Pac. 1110; *People v. Biggins*, 65 Cal. 564, 4 Pac. 570.

78. **Cal.**—*People v. Biggins*, 65 Cal. 564, 4 Pac. 570. **Ill.**—*Gould v. People*, 89 Ill. 216; *Parris v. People*, 76 Ill. 274; *People v. Martin*, 180 Ill. App. 578. **La.**—*State v. Hinton*, 49 La. Ann. 1354, 22 So. 617. **Mo.**—*State v. Howard*, 242 Mo. 432, 147 S. W. 95. **N. H.** *Const.*, Pt. II, art. 87. **Tex.**—*Code Crim. Proc.*, art. 466; *Wilson v. State*, 38 Tex. 548, 553; *Treadaway v. State*, 61 Tex. Crim. 546, 135 S. W. 147; *Wright v. State*, 37 Tex. Crim. 3, 35 S. W. 150, 38 S. W. 811; *Wood v. State*, 27 Tex. App. 538, 11 S. W. 525; *Alexander v. State*, 27 Tex. App. 533, 11 S. W. 628; *Thompson v. State*, 15 Tex. App. 39.

And see generally the statutes.

[a] **Under a constitutional requirement** that all prosecutions shall conclude against the peace and dignity of the state, the information must so conclude. *Parris v. People*, 76 Ill. 274, *followed in Gould v. People*, 89 Ill. 216; *People v. Martin*, 180 Ill. App. 578; *Wright v. State*, 37 Tex. Crim. 3, 35 S. W. 150, 38 S. W. 811. *Compare Nichols v. State*, 35 Wis. 308, holding that a constitutional provision that "all indictments shall conclude against the peace and dignity of the state," did not apply to an information.

[b] The omission from an information, otherwise sufficient, of this concluding phrase goes to matter of form, and in no degree impairs the jurisdiction of the court (*Chemgas v. Tynan*, 51 Colo. 35, 116 Pac. 1045), though the information is faulty because of this omission. *Chemgas v. Tynan*, 51 Colo. 35, 116 Pac. 1045.

79. *State v. Carlisle*, 30 S. D. 475, 489, 139 N. W. 127, wherein it was urged that the information was defective, for the reason that the phrase "against the peace and dignity of the state of South Dakota" occurs in the body and not at conclusion of information.

[a] **Misplacement.**—Though the concluding words of the information are inserted before instead of after a charge of prior conviction, such misplacement, being a mere matter of form, is immaterial. *People v. Fowler*, 88 Cal. 136, 25 Pac. 1110.

80. See the particular title.

81. See the title "**Homicide.**"

82. **La.**—*State v. Scott*, 48 La. Ann. 293, 19 So. 141. **Neb.**—*Bolln v. State*, 51 Neb. 581, 71 N. W. 444. **Tex.**—*Mercer v. State*, 52 Tex. Crim. 321, 106 S. W. 365; *Stebbins v. State*, 31 Tex. Crim. 294, 20 S. W. 552; *Alexander v. State*, 27 Tex. App. 533, 11 S. W. 628. **Wis.**—*State v. Tall*, 56 Wis. 577, 14 N. W. 596.

[a] The closing of the information "contrary to the form of the statute," etc., applies to each count. *State v. Scott*, 48 La. Ann. 293, 19 So. 141.

83. *State v. Howard*, 242 Mo. 432, 147 S. W. 95; *State v. Ulrich*, 96 Mo. App. 689, 70 S. W. 933.

[a] In *State v. Howard*, 242 Mo. 432, 147 S. W. 95, the court said: "The

conclusion of the information is not limited to the last sentence of each count preceding such concluding words, but applies to all which precedes it.⁸⁴

b. *Sufficiency of.*—It is sufficient if the conclusion, “contra pacem,” is in substantial conformity with the constitutional or statutory requirement.⁸⁵

If there be but one statute prohibiting the offense and prescribing the punishment, the information properly concludes in the singular, “against the form of the statute.”⁸⁶ If an information conclude contra formam statuti, and the offense charged is not within any statute,

constitutional formula is not required at the close of each part of an information, even though such part may charge all the elements of some offense for which the state might have proceeded. It is required only at the end of the entire information or at the end of each separate count, which is the same thing.”

[b] *The reasoning of the court in State v. Ulrich*, 96 Mo. App. 689, 70 S. W. 933, was as follows: “Since each count in an indictment must conclude as required by the constitution or else be fatally defective, and since if there are two or more counts in an indictment and the last one concludes properly but the others do not, the conclusion in the last will not help or supply the omission in the others, and since a criminal information, by reason of the constitutional provision previously referred to, is that at common law and since by the common law such an information is required to contain all the essentials required in an indictment, it must logically and necessarily follow that each count therein must conclude as an indictment, and that the omission of any count therein to so conclude will not be helped or supplied by the last which does so conclude. Applying this rule to the information in the present case, and it is clear that the count to which the defendant entered his plea of guilty is insufficient and will not support the judgment.”

As to necessity for conclusion to each count of an indictment, see *supra*, VIII, A, 6, e.

84. *People v. Biggins*, 65 Cal. 564, 4 Pac. 570 (wherein such contention is characterized as hypercritical); *State v. Stickney*, 29 Mont. 523, 75 Pac. 201.

85. See *Holt v. People*, 23 Colo. 1, 7, 45 Pac. 374.

[a] An information concluding “against the peace and dignity of the same people of the state of Colorado,” is a substantial conformity with the requirement that all prosecutions shall conclude “against the peace and dignity of the same.” The word “same” means “the people of the state of Colorado,” and these words are mere surplusage and may be disregarded. *Holt v. People*, 23 Colo. 1, 7, 45 Pac. 374.

[b] *Clerical Errors.*—In *State v. Calvin*, 160 Mo. App. 723, 142 S. W. 470, it was contended that the information was insufficient because it concluded “against the peace and oignity of the state” instead of “against the peace and dignity of the state.” It was found, however, on inspection that the information had been prepared on a typewriter which was badly worn, and the outline of the letters was not clear. It appeared, however, that the stem of the letter “d” was very dim, but the court found the letter “d” to have been used instead of the letter “o” as contended, and held the information not fatally defective on this account.

[c] *The omission of the article “the”* from before the word “state” is a fatal defect. *State v. Skillman*, 209 Mo. 408, 107 S. W. 1071; *Thompson v. State*, 15 Tex. App. 39, s. c., 15 Tex. App. 168. Compare *State v. Hellekson*, 13 S. D. 242, 83 N. W. 254, holding omission of the article “the” from before the word “peace” not fatal, as such formal clause is wholly unnecessary.

86. *State v. Agudo*, 5 La. Ann. 185. But see *Com. v. Hooper*, 5 Pick. (Mass.) 42, holding information founded upon single statute not vitiated by conclusion in plural.

these words may be rejected as surplusage.⁸⁷

7. Signature.—*a. In General.*—The statutes of several states require that the information be signed or subscribed by the prosecuting attorney,⁸⁸ and the failure to so sign or subscribe is fatal in most,⁸⁹ but not all states.⁹⁰ It is not necessary that the different counts of an information should all be signed by the prosecuting officer, however.⁹¹

b. Time of Signing.—The requirement of the statute is not answered where a paper purporting to be a blank information has been signed by the prosecuting officer before the commission of the offense, afterwards therein attempted to be charged.⁹² Where the signature

87. *Southworth v. State*, 5 Conn. 325; *Knowles v. State*, 3 Day (Conn.) 103; *State v. Ball*, 27 Mo. 324.

88. *Cal.*—*People v. Ebanks*, 117 Cal. 652, 49 Pac. 1049, 40 L. R. A. 269. *Colo.*—*Almond v. People*, 55 Colo. 425, 135 Pac. 783; *White v. People*, 8 Colo. App. 289, 45 Pac. 539. *Fla.*—Gen. St., 1906, §3893. *Ga.*—Written accusation corresponding to information required to be signed by the prosecuting officer. *Mitchell v. State*, 126 Ga. 84, 54 S. E. 931; *Brown v. State*, 109 Ga. 570, 34 S. E. 1031; *Williams v. State*, 107 Ga. 693, 33 S. E. 641; *Cooper v. State*, 63 Ga. 515; *Dickson v. State*, 62 Ga. 583, 589; *Flanders v. State*, 9 Ga. App. 820, 72 S. E. 286. *Idaho.*—Rev. Codes, 1908, §7656. *Kan.*—Gen. St., 1909, §6641; *State v. Brown*, 63 Kan. 262, 65 Pac. 213; *State v. Nulf*, 15 Kan. 404; *Jackson v. State*, 4 Kan. 150. *Ky.*—*Carroll's St.*, 1909, §1141. *Mich.*—*Howell's Sts.*, 1913, §15,105; *Mentor v. People*, 30 Mich. 91. See *Hill v. People*, 26 Mich. 499. *Mo.*—Rev. Sts., 1909, §5057; *State v. Broek*, 186 Mo. 457, 85 S. W. 595, 105 Am. St. Rep. 625; *State v. Clark*, 158 Mo. App. 489, 138 S. W. 894; *State v. O'Connor*, 58 Mo. App. 457. *Neb.*—Rev. Sts., 1913, §9063. *N. D.*—Rev. Codes, 1905, §9794. *Okla.*—Comp. Laws, 1909, §6644; *Oelke v. State*, 10 Okla. Crim. 49, 133 Pac. 1140; *Brown v. State*, 9 Okla. Crim. 382, 132 Pac. 359; *Fullingim v. State*, 7 Okla. Crim. 333, 123 Pac. 558. *Tex.*—Code Crim. Prac., art. 466; *Jones v. State*, 30 Tex. Crim. 426, 17 S. W. 1080. *Utah.*—Comp. Laws, 1907, §4606, 4771. *Wash.*—Rem. & Ball. Ann. Codes & Sts., §2050. *Wyo.*—Comp. Sts., 1910, §6129.

And see generally the statutes of the several states.

[a] The object of the statutes is that the accused and court may know

who makes the charge and whether or not by the proper officer. *State v. Broek*, 186 Mo. 457, 85 S. W. 595, 105 Am. St. Rep. 625. See also *Brown v. State*, 9 Okla. Crim. 382, 132 Pac. 359.

[b] Such signature is not a part of the information proper, however. *Brown v. State*, 9 Okla. Crim. 382, 132 Pac. 359.

89. *Kan.*—*State v. Brown*, 63 Kan. 262, 65 Pac. 213, "Such is the positive, mandatory provision of the statute." *Okla.*—*McGarrah v. State*, 10 Okla. Crim. 21, 133 Pac. 260; *Fullingim v. State*, 7 Okla. Crim. 333, 123 Pac. 558 (sufficient ground for quashing same). *Utah.*—Comp. Laws, 1907, §4771, information must be set aside when it is not signed by the district attorney or by the attorney pro tem for the state.

90. *Jones v. State*, 30 Tex. App. 426, 17 S. W. 1080 (under a statute providing that exceptions to the form of an information shall not go to the signature of the attorney representing the state); *Rasberry v. State*, 1 Tex. App. 664.

[a] Where the complaint upon which the information is based is sworn to and subscribed by the complainant before the county attorney, and that fact is certified to by the county attorney by his indorsement upon the same, and the information itself recites the fact, and purports to have been made by the county attorney, this is sufficient, though undoubtedly the better practice is for the county attorney to sign the information officially. *Rasberry v. State*, 1 Tex. App. 664.

91. *State v. McLane*, 4 La. Ann. 435; *State v. Paddock*, 24 Vt. 312. See also *Chase v. State*, 50 Wis. 510, 7 N. W. 376.

92. *Fullingim v. State*, 7 Okla. Crim. 333, 123 Pac. 558.

is omitted, however, the court may properly allow it to be attached at any time before the trial has actually begun.⁹³

c. *Who May Sign*.—The information cannot be signed by one without authority to do so.⁹⁴ But it is sufficient that the name of the prosecuting officer is signed to an information by his deputy or assistant, where the statute provides for an assistant,⁹⁵ and where the deputy is given the same powers as his principal, it is sufficient if the deputy sign the information in his own name where a proper case therefor is presented.⁹⁶

[a] "The delivery of blank informations signed by the county attorney to the clerk of a county court is not a defect or imperfection in matter of form only within the curative provision of the statute (section 6705, Snyder's St.) that no indictment or information is insufficient, nor can the trial, judgment, or other proceedings thereon be affected by reason of a defect or imperfection of form, which does not tend to the prejudice of the substantial rights of the defendant upon the merits, but is a defect of substance and prejudicial to the substantial rights of the defendant." Fullingim v. State, 7 Okla. Crim. 333, 123 Pac. 558.

93. *Cooper v. State*, 63 Ga. 515, wherein signature permitted after parties had announced ready for trial and jury stricken, but not sworn.

[a] But after the trial has actually commenced, the prosecuting officer cannot properly be allowed to sign an information insufficient for lack thereof. *Jackson v. State*, 4 Kan. 150.

94. *S. D.*—*State v. Severine*, 2 S. D. 238, 49 N. W. 1056, holding that an information purporting to be signed by an assistant state's attorney, when no such officer is known to the law is not such an information as would support a conviction. *Tex.*—*Sims v. State* (Tex. Crim.), 162 S. W. 1154 (wherein the information was signed by an attorney, who was neither the prosecuting officer of county, nor an appointee by the court to take the place of such officer. It was held that it should have been quashed on proper motion therefor); *Murrey v. State*, 48 Tex. Crim. 219, 87 S. W. 349 (signature by one not even de facto officer). *Utah.*—*Connors v. Pratt*, 38 Utah 258, 112 Pac. 399; *State v. Beddo*, 22 Utah 432, 63 Pac. 96 (wherein it was held that a conviction and sentence of a prisoner on

an information signed by an officer having no authority to do so was void).

[a] The signature of a de facto assistant district attorney was held sufficient in *People v. Turner*, 85 Cal. 432, 24 Pac. 857.

95. *Cal.*—*People v. Griner*, 124 Cal. 19, 56 Pac. 625; *People v. Etting*, 99 Cal. 577, 34 Pac. 237; *People v. Darr*, 61 Cal. 554. *Colo.*—*Almond v. People*, 55 Colo. 425, 135 Pac. 783; *Nesbit v. People*, 19 Colo. 441, 36 Pac. 221; *White v. People*, 8 Colo. App. 289, 45 Pac. 539. *Okla.*—*McGarrah v. State*, 10 Okla. Crim. 21, 133 Pac. 260. *Ore.*—*State v. Walton*, 53 Ore. 557, 99 Pac. 431, 101 Pac. 389, 102 Pac. 173; *State v. Guglielmo*, 46 Ore. 250, 79 Pac. 577, 80 Pac. 103, 69 L. R. A. 466. *Wash.*—*Hammond v. State*, 3 Wash. 171, 28 Pac. 334.

[a] It is no objection to an information filed in open court by the sworn assistant of the district attorney, that the signature of the district attorney attached to the information was written by such assistant, by virtue of a general authority conferred upon him by the district attorney. *United States v. Nagle*, 17 Blatchf. 258, 27 Fed. Cas. No. 15,852.

96. *Cal.*—See *People v. Turner*, 85 Cal. 432, 24 Pac. 857. *La.*—*State v. Ryder*, 36 La. Ann. 294. *Mich.*—*People v. Trombley*, 62 Mich. 278, 28 N. W. 837, in absence, disability or sickness of prosecuting officer. *Mo.*—*State v. White*, 251 Mo. 178, 158 S. W. 32; *State v. Speritus*, 191 Mo. 24, 90 S. W. 459; *State v. Ittner*, 100 Mo. App. 276, 73 S. W. 289. See *Browne's Appeal*, 69 Mo. App. 159. *N. H.*—*State v. Ingalls*, 59 N. H. 88, in absence of attorney-general, solicitor properly signs. *Okla.*—*Oelke v. State*, 10 Okla. Crim. 49, 133 Pac. 1140. *Wash.*—*State v. Ridgell*, 33 Wash. 324, 74 Pac. 477.

Where the district attorney is disqualified from prosecuting a case and the court appoints a special prosecutor, the prosecutor so appointed is authorized to sign an information in the case in his own name.⁹⁷

d. *Sufficiency of.*—A signature by the prosecuting attorney by the initials of his given name is sufficient.⁹⁸

That the information contains the signature of the prosecuting attorney in printed type, instead of the same being written, is an objection merely to a matter of form, which is amendable.⁹⁹ Nor is it objectionable that the name of the prosecuting attorney is written with a type-writer, where it is so affixed with authority and signed by his deputy.¹

The statutes do not in terms require that he should give any description of his official character, and the description does not seem² to

[a] Where a statute provides that the assistant district attorney may perform all the duties of the district attorney in his absence, sickness or inability to perform those duties, the court will presume, when an information is signed by the assistant district attorney, that he performed the duty of the district attorney, owing to the absence, sickness or inability of that officer. *State v. Faulkner*, 32 La. Ann. 725.

[b] "The proper practice is for the assistant county attorney to sign the name of his principal to the information, yet we think it is sufficient when signed by and in the name of a legally constituted assistant, when no objection thereto before verdict is made." *Oelke v. State*, 10 Okla. Crim. 49, 133 Pac. 1140.

[c] Though an information be improperly signed by an assistant prosecuting officer, it is not rendered thereby entirely nugatory, it being at most a mere formal error, or irregularity, which may be amended. *Browne's Appeal*, 69 Mo. App. 159.

97. *Williams v. People*, 26 Colo. 272, 57 Pac. 701.

[a] And the mere fact that he added to his signature the words "special deputy district attorney," or placed before it the name of the regular district attorney, neither adds to, nor detracts from, the proper authentication thereof in his own name. The additions will be treated as surplusage. *Williams v. People*, 26 Colo. 272, 57 Pac. 701.

[b] Where the court is without power to appoint a prosecuting officer, except in case of the death of the

county attorney or in the case of the absence, sickness or disability of both the prosecuting officer and his deputy, and the record shows the presence of such officer in court at the date of the order appointing a private citizen to prosecute an action, and does not show either the sickness or disability to prosecute of the prosecuting officer or his deputy, but on the contrary shows the opposite, it follows that the court is without power to authorize a private citizen to sign and file the information. A conviction under such a prosecution must be set aside. *State v. Brown*, 63 Kan. 262, 65 Pac. 213.

98. *State v. Kelley*, 191 Mo. 680, 90 S. W. 834; *State v. Brock*, 186 Mo. 457, 85 S. W. 595, 105 Am. St. Rep. 625; *State v. Kyle*, 166 Mo. 287, 307, 65 S. W. 763, 56 L. R. A. 115.

[a] An immaterial variance between the name of the county attorney as recited in the information and as signed thereto is not fatal on motion in arrest of judgment. *Williams v. State*, 44 Tex. Crim. 235, 70 S. W. 213, wherein information stated that "J. S. King" presented it whereas it was signed by "Geo. S. King."

99. *District of Columbia v. Washington Gas L. Co.*, 3 Mackey (D. C.) 343, 350.

1. *Almond v. People*, 55 Colo. 425, 135 Pac. 783.

2. *Ind.*—*Malone v. State*, 14 Ind. 219. *Kan.*—*State v. Nulf*, 15 Kan. 404. *Mo.*—*State v. Salts*, 172 S. W. 373, failure to write the words "prosecuting attorney" after signature does not invalidate information.

[a] An information signed by the public prosecutor as "prosecuting at-

be very material. The omission of the name of the county and state is also immaterial.³

8. Verification or Accompanying Affidavit.⁴—a. *Necessity, Nature and Object.*—Under the common law, the information was not necessarily verified,⁵ and now unless required by some constitutional or statutory provision, if filed by a prosecuting attorney, it need not be sworn to by him,⁶ or founded upon or supported by any affidavit or

torney" is equally as valid as though it should be signed by him as "county attorney." *State v. Nulf*, 15 Kan. 404.

[b] An objection that an information is signed by the "county attorney," instead of the "prosecuting attorney," is technical and a motion to quash based thereon properly denied. *State v. McGann*, 8 Idaho 40, 66 Pac. 823.

[c] So too, an information is properly signed though the prosecuting officer designate himself as "district attorney prosecutor," instead of "district attorney." *Malone v. State*, 14 Ind. 219.

3. *People v. Ebanks*, 117 Cal. 652, 49 Pac. 1049, 40 L. R. A. 269; *People v. Ashnauer*, 47 Cal. 98.

4. As to verification generally, see the title "**Verification.**"

As to verification of complaint or information in justice or police courts, see *infra*, VIII, C, 4.

As to verification of the preliminary affidavit or complaint, see *supra*, V, N.

5. See the following cases: **U. S.** *United States v. Baumert* (C. C. A.), 179 Fed. 735, 742. **Fla.**—*King v. State*, 17 Fla. 183, "the attorney-general or master of the crown office acting in their official capacity." **Mo.**—*State v. White*, 55 Mo. App. 356. *Ellison, J.*, in separate opinion. **N. M.**—*Territory v. Cutinola*, 2 N. M. 160, 14 Pac. 809. **Ore.**—*State v. Guglielmo*, 46 Ore. 250, 79 Pac. 577, 80 Pac. 103, 69 L. R. A. 466, 7 Am. & Eng. Ann. Cas. 976. **S. D.** *State v. Becker*, 3 S. D. 29, 35, 51 N. W. 1018.

6. **U. S.**—*Weeks v. United States* (C. C. A.), 216 Fed. 292, 298, 54 L. R. A. (N. S.) 651, *explaining and distinguishing* dictum in *United States v. Morgan*, 222 U. S. 274, 282, 32 Sup. Ct. 81, 56 L. ed. 198, and *United States v. Maxwell*, 3 Dill. 275, 26 Fed. Cas. No. 15,750, seemingly to the contrary. **Ill.**—*Long v. People*, 135 Ill. 435, 25 N. E. 851; *Gallagher v. People*, 120 Ill.

179, 11 N. E. 335; *Obermark v. People*, 24 Ill. App. 259. **La.**—*State v. Smith*, 114 La. 322, 38 So. 204; *State v. Smith*, 114 La. 318, 38 So. 202 (district attorney, acting on his official oath, may present an information, and, with leave of court, have it filed, without any necessity of taking a special oath). **Mo.**—*State v. Pohl*, 170 Mo. 422, 70 S. W. 695 (*explained* in *State v. Hicks*, 178 Mo. 433, 77 S. W. 539, wherein it was held that what court said therein upon this point was obiter); *State v. Kyle*, 166 Mo. 287, 65 S. W. 287, 56 L. R. A. 115 (obiter also); *State v. Ramsey*, 52 Mo. App. 668; *State v. Ramsberger*, 42 Mo. App. 466. **Mont.**—*State ex rel. Nolan v. Brantley*, 20 Mont. 173, 50 Pac. 410. **N. H.**—*State v. Dover*, 9 N. H. 468. **N. M.**—*Territory v. Cutinola*, 2 N. M. 160, 14 Pac. 809. **Ore.** *State v. Guglielmo*, 46 Ore. 250, 79 Pac. 577, 80 Pac. 103, 69 L. R. A. 466, 7 Am. & Eng. Ann. Cas. 976. **S. C.** *In re Jager*, 29 S. C. 438, 7 S. E. 605. **S. D.**—*State v. Becker*, 3 S. D. 29, 51 N. W. 1018. **W. Va.**—*State v. Graham*, 68 W. Va. 248, 69 S. E. 1010, 40 L. R. A. (N. S.) 924.

[a] In *State v. Hicks*, 178 Mo. 433, 445, 77 S. W. 539, the court discussed its decision in *State v. Pohl*, 170 Mo. 422, 70 S. W. 695, as follows: "It was inadvertently said in the case of *State v. Pohl*, 170 Mo. 422, that an information for felony filed on the 24th day of September, 1901, which was after the amendment to the constitution went into effect on the 19th day of December, 1900, need not be under oath, but was sufficient if presented by the attorney-general or the prosecuting attorney of the proper county under his official oath. As a matter of fact, however, the information in that case was supported by the affidavit of a person who had knowledge of the commission of the offense and by whom it was committed, as provided for by section 2478, Revised Statutes 1899, amended by Laws 1901, pages 138 and

affirmation,⁷ since such officer acts under his oath of office, and it is not assumed that he will proceed upon information without probable cause.⁸

It has been held for this same reason that constitutional provisions that no warrant shall issue but on probable cause, supported by oath or affirmation, do not even require an information filed by the prosecuting officer to be verified or supported by affidavit to justify the issuance of a warrant thereon;⁹ but upon this proposition probably

139. Moreover, no objection was taken to the information by motion to quash, but for the first time by motion in arrest, and then upon the grounds only that the information and the allegations therein contained were insufficient to require the defendant to be placed upon trial, and, because the information did not charge the defendant with a crime known to the law. It will thus be seen that no objection was taken to the information as not being sworn to by the prosecuting attorney, and what was said by us in this regard was mere obiter."

[b] **The Alaska Criminal Code of Procedure** "does not specially require a criminal information (of the nature of a common-law information) to be verified by the oath of the marshal or prosecuting attorney." *United States v. John J. Sesnon Co.*, 3 Alaska 595, citing and quoting from *United States v. Powers*, 1 Alaska 180, 187, wherein the court also said: "It (the information) was filed upon the verified complaint of two reputable witnesses, and that is sufficient."

[c] **In Oklahoma**, in the absence of a statute requiring verification, the prosecuting attorney, acting on his official oath, may present an information charging a felony, where the defendant having had a preliminary examination before an examining magistrate, or having waived such preliminary examination, was held to the district court for trial for the felony charged. *Henson v. State*, 5 Okla. Crim. 201, 114 Pac. 630. And see the cases cited *infra*, note 10, [a], this section.

7. *State v. Smith*, 114 La. 318, 38 So. 202; *State v. Anderson*, 30 La. Ann. 457.

As to necessity for a preliminary affidavit or complaint, see *supra*, V, A.

8. See the following cases: *U. S. Weeks v. United States* (C. C. A.), 216 Fed. 292, 54 L. R. A. (N. S.) 651. **La.**

State v. Smith, 114 La. 318, 38 So. 202. **N. M.**—*Territory v. Cutinola*, 4 N. M. 305, 14 Pac. 809. **Ore.**—*State v. Guglielmo*, 46 Ore. 250, 79 Pac. 577, 80 Pac. 103, 69 L. R. A. 466, 7 Am. & Eng. Ann. Cas. 976. **S. C.**—*In re Jager*, 29 S. C. 438, 7 S. E. 605. **W. Va.** *State v. Graham*, 68 W. Va. 248, 69 S. E. 1010, 40 L. R. A. (N. S.) 924.

[a] In *State v. Smith*, 114 La. 318, 38 So. 202, the court said: "The officer acts upon his official oath. The court will not assume that that oath is not sufficient to warn him against the grave impropriety or criminality of instituting a prosecution for any other reason than the proper administration of justice. The purpose of the official oath is to maintain good faith and guard against unjust and vindictive prosecution. If this fails of its purpose, an additional oath taken by the prosecuting officer to verify the information would also fail."

9. **La.**—*State v. Smith*, 114 La. 322, 38 So. 204, under Louisiana Bill of Rights. **N. M.**—*Territory v. Cutinola*, 4 N. M. 305, 14 Pac. 809, decided under 4th amendment of the United States constitution. **Ore.**—*State v. Guglielmo*, 46 Ore. 250, 79 Pac. 577, 80 Pac. 103, 69 L. R. A. 466, 7 Am. & Eng. Ann. Cas. 976, under Oregon Bill of Rights.

[a] The court in *State v. Guglielmo*, 46 Ore. 250, 79 Pac. 577, 80 Pac. 103, 69 L. R. A. 466, 7 Am. & Eng. Ann. Cas. 976, said: "The Bill of Rights of this state does not demand that the oath or affirmation sustaining the probable cause shall be reduced to writing, nor does our statute require an information charging the commission of a crime to be verified; and, in the absence of any enactment on the subject, the rules of the common law in relation to informations exhibited by the attorney-general are applicable and controlling. The district attorney of the proper judicial district in this state

the weight of authority is to the contrary.¹⁰ Nor does a statute

is responsible for all informations filed, and is not obliged to obtain leave of court to discharge his duty in this particular before he is permitted to exercise the discretion with which the law invests him. As the circuit court is authorized to convene a grand jury when deemed advisable (B. & C. Comp., §1264), indictments and informations are therefore concurrent remedies, and, as the former means of charging the commission of a crime is based on and supported by the oath of the grand jurors, which fact, in this state, need not be recited in the written accusation, so an information, under our statute, need not be verified, for the official oath of the person whose duty it is to prosecute the formal charge complies with the requirement of the organic act, and supplies the necessary oath or affirmation, thereby supporting the probable cause."

10. **Colo.**—*Lustig v. People*, 18 Colo. 217, 32 Pac. 275. See *Noble v. People*, 23 Colo. 9, 45 Pac. 376. **Ill.**—See *Myers v. People*, 67 Ill. 503. **Ohio.**—*Eichenlaub v. State*, 36 Ohio St. 140. **Okla.** *In re Tolley*, 4 Okla. Crim. 398, 112 Pac. 36, 31 L. R. A. (N. S.) 805; *Snapp v. State*, 2 Okla. Crim. 515, 103 Pac. 553; *Salter v. State*, 2 Okla. Crim. 464, 102 Pac. 719, 139 Am. St. Rep. 935, 25 L. R. A. (N. S.) 60 (information in misdemeanor cases must be verified). **Wyo.**—See *State v. Boulter*, 5 Wyo. 236, 39 Pac. 883.

[a] In both of the Oklahoma cases cited, it was contended that an information filed by the prosecuting attorney requires no verification other than the official oath of the public prosecutor, and reliance was placed upon *State v. Guglielmo*, 46 Ore. 250, 79 Pac. 577, 80 Pac. 103, 69 L. R. A. 466, 7 Am. & Eng. Ann. Cas. 976. The court in *Salter v. State*, 2 Okla. Crim. 464, 102 Pac. 719, said: "This contention is obviously without merit. The error of the argument is so self-evident as to require only a passing notice. Counsel overlooks the fact that by the adoption of the fourth amendment of the federal constitution the procedure by information lost its prerogative function or quality. It could not thereafter be the vehicle of preferring any arbitrary accusation. *United States v. Tureaud*,

supra (20 Fed. 621). The constitutional provision in the Bill of Rights is but a reiteration of this essential safeguard of the liberty and security of the citizen against the arbitrary action of those in authority. Such pernicious practice may suit the purpose of despotic power, but is alien to the pure atmosphere of political liberty and personal freedom. The constitution expressly requires a showing of cause before a warrant shall issue, and the constitutional safeguards for security and liberty cannot in this manner be abrogated or abridged. They must stand as adopted by the people." This quotation was made in *Snapp v. State*, 2 Okla. Crim. 515, 103 Pac. 553, where the court followed the *Salter* case.

[b] **Under the federal practice**, (1) the information need not be verified where no warrant of arrest is asked thereon. *Weeks v. United States* (C. C. A.), 216 Fed. 292, 54 L. R. A. (N. S.) 651. (2) But where an application is made to the court for a warrant of arrest upon the strength of the information, it must be verified, the fourth amendment guaranteeing the defendant against the issuance of a warrant for his arrest, except "upon probable cause supported by oath or affirmation." *Weeks v. United States* (C. C. A.), 216 Fed. 292, 302, 54 L. R. A. (N. S.) 651 (reviewing and distinguishing the federal cases upon the subject); *United States v. Baumert* (C. C. A.), 179 Fed. 735; *United States v. Shepard*, 27 Fed. Cas. No. 16,273. And see *United States v. Tureaud*, 20 Fed. 621.

[c] Where the defendant was arrested on a warrant issued upon an affidavit stating facts on knowledge and taken before a committing magistrate for preliminary examination, it was held that an information, setting out that it was on the oath of the district attorney, but not sworn to, was nevertheless sufficient, it being accompanied by the papers of the commissioner who held the preliminary examination, including the sworn testimony of the witnesses taken in the presence of the accused. *United States v. Polite*, 35 Fed. 58.

As to sufficiency of an information verified only upon information and be-

providing for a verification when the information is by a person other than the prosecuting officer require one by that officer to an information filed by him.¹¹

Statutes, however, in many states expressly require the information to be verified by the prosecuting attorney,¹² complainant,¹³ or some¹⁴

lief as basis for issuance of warrant, see *infra*, VIII, 8, d, (I).

11. *People v. Viskniskki*, 255 Ill. 384, 99 N. E. 621 (*affirming* 169 Ill. App. 230); *Samuel v. People*, 164 Ill. 379, 384, 45 N. E. 728; *Long v. People*, 135 Ill. 435, 25 N. E. 851, 10 L. R. A. 48; *People v. Lee*, 185 Ill. App. 452; *People v. Gard*, 175 Ill. App. 486, 492; *People v. Nelson*, 150 Ill. App. 595; *Hall v. People*, 134 Ill. App. 559; *Giroux v. People*, 132 Ill. App. 562.

12. See the following: **Kan.**—Gen. St., 1909, §6641; *State v. Spencer*, 43 Kan. 119, 23 Pac. 159; *State v. Hook*, 4 Kan. App. 451, 46 Pac. 44. **Mich.** *Howell's St.*, 1913, §15,106; *Washburn v. People*, 10 Mich. 372, 384. **Mo.** *Rev. St.*, 1909, §5057 (information in circuit court); *State v. Lawhorn*, 250 Mo. 293, 157 S. W. 344; *State v. Kelly*, 188 Mo. 450, 87 S. W. 451; *State v. Gutke*, 188 Mo. 424, 87 S. W. 503; *State v. Decker*, 185 Mo. 182, 83 S. W. 1082; *State v. Hannigan*, 182 Mo. 15, 81 S. W. 406; *State v. Sheridan*, 182 Mo. 13, 81 S. W. 410; *State v. McGee*, 181 Mo. 312, 80 S. W. 899; *State v. Hicks*, 178 Mo. 433, 77 S. W. 539; *State v. Bonner*, 178 Mo. 424, 77 S. W. 463; *State v. Balch*, 178 Mo. 392, 77 S. W. 547; *State v. Gregory*, 178 Mo. 48, 76 S. W. 970; *State v. Zehnder*, 182 Mo. App. 161, 168 S. W. 661; *State v. Clark*, 158 Mo. App. 489, 138 S. W. 894; *State v. McCoy*, 140 Mo. App. 395, 124 S. W. 78; *State v. Runzi*, 105 Mo. App. 319, 80 S. W. 36; *State v. O'Connor*, 58 Mo. App. 457. **Neb.**—*Rev. St.*, 1913, §9064; *Trimble v. State*, 61 Neb. 604, 85 N. W. 844 (words "prosecuting attorney" in said section mean county attorney). **N. D.**—*Rev. Codes*, 1905, §9795, or by the person appointed to prosecute. **S. D.**—*Comp. Laws*, 1910, C. C. P., §207. **Wash.**—*State v. Cronin*, 20 Wash. 512, 56 Pac. 26. **Wyo.**—*Comp. St.*, 1910, §6129.

13. See the following: **Kan.**—Gen. St., 1909, §6641; *State v. Spencer*, 43 Kan. 119, 23 Pac. 159; *State v. Hook*, 4 Kan. App. 451, 46 Pac. 44. **Mich.** *Howell's St.*, 1913, §15,106; *Washburn*

v. People, 10 Mich. 372, 384. **Neb.** *Rev. St.*, 1913, §9064. **N. D.**—*Rev. Codes*, 1905, §9795. **Wash.**—*Rem. & Ball. Ann. Codes & St.*, §2051; *State v. Cronin*, 20 Wash. 512, 56 Pac. 26. **Wyo.** *Comp. St.*, 1910, §6129.

[a] Such party need not be a citizen of the county of venue. *State v. York*, 7 Kan. App. 291, 53 Pac. 838.

14. See the following: **Kan.**—Gen. St., 1909, §6641; *State v. Spencer*, 43 Kan. 119, 23 Pac. 159; *State v. Hook*, 4 Kan. App. 451, 46 Pac. 44. **Mich.** *Howell's St.*, 1913, §15,106; *Washburn v. People*, 10 Mich. 372, 384. **Mo.**—*Rev. St.*, 1909, §5057. **Neb.**—*Rev. St.*, 1913, §9064. **N. D.**—*Rev. Codes*, 1905, §9795. **Wash.**—*Rem. & Ball. Ann. Codes & St.*, §2051; *State v. Cronin*, 20 Wash. 512, 56 Pac. 26. **Wyo.**—*Comp. St.*, 1910, §6129.

[a] Where an information is sworn to positively by some person, it is not necessary for the prosecuting officer to also verify it by his own oath. *State v. Brooks*, 33 Kan. 708, 7 Pac. 591, 6 Am. Crim. Rep. 299. And see *State v. Clark*, 158 Mo. App. 489, 138 S. W. 894; also *State v. Davidson*, 44 Mo. App. 513.

[b] That the information is twice verified does not weaken the charge, nor operate to the prejudice of the defendant, however. *State v. Gill*, 63 Kan. 382, 65 Pac. 682, wherein the information was verified positively by a private person, and upon information and belief by the prosecuting attorney. It was held that "either verification was sufficient to accomplish the purpose of the law, and the motion to quash was properly overruled." And see *State v. Shanks*, 98 Mo. App. 138, 71 S. W. 1065, holding that the fact that there is added to an information properly verified by the prosecuting attorney, the verification of a private person does not invalidate it. It is complete and perfect with or without such verification, which may be regarded as surplusage. *State v. Zepfendorf*, 12 Mo. App. 574.

other person, competent to testify as a witness,¹⁵ or be supported by the affidavit of such person, which shall be filed with the information.¹⁶

Some such statutes are applicable, however, only to informations in misdemeanor cases,¹⁷ and in such jurisdictions it is not necessary for

15. Mo. Rev. St., 1909, §5057; *State v. Lawhorn*, 250 Mo. 293, 157 S. W. 344; *State v. Bonner*, 178 Mo. 424, 77 S. W. 463; *State v. Gregory*, 178 Mo. 48, 76 S. W. 970; *State v. Zehnder*, 182 Mo. App. 161, 168 S. W. 661; *State v. Clark*, 158 Mo. App. 489, 138 S. W. 894; *State v. O'Connor*, 58 Mo. App. 457.

16. Mo. Rev. St., 1909, §5057; *State v. Lawhorn*, 250 Mo. 293, 157 S. W. 344; *State v. Schnettler*, 181 Mo. 173, 79 S. W. 1123; *State v. Gregory*, 178 Mo. 48, 76 S. W. 970; *State v. Hicks*, 178 Mo. 433, 77 S. W. 539; *State v. McCoy*, 140 Mo. App. 395, 124 S. W. 78.

[a] Said the court in *State v. Hicks*, 178 Mo. 433, 445, 77 S. W. 539: "A point is made on the sufficiency of the information which defendant says is invalid for the want of verification by the oath of the prosecuting attorney or some other competent person. This point was raised by motion in arrest in the court below, and is now insisted upon in this court. Since the Acts of the General Assembly, approved March 13, 1901 (Laws 1901, pp. 138, 139) went into effect, which was before the information in the case in hand was filed, all informations are required to be signed by the prosecuting attorney and to be verified by his oath or by the oath of some person competent to testify as a witness in the case, or be supported by the affidavit of such person, which shall be filed with the information (sec. 2477, R. S. 1899; Laws 1901, *supra*; *State v. Bonner*, 178 Mo. 424); . . ."

[b] Where the information is supported by the affidavit of a private person it is not necessary that it should be sworn to by the prosecuting attorney or by his assistant. *State v. Davidson*, 44 Mo. App. 513. See also *State v. Brooks*, 33 Kan. 708, 7 Pac. 591; *State v. Clark*, 158 Mo. App. 489, 138 S. W. 894.

[c] A complaint, duly verified, and filed prior to the filing of an information is not such an affidavit as is required by statute. *State v. Lawhorn*, 250 Mo. 293, 157 S. W. 344.

[d] The mere fact that the affidavit is made by one whose evidence is insufficient in the trial has been expressly decided to be immaterial if it appears he is a competent witness in the case. *State v. Clark*, 158 Mo. App. 489, 138 S. W. 894; *State v. Pitts*, 70 Mo. App. 446.

[e] **Texas.**—It is the affidavit upon which the information must be based, and not the verification of the information itself, which is deemed jurisdictional in the Texas cases. See the following cases: *Montgomery v. State*, 60 Tex. Crim. 303, 131 S. W. 1087; *Carroll v. State*, 56 Tex. Crim. 78, 118 S. W. 1031; *Mendoza v. State*, 56 Tex. Crim. 65, 118 S. W. 1031; *Abbey v. State*, 55 Tex. Crim. 232, 115 S. W. 1191; *Domingues v. State*, 37 Tex. Crim. 425, 35 S. W. 973; *White v. State* (Tex. Crim.), 35 S. W. 391; *Jennings v. State*, 30 Tex. App. 428, 18 S. W. 90; *Neiman v. State*, 29 Tex. App. 360, 16 S. W. 253; *Wadgymar v. State*, 21 Tex. App. 459, 2 S. W. 768; *Brown v. State*, 11 Tex. App. 451; *Casey v. State*, 5 Tex. App. 462; *Thornberry v. State*, 3 Tex. App. 36; *Morris v. State*, 2 Tex. App. 502; *Davis v. State*, 2 Tex. App. 184.

As to preliminary affidavit or complaint, see *supra*, V.

17. Okla. Comp. Laws, 1909, §6644; *Hazelton v. State*, 8 Okla. Crim. 184, 126 Pac. 703; *In re Talley*, 4 Okla. Crim. 398, 112 Pac. 36, 31 L. R. A. (N. S.) 805; *Drake v. State*, 2 Okla. Crim. 643, 103 Pac. 878; *De Graff v. State*, 2 Okla. Crim. 519, 103 Pac. 538; *Snapp v. State*, 2 Okla. Crim. 515, 103 Pac. 553; *Salter v. State*, 2 Okla. Crim. 464, 102 Pac. 719, 139 Am. St. Rep. 935, 25 L. R. A. (N. S.) 60; *Ex parte Flowers*, 2 Okla. Crim. 430, 101 Pac. 860 (obiter).

[a] The requirement that an information for a misdemeanor be verified before a warrant of arrest may issue thereon does not purport to deal with the essentials of an information as a mere accusation, but only with the manner and means of obtaining the custody and jurisdiction of the defendant's person. *In re Talley*, 4 Okla. Crim.

an information in a felony case to be verified, no statute expressly requiring it.¹⁸

Under other statutes the necessity for a verification depends alone upon the court in which the information is filed, and not upon whether it is a felony or a misdemeanor case.¹⁹

Under still other statutes, only where the defendant does not have a preliminary examination, is it necessary that the information be accompanied with the affidavit of some credible person verifying it.²⁰

398, 112 Pac. 36, 31 L. R. A. (N. S.) 805.

18. *Brown v. State*, 9 Okla. Crim. 382, 132 Pac. 359; *Gunnells v. State*, 7 Okla. Crim. 98, 122 Pac. 264; *Hughes v. State*, 7 Okla. Crim. 117, 122 Pac. 554; *Martin v. State*, 5 Okla. Crim. 355, 114 Pac. 1112; *Henson v. State*, 5 Okla. Crim. 201, 114 Pac. 630; *Davis v. State*, 4 Okla. Crim. 508, 113 Pac. 220; *Heacock v. State*, 4 Okla. Crim. 606, 112 Pac. 949; *In re Talley*, 4 Okla. Crim. 398, 112 Pac. 36, 31 L. R. A. (N. S.) 805, followed in *In re Simmons*, 4 Okla. Crim. xiv, 112 Pac. 41; *In re Crawford*, 4 Okla. Crim. xiii, 112 Pac. 41.

[a] **Reason.**—Such informations rest alone upon a preliminary trial had before an examining magistrate in which the defendant is held to answer the charge against him or the waiver of such examining trial by the defendant. *Brown v. State*, 9 Okla. Crim. 382, 132 Pac. 359; *Davis v. State*, 4 Okla. Crim. 508, 113 Pac. 220; *In re Talley*, 4 Okla. Crim. 398, 112 Pac. 36, 31 L. R. A. (N. S.) 805.

[b] “But these preliminary proceedings are not required in misdemeanor cases, and for that reason, and also on account of the provisions of §6644, Snyder’s Comp. Laws, informations charging the commission of a misdemeanor must be verified unless verification be waived by the defendant.” *In re Talley*, 4 Okla. Crim. 398, 112 Pac. 36, 31 L. R. A. (N. S.) 805.

As to necessity for a verification where no statute requires it, see *supra*, this section.

19. Thus in Missouri, an information filed in a circuit court must be verified under the express provision of the statute. See *supra*, this section. The statute in regard to filing informations in justice courts does not require a verification, and none is held necessary. See *infra*, V, C, 4.

[a] Formerly in Missouri, (1) it was held that an information filed in the St. Louis court of criminal correction need not be verified, where made by the prosecuting attorney, such being in substance the terms of a provision in the act establishing that court, which it was also held was not repealed by the general statute requiring all informations to be verified by the prosecuting attorney, or some other person competent to be a witness, or be supported by the affidavit of such person. *State v. Bach*, 25 Mo. App. 554; *State v. Fitzporter*, 17 Mo. App. 271; *State v. Zeppenfeld*, 12 Mo. App. 574. (2) But under more recent cases, it is now established that one, proceeded against in the city of St. Louis is entitled to have the information which is made the basis of the prosecution verified in the same way as if his prosecution were begun in another locality, it being held that the general law repeals the special statutory provision in this respect. *State v. Bennett* (Mo.), 11 S. W. 264. And see *State v. Bennett*, 102 Mo. 356, 14 S. W. 865, 10 L. R. A. 717; also *State v. Armstrong*, 106 Mo. 395, 16 S. W. 604, 27 Am. St. Rep. 361, 13 L. R. A. 419.

20. In Colorado, (1) it is required that in all cases in which a preliminary examination has not been had, or when upon such examination the accused has been discharged, that there shall be filed with the information the affidavit of some creditable person, verifying the information upon the personal knowledge of affiant that the offense was committed. *Ausmus v. People*, 47 Colo. 167, 107 Pac. 204, 19 Am. & Eng. Ann. Cas. 491, under Mill’s Ann. St., §1432h. And see *Noble v. People*, 23 Colo. 9, 45 Pac. 376; *Lustig v. People*, 18 Colo. 217, 32 Pac. 275; *White v. People*, 8 Colo. App. 289, 45 Pac. 539. (2) Otherwise, it seems no verification of any kind need be at-

A failure to verify an information where required by statute is fatal, when timely objection is made on that ground.²¹

Several Counts.—Where the several counts of an information are inconsistent with each other, a single verification will not suffice.²²

Amended Information.²³ — When an information is amended in matter of form,²⁴ or in unimportant particulars,²⁵ it need not be reverified.

tached to the information. *White v. People*, *supra*, wherein the court said: "It seems plain from the statute we are considering that no verification of any kind need be attached to the information. Where a verification is necessary at all, it must be contained in the independent affidavit of some credible person, having knowledge of the commission of the offense, and who is a competent witness to testify in the case. This affidavit must be filed with the information. If a preliminary examination has not been had or waived, or if upon the examination the accused has been discharged, or if the affidavit or complaint on which it has been held has not been delivered to the clerk of the proper court, then the affidavit is necessary; and upon it, by leave of the court first had, the information may be filed."

21. **Kan.**—*State v. Spencer*, 43 Kan. 119, 23 Pac. 159. **Mo.**—*State v. Kelly*, 188 Mo. 450, 87 S. W. 451; *State v. Gutke*, 188 Mo. 424, 87 S. W. 503; *State v. Decker*, 185 Mo. 182, 83 S. W. 1082; *State v. Hannigan*, 182 Mo. 15, 81 S. W. 406; *State v. Sheridan*, 182 Mo. 13, 81 S. W. 410; *State v. McGee*, 181 Mo. 312, 80 S. W. 899; *State v. Schnettler*, 181 Mo. 173, 79 S. W. 1123; *State v. Balch*, 178 Mo. 392, 77 S. W. 547; *State v. Bonner*, 178 Mo. 424, 77 S. W. 463; *State v. Weyland*, 126 Mo. App. 723, 105 S. W. 660; *State v. Runzi*, 105 Mo. App. 319, 326, 80 S. W. 36 (open to motion to quash, but not in arrest of judgment, overruling as to the latter point the holding to contrary in *State v. Sayman*, 61 Mo. App. 244; *State v. O'Connor*, 58 Mo. App. 457). **Okla.** *In re Talley*, 4 Okla. Crim. 398, 112 Pac. 36, 31 L. R. A. (N. S.) 805, unverified information charging a misdemeanor fatally defective on timely objection, but not otherwise.

[a] An unverified information properly charging a misdemeanor, signed by the county attorney, and filed in a court having jurisdiction of the offense, though insufficient to authorize the is-

suance of a warrant of arrest, is nevertheless sufficient for all other purposes, if not properly challenged. *In re Talley*, 4 Okla. Crim. 398, 112 Pac. 36, 31 L. R. A. (N. S.) 805.

[b] It is error for a court to overrule a motion to quash an unverified information charging a misdemeanor, but the matter is not jurisdictional. *In re Talley*, 4 Okla. Crim. 398, 112 Pac. 36, 31 L. R. A. (N. S.) 805. As to time for taking objection generally, see *infra*, XIV and XV.

As to waiver of objection that information is not verified, see *infra*, XV.

22. *State v. Jaeger*, 157 Mo. App. 328, 138 S. W. 345 (holding, however, counts not so inconsistent as to render their verification under one oath inconsistent); *State v. Weyland*, 126 Mo. App. 723, 105 S. W. 660 (wherein the information contained three counts, the first and third of which were inconsistent with each other).

[a] To swear to two statements one of which absolutely contradicts the other, is, at least, tantamount to a failure altogether to verify. *State v. Weyland*, 126 Mo. App. 723, 105 S. W. 660.

23. As to amending information, see *infra*, XII.

24. *State v. Bugg*, 66 Kan. 668, 72 Pac. 236, 14 Am. Crim. Rep. 109, correcting error in spelling of word.

25. In *State v. Darling*, 216 Mo. 450, 115 S. W. 1002, 129 Am. St. Rep. 526, 23 L. R. A. (N. S.) 272, the prosecuting attorney, by leave of court, amended an information in a murder case by inserting in one place the word "deliberately," and in another "wilfully," but did not reverify the information after amendment, and defendant moved to quash on the ground that it was not verified. The court, after quoting the statute authorizing amendments to informations said: "This statutory provision was ample authority for the action of the court and prosecuting attorney. When the

It is otherwise where the amendment is in a material allegation or particular of the information.²⁶

Nature and Object. — The verification is no part²⁷ of the information

prosecuting attorney added the two words over his own signature and affidavit, he amended the information, and there was no need of a new affidavit, which was no part of the information. Clearly the insertion of the word 'deliberately' did not affect defendant's rights as he was found guilty of manslaughter only. Counsel concede that an information need not be reverified where unimportant amendments are made."

[a] Where the original information is positively verified, it is not ground for quashing an amended information that it was not so verified. *State v. Engborg*, 63 Kan. 853, 66 Pac. 1007, wherein the word "unlawfully" was added to the information.

[b] Where the amendment is made in the presence of the person verifying the same, the court will assume that the changes were made at his instance or with his full consent, and will not require a verification anew. *State v. Nash*, 51 S. C. 319, 28 S. E. 946.

26. **III.**—*People v. Zlotnicki*, 246 Ill. 185, 92 N. E. 813; *People v. Lee*, 185 Ill. App. 452. **Okla.**—*Hubbard v. Territory*, 20 Okla. 764, 95 Pac. 217; *Hazleton v. State*, 8 Okla. Crim. 184, 126 Pac. 703. **Wash.**—*State v. Van Cleve*, 5 Wash. 642, 32 Pac. 461. **Can.**—*Queen v. McNutt*, 28 Nova Scotia 377, wherein the information was amended by changing the name of the person verifying the same.

[a] A new affidavit and jurat in due form should be appended and subscribed by the prosecuting witness and the officer in the same manner as upon the original information. *People v. Lee*, 185 Ill. App. 452. As to form and sufficiency of verification, see *infra*, VIII, B, 8, d.

[b] **New Allegations.**—Where the information is amended by interlineations containing new and material allegations, it should be reverified. It is error to force a defendant to trial upon such amended information without a verification thereof. *Hazleton v. State*, 8 Okla. Crim. 184, 126 Pac. 703.

[c] **New Offense.**—An information cannot be amended by the addition of

an entirely new offense unless it be "afterwards sworn to," as provided in case of an original information. Thus, an information, charging defendant with imputing to a female a want of chastity, cannot be so amended, after acquittal, as to charge him with lascivious language in a public place, an offense under a different statute, without being sworn to anew. *Hubbard v. Territory*, 20 Okla. 764, 95 Pac. 217.

[d] **Waiver.**—(1) The objection, that an information was not reverified after it was amended, is waived where the defendant demurred to the amended information and was later arraigned and pleaded not guilty without raising the objection as to the verification until after verdict. *State v. Stone*, 66 Wash. 625, 120 Pac. 76, *distinguishing State v. Van Cleve*, 5 Wash. 642, 32 Pac. 461, upon the ground that in that case the amendment was in a vital particular and was made after a plea of not guilty and after the commencement of the trial. The defendant, therefore, had no opportunity to object to the amended information or to enter any plea thereto. The court said: "This is not the case here. The appellant's demurrer to the amended information raised the question of its legal sufficiency to charge the crime sought to be charged, but it did not raise any objection that it was not reverified nor was this objection raised in any other manner. The record shows that appellant was arraigned and waived a reading of the information, and without further objection pleaded 'not guilty.' By so doing he waived the objection now urged." (2) But where timely objection is made and noted, it is not waived by going to trial. *Queen v. McNutt*, 28 Nova Scotia 377. As to waiver of objections generally, see *infra*, XV.

27. **Mo.**—*State v. Runzi*, 105 Mo. App. 319, 326, 80 S. W. 36. **Okla.** *Brown v. State*, 9 Okla. Crim. 382, 132 Pac. 359; *Gunnells v. State*, 7 Okla. Crim. 98, 122 Pac. 264; *Henson v. State*, 5 Okla. Crim. 201, 114 Pac. 639; *In re Talley*, 4 Okla. Crim. 398, 112 Pac. 36, 31 L. R. A. (N. S.) 805. **Wash.**

itself, and neither adds to the charge therein,²⁸ nor detracts therefrom.²⁹ Its object is not, as in the preliminary examination,³⁰ to satisfy the court that the defendant is guilty;³¹ nor is it for the purpose of evidence, which is to be weighed and passed upon;³² but merely to secure good faith in the institution of the proceedings, and to guard against groundless and vindictive prosecutions.³³

b. *Who May Make.*—The statutes generally provide by whom the information shall be verified.³⁴

c. *Who May Take.*³⁵—At common law, such oath was taken before a magistrate.³⁶ But now, in the absence of a statute demanding that the oath to an information be taken before the judge or court issuing the warrant,³⁷ it may be taken before any officer authorized to administer oaths,³⁸ though the common law on this point prevails in

State *v.* Regan, 8 Wash. 506, 36 Pac. 472; Hammond *v.* State, 3 Wash. 171, 28 Pac. 334.

See also State *v.* Darling, 216 Mo. 450, 115 S. W. 1002, 129 Am. St. Rep. 526, 23 L. R. A. (N. S.) 272.

28. State *ex rel.* Nolan *v.* Brantly, 20 Mont. 173, 50 Pac. 410.

29. The verification of an information, where none is necessary, does neither good nor harm, and has no effect upon the information itself. White *v.* People, 8 Colo. App. 289, 45 Pac. 539. See also State *v.* Gill, 63 Kan. 382, 65 Pac. 682; State *v.* Shanks, 98 Mo. App. 138, 71 S. W. 1065.

30. See the title "**Preliminary Examination.**"

31. Washburn *v.* People, 10 Mich. 372, 385.

32. Washburn *v.* People, 10 Mich. 372, 385. And see Henson *v.* State, 5 Okla. Crim. 201, 114 Pac. 630.

33. Mentor *v.* People, 30 Mich. 91; Washburn *v.* People, 10 Mich. 372, 385; State *v.* Cronin, 20 Wash. 512, 56 Pac. 26; State *v.* Regan, 8 Wash. 506, 36 Pac. 472; Hammond *v.* State, 3 Wash. 171, 28 Pac. 334.

[a] In an Oklahoma case, it is said: "The verification is not part of an information charging a felony, and is therefore not an indispensable requisite. The object of such verification is not, as in misdemeanors, for a showing of probable cause supported by oath or affirmation to authorize the arrest of the accused, and it is not for the purpose of evidence, which is to be weighed and passed upon, but only as we believe, to secure good faith and as a matter of good form in pleading." Henson *v.* State, 5 Okla. Crim. 201, 114 Pac. 630.

[b] "It bears the same relation to an information in a criminal action that it does to a complaint in a civil action." Hammond *v.* State, 3 Wash. 171, 28 Pac. 334. As to verification of a declaration or complaint in a civil action, see the title "**Verification.**"

34. See the statutes, and *supra*, VIII, B, 8, a.

[a] An information verified by the "prosecuting attorney" of the proper county is sufficient under a statute providing that a "county attorney" may verify. The terms are used interchangeably and are synonymous. Bush *v.* State, 62 Neb. 128, 86 N. W. 1062.

[b] So also, a verification by a deputy prosecuting attorney (1) is sufficient under statutes providing for a verification by the prosecuting attorney. People *v.* Trombley, 62 Mich. 278, 28 N. W. 837 (under a statute making it duty of assistant prosecuting attorney to perform all the duties of office of prosecuting attorney, in case of the absence, sickness or disability of his superior); Hammond *v.* State, 3 Wash. 171, 28 Pac. 334. (2) The fact that in the body of the affidavit he is described as prosecuting attorney instead of deputy is immaterial. Hammond *v.* State, 3 Wash. 171, 28 Pac. 334.

35. For treatment of same question in connection with verification of complaint, see *infra*, VIII, C, 4.

36. 1 Chit. Cr. Law 26; Richards *v.* State, 22 Neb. 145, 34 N. W. 346.

37. See the statutes of the several states.

38. U. S.—United States *v.* Baumert (C. C. A.), 179 Fed. 735, 741. Cal.—People *v.* Vasalo, 120 Cal. 168, 52

some states to the extent that the oath must be taken before a judicial officer.³⁹ If a particular officer is named before whom the information or affidavit must be sworn to, the statute must be followed.⁴⁰

d. *Sufficiency of.*—(I.) *In General.* With the exception of the rules as to a verification upon information and belief,⁴¹ and as to the form of the jurat,⁴² no well defined general rules exist by which to test the sufficiency of the verification or accompanying affidavit, but only a few fragmentary rules based upon a limited number of cases.⁴³

Pac. 305, before clerk of the police court. *Neb.*—*Nightingale v. State*, 62 Neb. 371, 87 N. W. 158 (deputy clerk of district court may take); *Trimble v. State*, 61 Neb. 604, 85 N. W. 844; *Sharp v. State*, 61 Neb. 187, 85 N. W. 38; *State ex rel. Bryant v. Lauver*, 26 Neb. 757, 42 N. W. 762 (all holding clerk of district court may properly take verification of information). *Okla.* *Caffee v. State* (Okla. Crim.), 145 Pac. 499, before clerk of court.

39. *Davis v. State*, 31 Neb. 247, 47 N. W. 854; *Richards v. State*, 22 Neb. 145, 34 N. W. 346.

[a] *Notary.*—(1) A verification before a notary is insufficient in such states. *Bailey v. State*, 36 Neb. 808, 55 N. W. 241; *Davis v. State*, 31 Neb. 247, 47 N. W. 854; *Richards v. State*, 22 Neb. 145, 34 N. W. 346. (2) But in other states, the taking of the verification is held within the statutory authority of a commercial notary. *Miller v. State*, 122 Ind. 355, 24 N. E. 156; *McNulty v. State*, 37 Ind. App. 612, 76 N. E. 547, 117 Am. St. Rep. 344. (3) In the latter states, it has been held that the fact that the person, who as notary administers the oath, was employed as a deputy prosecuting officer, does not constitute a valid reason why the accused should not be held to answer the charge in the information. *McNulty v. State*, 37 Ind. App. 612, 76 N. E. 547, 117 Am. St. Rep. 344.

[b] *Waiver of Objection.*—An objection to the information on the ground that it was not sworn to before a judicial officer will be waived unless made before trial and verdict. *Bailey v. State*, 36 Neb. 808, 55 N. W. 241; *Hodgkins v. State*, 36 Neb. 160, 54 N. W. 86; *Davis v. State*, 31 Neb. 247, 47 N. W. 854.

40. See *United States v. Baumert* (C. C. A.), 179 Fed. 735, 741.

41. See *infra*, this section.

42. See *infra*, VIII, B, 8, d, (II).

43. *Necessity for Repeating Venue.*

Where the information and the verification thereof are upon the same sheet of paper and the venue is laid in the caption, it is not necessary to repeat the venue in the verification. *State v. Bailey*, 190 Mo. 257, 276, 88 S. W. 733.

[a] An information as a whole constitutes but one statement; and a verification thereof which says that "the statement contained in the above information is true," is not defective for omitting to say that the statements therein contained are true. *Blair v. State*, 4 Okla. Crim. 359, 111 Pac. 1003.

[b] *The omission of the word "true"* in stating that the facts and statements of the information are true according to the information and belief of the prosecuting officer renders the verification defective. *State v. Spencer*, 43 Kan. 119, 23 Pac. 159.

[c] *Statutory Form of Verification or Accompanying Affidavit.*—See *Ausmus v. People*, 47 Colo. 167, 107 Pac. 204, 19 Am. & Eng. Ann. Cas. 491 (under *Mills' Ann. St.*, §1432h); *Wyo. Comp. St.*, 1910, §6132; *Gustavenson v. State*, 10 Wyo. 300, 315, 68 Pac. 1006.

[d] In Colorado, (1) the statute requires that the affidavit supporting the information "set forth the offense," and the name of the person or persons charged with the commission thereof. *Ausmus v. People*, 47 Colo. 167, 107 Pac. 204, 19 Am. & Eng. Ann. Cas. 491. (2) It need not set out the mode or manner of the perpetration of the offense, or the instrument or agency employed to accomplish the result. The details are unnecessary; the ultimate facts are sufficient. *Ausmus v. People*, 47 Colo. 167, 107 Pac. 204, 19 Am. & Eng. Ann. Cas. 491. (3) An affidavit attached to an information declaring that "the facts stated in the

Information and Belief.—When the verification is made by a person other than the prosecuting attorney, it must be by one having knowledge of the matters charged therein,⁴⁴ and it is not sufficient for such person to verify it on his information and belief alone.⁴⁵ But an

foregoing information are true, and the offense therein charged was committed of his own personal knowledge," is as effectual as an averment of the truth of the matters of fact alleged in the information, as though every statement of the information had been embodied in the affidavit. *Ausmus v. People*, 47 Colo. 167, 107 Pac. 204, 19 Am. & Eng. Ann. Cas. 491.

[e] Whether or not an affidavit upon which an information is based complies with the statute must be determined from the context of the affidavit itself, and its statements cannot be attacked by extraneous evidence. *Bergdahl v. People*, 27 Colo. 302, 61 Pac. 228.

[f] **The affidavit** (1) is not insufficient because it does not contain the name of the affiant in the body thereof, where the name appears at the bottom thereof, with the jurat of the officer taking it. *Snigh v. State* (Tex. Crim.), 146 S. W. 891. (2) Nor is it necessary that the affidavit should recite that the affiant is a competent witness. *Walt v. People*, 46 Colo. 136, 104 Pac. 89; *State v. Davidson*, 44 Mo. App. 513; *State v. Downing*, 22 Mo. App. 504.

[g] **The affidavit is not required to be signed by the prosecuting attorney.** (1) If the information is in fact signed by him and certified to by a proper officer as having been sworn to before him, it is a substantial compliance with the statute. *State v. Hicks*, 178 Mo. 433, 455, 77 S. W. 539; *State v. Zehnder*, 182 Mo. App. 161, 168 S. W. 661, 666. (2) But it is not error to allow the affixing of such signature at any time, even after the jury is sworn. *State v. Zehnder*, 182 Mo. App. 176, 168 S. W. 666.

[h] **Sufficient Verifications.**—*State v. White*, 12 Wash. 417, 41 Pac. 182; *State v. Regan*, 8 Wash. 506, 36 Pac. 472.

As to waiver of objection that information is not sufficiently verified, see *infra*, XV.

44. **Personal Knowledge of Offense.** One verifying an information positive-

ly need not have actual personal knowledge of the facts constituting the offense charged. Notice or knowledge from hearsay of the particular transaction complained of is sufficient. *State v. Penquite*, 86 Kan. 970, 122 Pac. 894. See also *Bergdahl v. People*, 27 Colo. 302, 61 Pac. 228.

[a] **It will be presumed**, in the absence of a showing to the contrary, that one verifying the information has actual knowledge of the facts stated therein. *State v. Lund*, 51 Kan. 1, 32 Pac. 657; *State v. Brooks*, 33 Kan. 708, 7 Pac. 591.

45. **Colo.**—*Brown v. People*, 20 Colo. 161, 36 Pac. 1040. **Kan.**—*State v. Hook*, 4 Kan. App. 451, 46 Pac. 44. **Mo.** *State v. Hayward*, 83 Mo. 299 (wherein the verification recited that "the facts set forth in the above information are true, as therein contained to the best of his information and belief"); *State v. Clark*, 158 Mo. App. 489, 138 S. W. 894; *State v. McCoy*, 140 Mo. App. 395, 124 S. W. 78. See also *State v. Bennett*, 102 Mo. 356, 14 S. W. 865, 10 L. R. A. 717.

[a] Must be positively sworn to, when verified by other than prosecuting officer. *State v. Hook*, 4 Kan. App. 451, 46 Pac. 44.

[b] Such rule obtains by express provision of statute in some states. Wyo. Comp. St., 1910, §6132, and generally the statutes.

[c] **In Missouri**, in a case which states its adherence to the rule established in *State v. Hayward*, 83 Mo. 304, it is nevertheless held that if the affiant swears that the facts stated "are true according to his best knowledge and belief," the verification is sufficient, though affiant be a private citizen, and that case is distinguished upon the recital alone. It is said that "when a person swears to its truth 'according to his best knowledge and belief,' he does all that should justly be required of him. . . . In making such an affidavit the affiant necessarily asserts knowledge of the specific facts recited. . . . The addition of the phrase, 'and belief,' does not impair the force of

information verified by the prosecuting attorney upon information and belief is sufficient,⁴⁶ according to the express terms of the statutes in some states,⁴⁷ for every purpose, except in some jurisdictions for

the word, 'knowledge.'" *State v. Bennett*, 102 Mo. 356, 14 S. W. 865, 10 L. R. A. 717. To the same effect is *State v. Armstrong*, 106 Mo. 395, 413, 16 S. W. 604, 27 Am. St. Rep. 361, 13 L. R. A. 419, (which cites and relies on *State v. Bennett*, *supra*, as decisive upon the point); *State v. Bach*, 25 Mo. App. 554 (under special law relating to St. Louis court of criminal correction, and likewise *distinguishing State v. Hayward*, 83 Mo. 299, on the ground that it was decided under the general statute.)

46. **Colo.**—*Brown v. People*, 20 Colo. 161, 36 Pac. 1040, in a case in which there has been a preliminary examination or in which the same has been waived. **Mich.**—*Mentor v. People*, 30 Mich. 91; *Washburn v. People*, 10 Mich. 372, *followed in Hicks v. People*, 10 Mich. 395. **Mont.**—*State v. Shafer*, 26 Mont. 11, 66 Pac. 463. **Neb.**—*Emery v. State*, 78 Neb. 547, 111 N. W. 374, 9 L. R. A. (N. S.) 1124 (although charge be in positive terms); *Sharp v. State*, 61 Neb. 187, 85 N. W. 38; *Richards v. State*, 22 Neb. 145, 34 N. W. 346. **N. D.** *State v. Hazledahl*, 2 N. D. 521, 52 N. W. 315, 16 L. R. A. 150. **S. D.**—*State v. Donaldson*, 12 S. D. 259, 81 N. W. 299; *State v. Becker*, 3 S. D. 29, 35, 51 N. W. 1018; *State v. Brennan*, 2 S. D. 384, 50 N. W. 625. **Wash.**—*State v. Cronin*, 20 Wash. 512, 56 Pac. 26, where statute prescribes verification, but no particular form therefor.

[a] A conviction on an information charging a felony by the prosecuting attorney, verified only on information and belief, is not in derogation of the defendant's constitutional guaranty that no warrant shall issue but upon probable cause, supported by oath or affirmation, where the prosecution was in fact predicated on a verified complaint filed before an examining magistrate and the action of that officer in holding for trial in the district court. *Henson v. State*, 5 Okla. Crim. 201, 114 Pac. 630. This case is to be distinguished from those discussed in a subsequent note, (48, [a]) wherein it is held that an information in a misdemeanor case in Oklahoma must be verified positively,

since it is the basis of the warrant, the statute providing that such an information verified upon information and belief is sufficient, being unconstitutional.

[b] In Texas, an affidavit upon which the information is based, made by the prosecuting attorney upon his information and belief alone, has been held insufficient. *Daniels v. State*, 2 Tex. App. 353, 361.

47. See the following: **Kan.**—*Gen. St.*, 1909, §6642; *State v. Stoffel*, 48 Kan. 364, 29 Pac. 685; *State v. Druitt*, 42 Kan. 469, 22 Pac. 697; *State v. Clark*, 34 Kan. 289, 8 Pac. 528; *State v. Blackman*, 32 Kan. 615, 5 Pac. 173; *State v. Nulf*, 15 Kan. 308; *State v. Montgomery*, 8 Kan. 237; *State v. Cropper*, 4 Kan. App. 245, 45 Pac. 131. **Mo.**—*Rev. St.*, 1909, §5057; *State v. Swearingin*, 234 Mo. 549, 137 S. W. 880; *State v. Green*, 229 Mo. 642, 129 S. W. 700; *State v. Temple*, 194 Mo. 228, 92 S. W. 494, 5 Am. & Eng. Ann. Cas. 954; *State v. Gregory*, 178 Mo. 48, 76 S. W. 970; *State v. Jones*, 168 Mo. 398, 68 S. W. 506; *State v. Hayward*, 83 Mo. 299; *State v. Clark*, 158 Mo. App. 489, 138 S. W. 894; *State v. McCoy*, 140 Mo. App. 395, 124 S. W. 78; *State v. Hunt*, 106 Mo. App. 326, 80 S. W. 279. **Wyo.**—*Comp. St.*, 1910, §6131; *Hollihaugh v. Hehn*, 13 Wyo. 269, 276, 79 Pac. 1044; *In re Boulter*, 5 Wyo. 329, 342, 40 Pac. 520.

[a] A verification by the prosecuting officer stating that the information "is true according to the best of his information and belief" is a sufficient compliance with the statute. A person who makes such a verification imports that he has information and is entitled to entertain the belief he expresses, and when he swears "to the best of his information and belief," he swears that he has information and belief. *State v. Whisner*, 35 Kan. 271, 278, 10 Pac. 852. See also *State v. Bennett*, 102 Mo. 356, 14 S. W. 865, 10 L. R. A. 717, *followed in State v. Armstrong*, 106 Mo. 395, 413, 16 S. W. 604, 27 Am. St. Rep. 361, 13 L. R. A. 419.

[b] Sufficient though it be supported by an insufficient affidavit of some individual which is filed with it.

issuing a warrant for the arrest of the defendant, where timely objection is made on that ground.⁴⁸

(II.) *The Jurat.*⁴⁹ — The particular form of the jurat is immaterial so long as it shows, when reasonably construed, that the person making the verification appeared before and was sworn by an officer authorized to take it.⁵⁰

A clerical error in describing the officer taking the verification does not invalidate it.⁵¹ When the verification is made before a deputy

State v. Nave, 185 Mo. 125, 84 S. W. 1; *State v. Clark*, 158 Mo. App. 489, 138 S. W. 894; *State v. Pitts*, 70 Mo. App. 446.

48. **U. S.**—*United States v. Tureaud*, 20 Fed. 621. **Kan.**—*State v. Barr*, 54 Kan. 230, 38 Pac. 289; *State v. Moseli*, 49 Kan. 142, 30 Pac. 189; *State v. Clark*, 34 Kan. 289, 8 Pac. 528; *State v. Blackman*, 32 Kan. 615, 5 Pac. 173; *State v. Gleason*, 32 Kan. 245, 4 Pac. 363; *State v. Cropper*, 4 Kan. App. 245, 45 Pac. 131. **Wyo.**—*Hollibaugh v. Hehn*, 13 Wyo. 269, 276, 79 Pac. 1044. See *State v. Boulter*, 5 Wyo. 236, 39 Pac. 883, all holding that an information verified on information and belief does not of itself constitute "probable cause supported by affidavit," within meaning of constitutional provisions that "no warrant shall issue but upon probable cause, supported by affidavit."

As to necessity for verification of information for purposes of issuing a warrant of arrest, see *supra*, VIII, B, 8, a.

As to waiver by failure to object at proper time by attack on warrant, see *infra*, XV.

[a] **In Oklahoma**, it is held that the statutory provision, that informations in misdemeanor cases are sufficient if verified upon information and belief, is unconstitutional, since the information in such cases is the basis of the warrant, and the constitution provides that "no warrant shall issue, but upon probable cause supported by oath or affirmation;" and that an information so verified is not sufficient to justify the issuance of a warrant of arrest or to support a conviction. *Salter v. State*, 2 Okla. Crim. 464, 102 Pac. 719, 139 Am. St. Rep. 935. And see *DeGraff v. State*, 2 Okla. Crim. 519, 103 Pac. 538. These cases are to be distinguished from *Henson v. State*, 5 Okla. Crim. 201, 114 Pac. 630, cited *supra*, and holding that an information in a felony case verified on information and belief

is sufficient, since in a felony case the preliminary complaint is the basis of the warrant and not the information itself.

[b] **Purpose of Requirement.**—The requirement that an information charging a misdemeanor shall be verified in positive terms before a warrant of arrest may issue thereon is intended for the preservation of the personal security and liberty of the individual, by forbidding the issuance of a warrant for his arrest except upon probable cause shown under oath, and by preventing the institution of baseless and unfounded prosecutions. *In re Talley*, 4 Okla. Crim. 398, 112 Pac. 36, 31 L. R. A. (N. S.) 805.

[c] **Positive Verification Sufficient To Sustain Warrant.**—An affidavit that the facts stated in an information are true and correct, is a positive verification of the information, and sufficient to sustain a warrant issued thereon. *State v. Watson*, 6 Kan. App. 897, 50 Pac. 959.

49. As to jurat in verification to complaint, see *infra*, VIII, C, 4.

50. *State v. Rosener*, 8 Wash. 42, 35 Pac. 357.

[a] **Statutory Form.**—**Wyo.** Comp. St., 1910, §6132; *Gustavenson v. State*, 10 Wyo. 300, 315, 68 Pac. 1006.

[b] **Omissions.**—The omission of the words "before me," which usually follow after the words "sworn to" is not fatal, where the statute provides that an information shall not be set aside for any defect or imperfection which does not tend to the prejudice of the substantial rights of the defendant upon the merits. *State v. Smith*, 38 Kan. 194, 16 Pac. 254.

As to who may make verification, see *supra*, VIII, B, 8, b.

As to who may take verification, see *supra*, VIII, B, 8, c.

51. *State v. Derkum*, 27 Mo. App. 628, clerical error consisted in writing

county clerk, it is proper that the jurat should be signed by such officer in his own name;⁵² and it is not necessary that he sign, in such case, in the name of his principal by himself as deputy,⁵³ though such a signature is also proper.⁵⁴

A signing by the clerk by the initials only of his Christian name is sufficient.⁵⁵ The signature of the clerk, where the verification is taken by the clerk of court, should be attested by the seal of the court.⁵⁶ But, since the courts take judicial notice of the names and signatures of their officers, its omission does not invalidate the verification.⁵⁷ A clerical mistake in the jurat as to the time when the verification was taken does not render the verification insufficient.⁵⁸

9. Indorsements.—a. *In General.*—Though the statute provides that an information shall be substantially in the form prescribed for an indictment, it is not necessary that it be indorsed “a true information.”⁵⁹

circuit “court” instead of circuit “clerk” following clerk’s signature.

[a] The omission of the word “county” in the title of the officer before whom the verification is taken is not ground for a motion to quash the information. *State v. Douglass*, 72 Kan. 673, 83 Pac. 621.

52. *State v. Rosener*, 8 Wash. 42, 35 Pac. 357; *State v. Devine*, 6 Wash. 587, 34 Pac. 154.

53. *State v. Devine*, 6 Wash. 587, 34 Pac. 154.

54. *State v. Clark*, 58 Wash. 128, 107 Pac. 1047 (wherein the deputy signed the name of the clerk by himself as deputy); *State v. Rosener*, 8 Wash. 42, 35 Pac. 357.

55. *Rice v. People*, 15 Mich. 9; *Trimble v. State*, 61 Neb. 604, 85 N. W. 844 (the court takes judicial notice of its clerk).

56. *State v. Pfenninger*, 76 Mo. App. 313; *Gustavenson v. State*, 10 Wyo. 300, 315, 68 Pac. 1006.

57. **Kan.**—*State v. Foulk*, 57 Kan. 255, 45 Pac. 603. **Mo.**—*State v. Fogg*, 206 Mo. 696, 708, 105 S. W. 618; *State v. Forsha*, 190 Mo. 296, 88 S. W. 746, 4 L. R. A. (N. S.) 576; *State v. Pfenninger*, 76 Mo. App. 313. **Wyo.**—*Gustavenson v. State*, 10 Wyo. 300, 315, 68 Pac. 1006, wherein the court said that while “it was unquestionably the duty of the clerk, under the statute (making him custodian of the seal of the court and providing that it shall be attached to all instruments signed by him in his official capacity), to attach the seal of the court, it does not appear to have been the purpose of the legislature

to make the performance of this duty essential to the sufficiency of the verification. The seal is, principally at least, a matter of evidence to identify the officer and establish his official character and authority. If the statute provided that the acts of the officer, not attested by the seal of the court, should be void, a different question would be presented and a different question might arise if the legality of the defendant’s arrest were at issue under Section 4 of the Bill of Rights. But neither of these questions is involved, and the courts take judicial notice of the names and signatures of their officers, and the seal of a court need not be attached to the jurat of an affidavit, sworn to before its clerk, and to be used only in such court.”

[a] **Presumption.**—When the attention of the court is called to the signature of the clerk by a motion to quash, it will be presumed in the absence of any evidence to the contrary that he inspected the signature of the jurat and saw that it was genuine. *State v. Pfenninger*, 76 Mo. App. 313.

58. *State v. Sassaman*, 214 Mo. 695, 725, 114 S. W. 590, giving date as “25th day of February,” instead of “January.” And see *State v. Fraser*, 161 Mo. App. 333, 342, 143 S. W. 545, holding that the fact that the verification is dated the day following the filing of the information is not fatal where there is no evidence to show that it was not verified when filed, and there is nothing to show but what it was simply a clerical error.

59. *State v. Belding*, 43 Ore. 95, 71 Pac. 330.

An indorsement of approval by the prosecuting officer is required by express provision of statute in one state.⁶⁰

b. *Nature of Offense*.—An indorsement of the character of the offense charged is for convenience only, and forms no part of the substance of the charge.⁶¹ It is advisable that the prosecuting officer or clerk, if he makes such indorsement at all, should describe the offense as accurately as is consistent with brevity;⁶² but a mistake in this particular can neither enlarge nor reduce, nor vitiate the authentic accusation which is contained only in the body of the information.⁶³

c. *Names of Witnesses for Prosecution*.⁶⁴—(I.) *Necessity and Object*. Statutes, requiring that the prosecuting officer indorse on the information the names of all the witnesses for the prosecution known to him at the time of filing the same, are almost universal.⁶⁵ Indeed, such

[a] *Reason*.—(1) "The district attorney is alone responsible for informations returned into court, the filing of which affords conclusive evidence of his intention to prosecute the persons charged; and, as the law does not require the performance of vain things, no necessity would appear to exist for indorsing the information in the manner insisted upon." *State v. Belding*, 43 Ore. 95, 71 Pac. 330. (2) But where the information is indorsed "A true information," under which appear the printed words of the name of the district attorney, the indorsement substantially complies with the statute, if such indorsement is necessary. The officer adopts the printed signature, binding him as effectually as if it is personally subscribed by him. *State v. Belding*, 43 Ore. 95, 71 Pac. 330.

As to requirement of indorsement "a true bill" on an indictment, see *supra*, VIII, A, 8, c.

60. Burns' Ann. St. (Ind.) 1914, §1996 (prosecuting attorney shall approve affidavit, which takes place of information under present statute, by indorsement, using the words "approved by me"); *Robinson v. State*, 177 Ind. 263, 97 N. E. 929; *Cole v. State*, 169 Ind. 393, 82 N. E. 796.

[a] An omission in this respect (1) is fatal on a motion to quash (*Robinson v. State*, 177 Ind. 263, 97 N. E. 929; *Cole v. State*, 169 Ind. 393, 82 N. E. 796), (2) though not when objection thereto is taken for the first time in a court of review. *Robinson v. State*, 177 Ind. 263, 97 N. E. 929.

Court may allow amendment by adding indorsement after affidavit has been

filed. *Cole v. State*, 169 Ind. 393, 82 N. E. 796.

61. *State v. McGinnis*, 12 La. Ann. 743.

62. *State v. McGinnis*, 12 La. Ann. 743.

63. *State v. McGinnis*, 12 La. Ann. 743.

Review.—It will not be presumed that the indorsement of the character of the offense in connection with the word "information," was prejudicial to the accused when such indorsement aptly summarized the facts stated within the information and the attention of the trial court had been in no way directed to the indorsement complained of. *Fager v. State*, 49 Neb. 439, 68 N. W. 611.

64. As to requirement of indorsement on indictment, see *supra*, VIII, A, 8, f.

65. See the following: **Colo.**—*Mills'* Ann. St., 1912, §2084; *Wickham v. People*, 41 Colo. 345, 93 Pac. 478. **Idaho**. Rev. Codes, 1908, §7656; *State v. Silva*, 21 Idaho 247, 120 Pac. 835; *State v. Allen*, 20 Idaho 263, 117 Pac. 849; *State v. Crea*, 10 Idaho 88, 76 Pac. 1013. **Kan.** Gen. St., 1909, §6611; *State v. Tassell*, 87 Kan. 861, 126 Pac. 1090. **Mich.** *Howell's St.*, 1913, §15105; *People v. Bollman*, 178 Mich. 159, 144 N. W. 537; *People v. Hammond*, 132 Mich. 422, 428, 93 N. W. 1084; *People v. Casey*, 124 Mich. 279, 82 N. W. 883; *People v. Williams*, 118 Mich. 692, 77 N. W. 218; *People v. Howes*, 81 Mich. 396, 45 N. W. 961; *People v. Evans*, 72 Mich. 367, 40 N. W. 473; *Edwards v. People*, 39 Mich. 760; *Hill v. People*, 26 Mich. 496; *People v. Lilly*, 1 Mich. N. P. 239. **Mo.** Rev. St., 1909, §5057; *State v. Martin*,

practice has long prevailed in this country and England,⁶⁶ though it was not necessary at common law,⁶⁷ and is not now necessary where no statute requires it.⁶⁸

While such indorsement does not constitute a part of the information proper,⁶⁹ yet it is directed by the statutes for the protection of the

230 Mo. 680, 688, 132 S. W. 595; *State v. Jeffries*, 210 Mo. 302, 322, 109 S. W. 614; *State v. Davidson*, 44 Mo. App. 513. **Mont.**—Rev. Codes, 1907, §9109; *State v. Newman*, 34 Mont. 434, 87 Pac. 462; *State v. Schnepel*, 23 Mont. 523, 59 Pac. 927; *State v. Calder*, 23 Mont. 504, 59 Pac. 903. **Neb.**—Rev. St., 1913, §9063; *Wilson v. State*, 87 Neb. 638, 128 N. W. 38; *Ossenkop v. State*, 86 Neb. 539, 126 N. W. 72; *Reed v. State*, 75 Neb. 509, 106 N. W. 649; *Trimble v. State*, 61 Neb. 604, 85 N. W. 844; *Barney v. State*, 49 Neb. 515, 68 N. W. 636; *Rauschkolb v. State*, 46 Neb. 658, 65 N. W. 776; *Perry v. State*, 44 Neb. 414, 63 N. W. 26; *Stevens v. State*, 19 Neb. 647, 28 N. W. 304. **N. D.**—Rev. Codes, 1905, §9794; *State v. Albertson*, 20 N. D. 512, 128 N. W. 1122; *State v. Kent*, 5 N. D. 516, 67 N. W. 1052, 35 L. R. A. 518. **Okla.**—Comp. Laws, 1909, §6644; *Brown v. State*, 9 Okla. Crim. 382, 132 Pac. 359; *Starr v. State*, 9 Okla. Crim. 210, 131 Pac. 542; *Hawkins v. State*, 6 Okla. Crim. 308, 118 Pac. 607; *Steen v. State*, 4 Okla. Crim. 309, 314, 111 Pac. 1097. **Ore.**—B. & C. Comp., §1262 (name of each witness examined on oath or affirmation in support of information); *State v. Belding*, 43 Ore. 95, 71 Pac. 330; *State v. Warren*, 41 Ore. 348, 69 Pac. 679 (examination of witnesses before a coroner's jury is not such an examination in support of the information as is contemplated by the statute). **S. D.**—Rev. Code Crim. Proc., §206; *State v. Frazer*, 23 S. D. 304, 121 N. W. 790; *State v. King*, 9 S. D. 628, 76 N. W. 1046. **Utah.**—Comp. Laws, 1907, §4695 (names of witnesses testifying for the state on preliminary examination must be indorsed thereon); *State v. Sheffield*, 146 Pac. 306. **Wash.** Rem. & Ball. Ann. Codes & St., §2050. **Wyo.**—Comp. St., 1910, §6129; *Boulter v. State*, 6 Wyo. 66, 76, 42 Pac. 606.

And see generally the statutes.

The name of the prosecuting witness. (1) as such, should be indorsed on the information by express provision of statute in some states. Lord's Ore. Laws, §1580; Wyo. Comp. St., 1910,

§6129, and generally the statutes. (2) But where he absconded after making the complaint, and the officers were unable to produce him at the preliminary examination, and diligent search failed to discover him before the trial, there was sufficient excuse shown for leaving his name off the information and not producing him at the trial. *People v. Boyd*, 151 Mich. 577, 115 N. W. 687.

66. *State v. Kent*, 5 N. D. 516, 534, 67 N. W. 1052, 35 L. R. A. 518.

67. *State v. Calder*, 23 Mont. 504, 59 Pac. 903.

68. **U. S.**—*Booth v. United States*, 197 Fed. 283, 116 C. C. A. 645 (no such provision in the Criminal Code of Alaska); *United States v. Shepard*, 1 Abb. 431, 27 Fed. Cas. No. 16,273 (no act of Congress requiring it at this date). **Cal.**—*People v. Neary*, 104 Cal. 373, 37 Pac. 943; *People v. Overacker*, 15 Cal. App. 620, 115 Pac. 756; *People v. Sherman*, 3 Cal. Unrep. Cas. 851, 32 Pac. 879. **Ill.**—*Hall v. People*, 134 Ill. App. 559.

[a] It is only by virtue of the statutes that such necessity exists. *State v. Calder*, 23 Mont. 504, 59 Pac. 903.

[b] **Name of prosecuting witness** need not be indorsed where no statute requires it. *Bartlett v. State*, 28 Ohio St. 669, wherein the court said: "This is required, as to indictments, by section 83 of the criminal code, but we do know that it is necessary in regard to informations. In case of indictments, it is desirable to have the prosecuting witness indorse, so as to make him responsible for costs. This prevents frivolous prosecutions. But when an information is presented by the public prosecutor, this is sufficient guarantee of the bona fides of the transaction."

69. See the following cases: **Kan.** *State v. Tassell*, 87 Kan. 861, 126 Pac. 1090, no part of the charge which the defendant is required to meet. **Mich.** *People v. Lilly*, 1 Mich. N. P. 239. **Mo.** *State v. Davidson*, 44 Mo. App. 513. **Mont.**—*State v. De Lea*, 36 Mont. 531, 93 Pac. 814. **Okla.**—*Brown v. State*, 9 Okla. Crim. 382, 132 Pac. 359.

defendant,⁷⁰ and such statutes being mandatory in some,⁷¹ though not all states,⁷² it is the duty of the district attorney to comply therewith,⁷³ a failure in this respect being fatal to the information, where timely objection is made.⁷⁴

70. This is required by the prosecutor in order to give full opportunity to the defendant to know the name or names of the witnesses who will be called upon by the prosecution, so that the defendant may make such preparation for trial as he may deem necessary. *State v. Allen*, 20 Idaho 263, 117 Pac. 849. And see the following cases: **Mich.**—*People v. Quick*, 58 Mich. 321, 25 N. W. 302; *Edwards v. People*, 39 Mich. 760; *People v. O'Hare*, 2 Mich. N. P. 170; *People v. Lilly*, 1 Mich. N. P. 239. **Mo.**—*State v. Walton*, 255 Mo. 232, 243, 164 S. W. 211; *State v. Whitsett*, 232 Mo. 511, 526, 134 S. W. 555; *State v. Martin*, 230 Mo. 680, 689, 132 S. W. 595. **Mont.**—*State v. Schnepel*, 23 Mont. 523, 59 Pac. 927; *State v. Calder*, 23 Mont. 504, 59 Pac. 903. **Neb.**—*Ossenkop v. State*, 86 Neb. 539, 126 N. W. 72; *Reed v. State*, 75 Neb. 509, 106 N. W. 649; *Carrall v. State*, 53 Neb. 431, 73 N. W. 939; *Parks v. State*, 20 Neb. 515, 31 N. W. 5; *Stevens v. State*, 19 Neb. 647, 28 N. W. 304. **N. D.**—*State v. Kent*, 5 N. D. 516, 67 N. W. 1052, 35 L. R. A. 518. **Okla.**—*Herrell v. State*, 10 Okla. Crim. 131, 134 Pac. 1139; *Brown v. State*, 9 Okla. Crim. 382, 132 Pac. 359. **Wash.**—*State v. McGonigle*, 14 Wash. 594, 45 Pac. 20; *State v. Townsend*, 7 Wash. 462, 35 Pac. 367.

[a] However, the statutes were not enacted solely to aid the accused in finding out what the evidence on the part of the state will be. They were designed in part, at least, to regulate the taxation of costs and the granting of continuances on the part of the state. *State v. Walton*, 255 Mo. 232, 243, 164 S. W. 211.

71. **Colo.**—*Wickham v. People*, 41 Colo. 345, 93 Pac. 478. **Mich.**—*People v. Price*, 74 Mich. 37, 41 N. W. 853 (the statute is imperative as to such as were known at the time the information was filed); *People v. O'Hare*, 2 Mich. N. P. 170; *People v. Lilly*, 1 Mich. N. P. 239. **Ore.**—*State v. Warren*, 41 Ore. 348, 356, 69 Pac. 679.

[a] "This is not a mere formality; and wherever it has been provided

for by statute it has been treated as a substantial right." *People v. Hall*, 48 Mich. 482, 12 N. W. 665, 42 Am. Rep. 477. And see *People v. Howes*, 81 Mich. 396, 45 N. W. 961.

72. *State v. Tassell*, 87 Kan. 861, 126 Pac. 1090 (the requirement is not so mandatory or essential that non-compliance with it necessarily invalidates the information or defeats the prosecution); *Boulter v. State*, 6 Wyo. 66, 76, 42 Pac. 606, holding that the qualifying language of the statute, which provides that the failure to indorse the names of the witnesses shall not be ground for quashing or setting aside the information, "neutralize the mandatory language of the portion requiring the indorsement, and are a legislative construction that the matter of indorsement of the names of the witnesses is directory instead of mandatory."

73. *Wickham v. People*, 41 Colo. 345, 93 Pac. 478; *State v. Jeffries*, 210 Mo. 302, 322, 109 S. W. 614.

[a] It is no sufficient excuse for not doing so (1) that the whereabouts of the witness is not known, or that the prosecutor does not know that he can secure his attendance (*People v. Price*, 74 Mich. 37, 41, 42 N. W. 604), (2) unless the witness is where the prosecution cannot compel attendance, as in another state. *People v. Perriman*, 72 Mich. 184, 40 N. W. 425, holding in latter case that it is not an absolute requirement that indorsement of known witnesses be made.

[b] Even though the statute is not considered as mandatory, "it is the duty of the county attorney, of course, to make the indorsement, so that the defendant may make inquiry concerning the standing and credibility of the witnesses who are to testify against him." *State v. Tassell*, 87 Kan. 861, 126 Pac. 1090.

[c] **Presumption.**—Where names are indorsed it is to be presumed that the prosecuting officer has done his duty, and will call no others. *People v. Lilly*, 1 Mich. N. P. 239.

74. *State v. Martin*, 230 Mo. 680, 688,

Such provisions do not require the indorsement of the names of witnesses that are called for the purpose of rebutting the testimony given on behalf of the defendant, however.⁷⁵ Nor is a dying declaration within the provisions of the statutes.⁷⁶

(II.) Time of Making.—Statutes requiring the indorsement contemplate that it be made, so far as the witnesses are known to the prosecuting officer, at the time of filing the information.⁷⁷ It has been determined, however, that the court is vested with discretion to allow the indorsement after the information has been filed,⁷⁸ and even during the trial,⁷⁹ and that unless there is an abuse of that discretion the defendant has no cause to complain.⁸⁰ The rule in some states is

132 S. W. 595 (unless the prosecuting attorney offers to supply such omission); *State v. Matejousky*, 22 S. D. 30, 115 N. W. 96. But see *State v. Jeffries*, 210 Mo. 302, 322, 109 S. W. 614.

As to time for making objection, see *infra*,

[a] Where no names are indorsed, the defendant may move to have it done before pleading. *People v. Lilly*, 1 Mich. N. P. 239.

[b] Where the names of the witnesses were written in the body of the information, the omission of the indorsement was not ground for reversal, however. *State v. McGonigle*, 14 Wash. 594, 45 Pac. 20.

75. See the following cases: *Idaho*. *State v. Silva*, 21 Idaho 247, 120 Pac. 835. *Neb.*—*Ossenkop v. State*, 86 Neb. 539, 126 N. W. 72; *Clements v. State*, 80 Neb. 313, 114 N. W. 271; *Kastner v. State*, 58 Neb. 767, 778, 79 N. W. 713; *McVey v. State*, 57 Neb. 471, 77 N. W. 1111; *Kelly v. State*, 51 Neb. 572, 71 N. W. 299; *Fager v. State*, 49 Neb. 439, 68 N. W. 611; *State v. Huckins*, 23 Neb. 309, 36 N. W. 527. *Okla.*—*Bigfeather v. State*, 7 Okla. Crim. 364, 123 Pac. 1026. *Wash.*—*State v. Champoux*, 33 Wash. 339, 352, 74 Pac. 557; *State v. Phelps*, 22 Wash. 181, 60 Pac. 134; *State v. Regan*, 8 Wash. 506, 36 Pac. 472.

And 3 ENCY. OF EV. 242. But see *People v. Casey*, 124 Mich. 279, 82 N. W. 883; *People v. Deitz*, 86 Mich. 419, 427, 49 N. W. 296; *People v. Quick*, 58 Mich. 321, 25 N. W. 302. Compare *People v. McArron*, 121 Mich. 1, 79 N. W. 944, holding reception of rebuttal testimony against objection, with knowledge of the facts, equivalent to an indorsement.

76. *People v. Beverly*, 108 Mich. 509, 66 N. W. 379.

77. See the statutes. cited *supra*, note 65; and *People v. O'Hare*, 2 Mich. N. P. 170.

78. *State v. Tassell*, 87 Kan. 861, 126 Pac. 1090; *State v. Calder*, 23 Mont. 504, 59 Pac. 927; *State v. Black*, 15 Mont. 143, 151, 38 Pac. 674.

[a] Even if the indorsement is treated as a part of the information, there is authority to amend it at any time before the defendant pleads. *State v. Tassell*, 87 Kan. 861, 126 Pac. 1090.

79. *State v. Tassell*, 87 Kan. 861, 126 Pac. 1090.

[a] Where the name of the complaining witness (1) is omitted through inadvertence, the court may, in its discretion, allow such name to be indorsed even after the jury is sworn. *People v. Evans*, 72 Mich. 367, 40 N. W. 473. (2) In permitting such indorsement, however, the court is bound to take care of the rights of the accused, and if reasonable claim is made that he is not prepared to meet the testimony expected by such witness, the court should grant a continuance. *People v. Evans*, 72 Mich. 367, 40 N. W. 473.

80. *State v. Tassell*, 87 Kan. 861, 126 Pac. 1090.

[a] There was no abuse of discretion in the following cases: *State v. Tassell*, 87 Kan. 861, 126 Pac. 1090 (where several days before the trial and without leave of court the county attorney indorsed the names of the witnesses, it was not error for the court to allow him to reindorse such names on the day of the trial); *State v. Calder*, 23 Mont. 504, 59 Pac. 903 (where omission was not in bad faith, not erroneous to permit indorsement on day before trial).

[b] The discretion vested in the

that such indorsement must be made before the trial, however.⁸¹

(III.) **Names of Additional Witnesses.**—(A.) **BEFORE TRIAL.**—The duty of the prosecuting officer is fully performed, when he has, at the time of presenting the charge for filing, indorsed the names of all witnesses then known to him, where there is no command that, if thereafter other witnesses are discovered, their names shall also be indorsed.⁸² Statutes, however, expressly provide that at such time before trial, as the court may rule or otherwise prescribe, the prosecuting attorney shall indorse the names of such other witnesses as shall then be known to him.⁸³

court should, of course, be cautiously exercised, and to that end should require the county attorney to act with good faith and not permit the bringing in of important witnesses without the defendant having an opportunity to make due inquiry into their standing and credibility. *State v. Tassell*, 87 Kan. 861, 126 Pac. 1090.

81. *Kastner v. State*, 58 Neb. 767, 777, 79 N. W. 713; *Parks v. State*, 20 Neb. 515, 31 N. W. 5.

[a] But it was no ground for exception that the name of a witness known to the prosecuting officer at the time of filing the information was indorsed after the trial had begun, where there was no showing of prejudice, and no postponement of the trial asked. This was necessary if the accused were prejudiced or surprised by the action of the court in permitting the indorsement to be made. *Kemplin v. State*, 90 Neb. 655, 134 N. W. 275, *distinguishing* *Wilson v. State*, 87 Neb. 638, 128 N. W. 38, the court saying: "In that case the county attorney was permitted to indorse ten names of witnesses after the case was called for trial. It was a capital case. The fact of that number of witnesses being indorsed at the moment of calling a case for trial would of itself raise a presumption of prejudice and a possible lack of fair dealing, and the granting of 24 hours of time in which to investigate as to the facts to be proved would be little less than mockery."

82. *State v. Schnepel*, 23 Mont. 523, 59 Pac. 927.

[a] In Montana, the statute does not provide for the indorsement of witnesses after the filing of the information. Nevertheless, it is held that an indorsement at commencement of trial of a witness not previously known to the prosecuting officer is properly al-

lowed by the court. *State v. Biggs*, 45 Mont. 400, 123 Pac. 410.

83. See the following: **Colo.**—*Mills' Ann. St.*, 1912, §2084; *Wickham v. People*, 41 Colo. 345, 93 Pac. 478. **Idaho.** *Rev. Codes*, 1908, §7656; *State v. Silva*, 21 Idaho 247, 120 Pac. 835; *State v. Allen*, 20 Idaho 263, 117 Pac. 849; *State v. Crea*, 10 Idaho 88, 76 Pac. 1013; *State v. Wilmbusse*, 8 Idaho 608, 70 Pac. 849. **Kan.**—*Gen. St.*, 1909, §6641; *State v. Turner*, 87 Kan. 449, 124 Pac. 424. **Mich.**—*Howell's St.*, 1913, §15,105; *People v. Bollman*, 178 Mich. 159, 144 N. W. 537; *People v. Williams*, 118 Mich. 692, 77 N. W. 248; *People v. Howes*, 81 Mich. 396, 45 N. W. 961; *Hill v. People*, 26 Mich. 496. **Neb.**—*Rev. St.*, 1913, §9063; *Wilson v. State*, 87 Neb. 638, 128 N. W. 38; *Ossenkop v. State*, 86 Neb. 539, 126 N. W. 72; *Trimble v. State*, 61 Neb. 604, 85 N. W. 844; *Barney v. State*, 49 Neb. 515, 68 N. W. 636; *Rauschkolb v. State*, 46 Neb. 658, 65 N. W. 776; *Stevens v. State*, 19 Neb. 647, 28 N. W. 304. **Okla.**—*Comp. Laws*, 1909, §6644; *Brown v. State*, 9 Okla. Crim. 382, 132 Pac. 359; *Hawkins v. State*, 6 Okla. Crim. 308, 116 Pac. 607; *Steen v. State*, 4 Okla. Crim. 309, 314, 111 Pac. 1097 (statutory provision as to misdemeanor cases has no application to felony cases). **Wash.**—*Rem. & Ball. Ann. Codes & St.*, §2050; *State v. Nordstrom*, 7 Wash. 506, 35 Pac. 382. **Wyo.**—*Comp. Sts.*, 1910, §6129.

And see generally the statutes of the several states.

[a] **South Dakota.**—(1) Previous to revision of *Crim. Proc. Act* in 1903, the statutes contained a similar provision. *State v. King*, 9 S. D. 628, 70 N. W. 1046. (2) Names could be added only under a general rule or special order of court. *State v. King*, 9 S. D. 628, 70 N. W. 1046. (3) They could not

Under these statutes, an indorsement after the filing of the information and before the trial is a matter within the discretion of the court, and does not constitute error unless there is an abuse of such discretion.⁸⁴ The indorsement should be made at as early a date as

be added after the trial began, because, if they were previously known, they should have been previously indorsed, and, if not, it was unnecessary. *State v. King*, 9 S. D. 623, 70 N. W. 1046.

[b] **New Information Unnecessary.** Where new names are added to the information, it is not necessary that the accused be served with a new copy thereof. Notice of the addition of new names of witnesses meets every reasonable requirement. *State v. Nordstrom*, 7 Wash. 506, 35 Pac. 382.

84. See the following cases: *Kan.* *State v. Wallace*, 92 Kan. 440, 140 Pac. 863 (when case called for trial); *State v. Sorter*, 52 Kan. 531, 34 Pac. 1036 (when case called for trial); *State v. Reno*, 41 Kan. 674, 21 Pac. 803. *Mich.*—*People v. Luders*, 126 Mich. 440, 85 N. W. 1081, at the trial, before jury sworn. *Neb.*—*Johns v. State*, 88 Neb. 145, 129 N. W. 247; *Barney v. State*, 49 Neb. 515, 522, 68 N. W. 636; *Fager v. State*, 49 Neb. 439, 68 N. W. 611; *Rauschkolb v. State*, 46 Neb. 658, 65 N. W. 776; *Johnson v. State*, 34 Neb. 257, 51 N. W. 835. *Okla.*—*Bigfeather v. State*, 7 Okla. Crim. 364, 123 Pac. 1026; *Hawkins v. State*, 7 Okla. Crim. 385, 123 Pac. 1024; *Hughes v. State*, 7 Okla. Crim. 117, 122 Pac. 554 (when case called for trial). *Wash.*—*State v. Carpenter*, 56 Wash. 670, 106 Pac. 206; *State v. Holmes*, 12 Wash. 169, 40 Pac. 735, 41 Pac. 887; *State v. Lee Doon*, 7 Wash. 308, 34 Pac. 1103.

[a] The court did not abuse its discretion, under the circumstances indicated in the following cases: *Colo.* *Wickham v. People*, 41 Colo. 345, 93 Pac. 478, not reversible error to allow, on the day before the case was set for trial, the district attorney to indorse upon the information the names of additional witnesses said to have been known to him when the information was filed, where defendant did not apply for a continuance nor make a showing of surprise or prejudice. *Idaho.*—*State v. Rooke*, 10 Idaho 388, 70 Pac. 82, where it satisfactorily ap-

peared to the court that the prosecuting officer could not reasonably have asked such permission at an earlier time, not error to allow indorsement at beginning of trial. *Kan.*—*State v. Hargis*, 85 Kan. 873, 118 Pac. 699 (where indorsement made two days before the trial); *State v. Reed*, 53 Kan. 767, 37 Pac. 174, 42 Am. St. Rep. 322 (where attention of defendant was called to witnesses, and inquiry had been made of some of them as to what their testimony would be); *State v. Sorter*, 52 Kan. 531, 34 Pac. 1036 (where sufficient time was given by court for accused to make inquiry regarding character and credibility of the proposed witnesses before the introduction of any evidence in the case). *Mich.*—*People v. Gregory*, 130 Mich. 522, 90 N. W. 414, not error to permit indorsement on day of trial and before jury sworn, where prosecuting officer gave notice to defendant's attorneys immediately upon receiving information that witnesses were essential, which was eight days before the trial. *Mo.*—*State v. Wilson*, 223 Mo. 173, 122 S. W. 671, where defendant made no complaint that he was taken by surprise by reason of the additional indorsement. *Wash.* *State v. Le Doon*, 7 Wash. 308, 34 Pac. 1103, in the absence of a rule of court prescribing time for indorsement, court does not err in allowing same during the impaneling of the jury, as the trial does not commence until the jury has been accepted and sworn.

[b] The accused is not prejudiced by the allowance of the indorsement of the names of additional witnesses, testifying to matters brought out in the preliminary examination by witnesses whose knowledge was only gained through hearsay, even though such indorsement is made but a short time before the trial. *People v. Segal*, 179 Mich. 316, 146 N. W. 644, wherein it was contended that since the prosecuting officer knew from the preliminary examination that he would have to have additional witnesses, he

practicable after the discovery of such witnesses,⁸⁵ and before the commencement of the trial.⁸⁶

should have endeavored to learn the names thereof earlier than he did.

[c] Where Witnesses Not Called.

An accused is not prejudiced by the indorsement of several witnesses after the information has been filed, where the only one of such witnesses sworn on the trial is one because of whose absence he moved for a continuance. *People v. Burwell*, 106 Mich. 27, 63 N. W. 986.

[d] Court Reporter and Witness in Rebuttal.

Permission to indorse upon an information, when a case was called for trial, the name of the court reporter, who merely testified to the correctness of his report of the testimony of witnesses given at a former trial, and the name of another witness whose testimony was given in rebuttal, was within the proper discretion of the court. *State v. Jackett*, 85 Kan. 427, 116 Pac. 509.

[e] Notwithstanding a general rule of court requiring such names to be indorsed within twenty-four hours after their discovery, a judgment will not be reversed where the application to indorse the names was not made until a later time, provided no prejudice to the accused resulted. *Barney v. State*, 49 Neb. 515, 68 N. W. 636, wherein the court said: "A rule of court which would arbitrarily forbid the indorsement of names of witnesses essential to the state, under circumstances not prejudicing the rights of the accused, and thereby defeating a just administration of the criminal law, would be unreasonable and more honored in the breach than the observance."

[f] Under a rule of court, adopted pursuant to such statutory authority, and providing that the prosecuting attorney may at any time before the trial indorse on the information the names of such witnesses as shall then for the first time become known to him, upon his filing with the clerk of the court his affidavit setting forth that the materiality of such witnesses' testimony has just come to his knowledge and that they were not known to him to be material witnesses at the time of filing the information, no

prejudice was shown, where in accordance with this rule, the county attorney filed the necessary affidavit to entitle him to indorse the name of a witness upon the information, to which the attention of the attorney for the defense was called, and indorsed the name of such witnesses, who were permitted to testify over the objections of defendant. *Trimble v. State*, 61 Neb. 604, 85 N. W. 844, holding that "If defendants were taken by surprise by the indorsement of said name, they should have asked for a postponement of the trial."

[g] If the accused does not request a postponement of the trial, no prejudice will be presumed because of such indorsement. *Johns v. State*, 88 Neb. 145, 129 N. W. 247. See also *State v. Miller*, 80 Wash. 75, 141 Pac. 293; *State v. Holedger*, 15 Wash. 443, 46 Pac. 652.

85. *Idaho.*—*State v. Allen*, 20 Idaho 263, 275, 117 Pac. 849. *Neb.*—*Wilson v. State*, 87 Neb. 638, 128 N. W. 38; *Gandy v. State*, 24 Neb. 716, 40 N. W. 302. *Okla.*—*Hawkins v. State*, 6 Okla. Crim. 308, 116 Pac. 607.

86. *People v. O'Hare*, 2 Mich. N. P. 170; *Wilson v. State*, 87 Neb. 638, 128 N. W. 38; *Sweeney v. State*, 59 Neb. 269, 80 N. W. 815 (error to permit indorsement after trial has commenced); *Gandy v. State*, 24 Neb. 716, 40 N. W. 302 (before day of trial); *Stevens v. State*, 19 Neb. 647, 28 N. W. 304. And see generally the statutes cited, *supra*, note 83.

[a] The carelessness or neglect of the prosecuting attorney will not warrant the court in permitting names to be indorsed upon the trial when the witnesses were before known to him. *People v. Howes*, 81 Mich. 396, 45 N. W. 961.

[b] Prosecutor Not Permitted To Spring Premeditated Surprise.—The court ought to require the utmost good faith of the prosecuting officer, and not permit him purposely to spring a surprise upon the accused by indorsing on the information during the trial the names of witnesses whom he intended beforehand to call in chief. *State v. McDonald*, 57 Kan. 537, 46 Pac. 966.

The trial court should require a strong showing at the time the application is made why the name or names were not indorsed at the time the information was filed,⁸⁷ or why application was not sooner made after such information was filed.⁸⁸

(B.) AFTER COMMENCEMENT OF TRIAL.—The statutes are silent as to what shall be done in case any witnesses are discovered after the commencement of the trial.⁸⁹ Nevertheless, the general rule has been adopted that if, after the trial has begun, the prosecuting officer learns of other witnesses whom he did not know of before, upon a proper showing of that fact made to the court,⁹⁰ leave to indorse such

87. *State v. Allen*, 20 Idaho 263, 117 Pac. 849; *State v. Crea*, 10 Idaho 88, 76 Pac. 1013 (by affidavit or otherwise); *Gandy v. State*, 27 Neb. 707, 733, 43 N. W. 747, 44 N. W. 108.

[a] In cases where new witnesses become known to counsel, or are ascertained to be necessary after the information has been filed, with such witnesses indorsed thereon as were known to him at the time of filing, it is only necessary that he make such a showing of the facts as will bring to the knowledge of the court that the prosecutor has acted in good faith and that the additional witnesses are necessary for the due presentation of the case. *Parks v. State*, 20 Neb. 515, 31 N. W. 5.

[b] If good cause be shown by the prosecuting officer why such indorsement was not made in accordance with the statute, and it appears that the failure to indorse the witness' name upon the information has in no way prejudiced or misled the defendant, then in such case the defendant can in no way be injured, and none of his rights will be denied by permitting the name of a witness to be indorsed after the information is filed. *State v. Allen*, 20 Idaho 263, 117 Pac. 849.

[c] A showing supporting a motion for permission to indorse a name upon the information after the information is filed and the trial begun, which shows that the witness whose name the prosecution asks to have indorsed upon the information was a witness at the preliminary examination, and that the defendant knew that such witness was an important and material witness for the prosecution, and the only reason why such name was not indorsed was the oversight and neglect of the prosecuting attorney, and no showing is made on behalf of the

defendant to the effect that such defendant was in any way misled or deceived by the failure to indorse such name on the information, and that the court offered to grant a continuance giving the defendant time to secure necessary and material evidence made necessary by such indorsement, is sufficient to warrant the court in permitting such name to be indorsed upon the information. *State v. Allen*, 20 Idaho 263, 117 Pac. 849.

[d] No showing seems to be necessary where the indorsement is made without objection on the part of the accused. *People v. Williams*, 118 Mich. 692, 77 N. W. 248.

88. *State v. Allen*, 20 Idaho 263, 117 Pac. 849.

89. *People v. O'Hare*, 2 Mich. N. P. 170; *State v. Bokien*, 14 Wash. 403, 44 Pac. 889. And see the statutes.

90. **Idaho.**—*State v. Wilmbus*, 8 Idaho 608, 70 Pac. 849. **Mich.**—*People v. Bollman*, 178 Mich. 159, 144 N. W. 537; *People v. Baker*, 112 Mich. 211, 70 N. W. 431; *People v. Hall*, 48 Mich. 482, 12 N. W. 665, 42 Am. Rep. 477. **Okla.**—*Hawkins v. State*, 6 Okla. Crim. 308, 118 Pac. 607; *Steen v. State*, 4 Okla. Crim. 309, 111 Pac. 1097.

[a] Without some excuse for delay the prosecuting attorney is not entitled to and should not be permitted to indorse a new witness' name on the information during the trial. *People v. Karamol*, 173 Mich. 354, 139 N. W. 1.

[b] But it is not reversible error to allow such indorsement without showing that the witnesses were unknown to the prosecuting officer before, where no continuance was asked by the accused. *State v. La Pitre*, 54 Wash. 166, 103 Pac. 27.

[c] The statement of the prosecutor at the trial that he had just been informed that morning of a material

names, even while the trial is in progress, may be granted by the court in the exercise of its discretion,⁹¹ and the defendant cannot complain, where no abuse of such discretion is shown.⁹² The indorse-

witness, whose name he sought to have indorsed, was a sufficient showing as against a general objection of the accused's counsel. *People v. Bollman*, 178 Mich. 159, 144 N. W. 537, holding that in the absence of a specific objection that the showing made by the prosecution was insufficient, because not made under oath, such contention would not be considered, on writ of error, no claim having been made by accused to the trial court that he was surprised in any way, nor that he wanted time to investigate the witness; nor complaint made that he was prejudiced in any way by the testimony of the witness.

[d] **Correcting Name of Witness.**

(1) The prosecuting officer may be permitted to correct an error made in indorsing name of a witness where there is no showing that it misled or prejudiced defendant. *State v. McGann*, 8 Idaho 40, 66 Pac. 823. (2) But he should be required to show that he was not aware of the mistake until time of asking leave to correct. *Binkley v. State*, 34 Neb. 757, 52 N. W. 708. (3) And if the accused was misled by such mistake, the court should grant a continuance. *Binkley v. State*, 34 Neb. 757, 52 N. W. 708.

91. See the following cases: **Idaho.** *State v. Wilmbusse*, 8 Idaho 608, 70 Pac. 849. **Kan.**—*State v. Price*, 55 Kan. 606, 40 Pac. 1000; *State v. Taylor*, 36 Kan. 329, 336, 13 Pac. 550; *State v. McKinney*, 31 Kan. 570, 3 Pac. 356. **Mich.**—*People v. Isham*, 109 Mich. 72, 67 N. W. 819. **Mont.**—*State v. Schnepel*, 23 Mont. 523, 59 Pac. 927. **Okla.**—*Cahn v. State*, 10 Okla. Crim. 200, 135 Pac. 1155; *Hawkins v. State*, 6 Okla. Crim. 308, 118 Pac. 607, s. c., 123 Pac. 1024. **Wash.**—*State v. Pepoon*, 62 Wash. 635, 645, 114 Pac. 449; *State v. Quinn*, 56 Wash. 295, 105 Pac. 818; *State v. La Pitre*, 54 Wash. 166, 103 Pac. 27; *State v. Kelley*, 14 Wash. 702, 45 Pac. 38; *State v. Boken*, 14 Wash. 403, 44 Pac. 889; *State v. Regan*, 8 Wash. 506, 36 Pac. 472.

And see generally the cases cited in the preceding note.

92. See the following: **Kan.**—*State*

v. Price, 55 Kan. 606, 40 Pac. 1000. **Mich.**—*People v. Baker*, 112 Mich. 211, 70 N. W. 431 (where proper showing made); *People v. Machen*, 101 Mich. 400, 59 N. W. 664. **Wash.**—*State v. Pepoon*, 62 Wash. 635, 645, 114 Pac. 449; *State v. Quinn*, 56 Wash. 295, 105 Pac. 818.

[a] **Reason.**—(1) Such witnesses may be called and examined at the trial whether their names have been indorsed or not. See 3 ENCY. OF EV. 241, et seq. (2) The defendant, therefore, cannot complain if the county attorney indorses their names under the directions of the court, thus giving formal notice of the intention to call them, when no such notice is required. *State v. Schnepel*, 23 Mont. 523, 59 Pac. 927.

[b] There was no such abuse of discretion in the following cases: **Kan.** *State v. Price*, 55 Kan. 606, 40 Pac. 1000 (wherein names of witnesses were stated in information, which was actual notice to defendant that they were witnesses in the case); *State v. Taylor*, 36 Kan. 329, 336, 13 Pac. 550 (court would not say allowance of indorsement of seventeen additional witnesses an abuse of discretion by trial court, where record did not show what the testimony of the witnesses was, or that it was in any way prejudicial to the defendant). **Mich.**—*People v. Moore*, 155 Mich. 107, 119 N. W. 918 (where prosecuting attorney asked leave within two hours after he was apprised of the witness and his testimony, and the court announced that the case would not be concluded until the following day if the accused desired to investigate the witness); *People v. Isham*, 109 Mich. 72, 67 N. W. 819 (where affidavit showing materiality of witness filed thirteen days before trial); *People v. Howes*, 81 Mich. 396, 45 N. W. 961 (where accused's counsel waived any further showing than statement of prosecutor that he had just learned witnesses material). **Wash.**—*State v. Gray*, 61 Wash. 549, 112 Pac. 641, where defendant asked either a continuance or a subpoena for additional witnesses, and court

ment in such case should be made as soon as the witnesses are discovered.⁹³

(C.) **CONTINUANCE OR POSTPONEMENT.**—If, upon the indorsement of additional witnesses, whether before or during the trial, the accused will in any way be prejudiced by proceeding with the trial, the court should allow a continuance or postponement upon application therefor.⁹⁴

(IV.) **Sufficiency of Indorsement.**—The names of the witnesses should be correctly given.⁹⁵ The indorsement of the surname and the initials of the Christian or given name of a witness is a sufficient compliance with the requirements of the statute, however.⁹⁶

(V.) **Competency and Calling.**—A statement of the rules⁹⁷ upon the

authorized issuance of subpoena and all the witnesses so called appeared in time to testify.

93. *People v. Quick*, 58 Mich. 321, 25 N. W. 302.

94. See the following cases: **Idaho.** *State v. Allen*, 20 Idaho 263, 275, 117 Pac. 849. **Kan.**—*State v. McDonald*, 57 Kan. 537, 46 Pac. 966, where leave to indorse witnesses known to prosecuting officer before trial is granted during trial, it ought to be upon terms as to postponement if requested by the accused. **Mich.**—*People v. Price*, 74 Mich. 37, 41 N. W. 853, where witness known to prosecutor at time of filing information allowed to be indorsed upon trial, error to refuse a continuance. **Okla.**—*Cahn v. State*, 10 Okla. Crim. 200, 135 Pac. 1155; *Star v. State*, 9 Okla. Crim. 210, 131 Pac. 542; *Ford v. State*, 5 Okla. Crim. 240, 114 Pac. 273. **Wash.**—*State v. Bokien*, 14 Wash. 403, 44 Pac. 889.

[a] A continuance is not allowable as a matter of right, where no showing is made of prejudice to defendant's rights. *State v. Carpenter*, 56 Wash. 670, 106 Pac. 206.

[b] The indorsement of the name of a court reporter who merely testified to the correctness of his report of testimony taken at a former trial, and the name of another witness whose testimony was given in rebuttal afforded no ground for a continuance. *State v. Jakkett*, 85 Kan. 427, 116 Pac. 509.

[c] Where accused does not seek a continuance on the ground that certain witnesses are not indorsed on the information before trial, it will be presumed that he considered himself ready for trial, and was not injured by want of notice of them. *State v. Townsend*, 7 Wash. 462, 35 Pac. 367.

95. *Binkley v. State*, 34 Neb. 757, 52 N. W. 708

[a] **Married Woman.**—It is allowable, though probably not the best practice, to indorse the name of a married woman on the information as a prospective witness in a criminal case by the use of her husband's surname and prefixed thereto the appellative abbreviation "Mrs." and the Christian name or names of her husband, or the initial letter or letters thereof. *Carrall v. State*, 53 Neb. 431, 73 N. W. 939.

[b] The law does not recognize other than the one or first Christian name, but where a person as a matter of fact has a second or middle Christian name and is commonly known or identified by the use of such middle Christian designation, if his wife's purposed use as a witness in a criminal cause is evidenced by an indorsement of her husband's surname and the abbreviation "Mrs." together with the middle Christian appellation of the husband, it is sufficient where it does not appear or there is no complaint that the accused person was misled thereby or lacked information of what person was to be produced as a witness. *Carrall v. State*, 53 Neb. 431, 73 N. W. 939.

[c] **A misnomer** does not require the exclusion of the testimony, when the defendant is not thereby surprised or prejudiced, however. 3 ENCY. OF EV. 242.

96. *Basye v. State*, 45 Neb. 261, 63 N. W. 811; *Perry v. State*, 44 Neb. 414, 63 N. W. 26. See also *Binkley v. State*, 34 Neb. 757, 52 N. W. 708.

97. See the title "Competency," 3 ENCY. OF EV. 241, et seq.

questions of the competency of witnesses not indorsed, and of compelling the calling of witnesses whose names are indorsed,⁹⁸ will be found in another work.

C. COMPLAINT OR INFORMATION IN JUSTICE OR POLICE COURTS.⁹⁹

1. **In General.**—The complaint upon which prosecutions for minor offenses are founded must be in writing in some,¹ but not all, states.² Where in writing, it may sufficiently show that the offense charged therein was committed within the state, without any caption, or venue in the margin.³ It should be addressed to the proper court or magistrate, however,⁴ and if made by a grand juror, addressed by him under

98. See the title "Witnesses," 14 ENCY. OF EV. 568.

99. As to formal requisites of indictment, see *supra*, VIII, A; of information, see *supra*, VIII, B; of preliminary complaint or affidavit upon which information is based, see *supra*, V.

1. *State v. Quigg*, 13 N. J. L. 293; *State v. Walker*, 9 S. D. 438, 69 N. W. 586. See also *Kan.*—*Prell v. McDonald*, 7 Kan. 226, 450. *Me.*—*Campbell v. Thompson*, 16 Me. 117. *Miss.*—*Wilecox v. Williamson*, 61 Miss. 310.

[a] In some states, a verbal or oral complaint is first made, whereupon the justice examines the complainant on oath, and other witnesses produced by him, if he produces any, and he then reduces the complaint to writing and causes it to be subscribed by the complainant. See generally the statutes, and *Com. v. De Voe*, 159 Mass. 101, 34 N. E. 85; *State v. Davie*, 62 Wis. 305, 22 N. W. 411.

2. *Village of Oran v. Bles*, 52 Mo. App. 509, under Rev. St., 1889, §1685, complaint made by marshal need not be in writing if defendant was present in court and in custody. See also *Hobbs v. Hill*, 157 Mass. 556, 32 N. E. 862.

[a] Statutes do not prescribe a form of complaint in Vermont. *State v. Freeman*, 59 Vt. 661, 10 Atl. 752.

3. A complaint, made "in behalf of the Commonwealth," and alleging an offense in a particular city and county, corresponding in name to a city and county of the commonwealth, against a statute, the title and date of which are stated, and rightly describing a statute passed by the legislature of the state, sufficiently shows that the offense was committed within the state, without any caption, or venue in the margin. *Com. v. Quin*, 5 Gray (Mass.) 478.

[a] The office of the venue in a

complaint is to name the place where the alleged offense was committed, and to show that the court before whom the information is laid has jurisdiction to proceed. It is not an error fatal to the jurisdiction of the court to recite these matters in the English language, and no particular form of words is indispensably requisite for that purpose. *Seay v. Shrader*, 69 Neb. 249, 95 N. W. 690, wherein it was contended that the complaint was insufficient to confer jurisdiction because the charging part was not preceded by the words, "State of Nebraska, Otoe County—ss."

4. The court to which the complaint was addressed was sufficiently described in the following cases: *Com. v. Baker*, 155 Mass. 287, 29 N. E. 512; *Com. v. Hoar*, 121 Mass. 375; *State v. Soragan*, 40 Vt. 450 (wherein it was directed to A. B., "Recorder of the City of Burlington within and for the county of Chittenden," and it was objected that there was no such officer as recorder for the county of Chittenden, that these words were descriptive of the office and a misdescription, vitiating the complaint. The court said: "But the words, 'recorder of the city of Burlington,' constitute a perfect and sufficiently accurate description; and if the words, 'within and for the county of Chittenden,' can be rejected as nugatory, and treated as surplusage, it obviates this objection. We think as there is a previous perfect description of the office, inasmuch as there is no such officer as recorder of the county, the words which purport to give the officer named the territorial jurisdiction of the county may be rejected as the false description, leaving the true description to have its legitimate effect").

[a] **Special Justice.**—In *Com. v. Brown*, 158 Mass. 168, 33 N. E. 341,

his oath of office and official signature, under statutes in some states.⁵

Commencement.—Under a constitutional requirement that all "prosecutions" must be carried on in the name and by authority of the state, it must so commence.⁶

2. Conclusion.—It need not conclude, as required of an indictment or information for a felony,⁷ against the peace and dignity of the state,⁸ or contrary to the statute,⁹ though upon this proposition

the complaint was addressed "To the Justice of the Police Court of Chelsea." There was a special justice sitting at the time. Such address was nevertheless sufficient. The court said: "There is nowhere any requirement that it should be otherwise addressed, and this form was sufficient and proper, even though a special justice was sitting at the time when it was actually laid before him."

[b] It is not necessary that the caption or address should state the reason for the sitting of the special justice in the place of the regular one; it is sufficient that such be set out in the record. *Com. v. De Voe*, 159 Mass. 101, 34 N. E. 85.

[c] Where it appears that the complaint was in fact made to the proper justice and received by him, the fact that it is addressed to one who had previously been justice is not fatal, since the latter name may be treated as surplusage. *State v. Wright*, 16 R. I. 518, 17 Atl. 998.

5. See the statutes of the several states and *State v. Davis*, 52 Vt. 376.

6. *Ex parte Jackson* (Tex. Crim.), 96 S. W. 924, distinguishing *Johnson v. State*, 31 Tex. Crim. 464, 20 S. W. 980; *Jefferson v. State*, 24 Tex. App. 535, 7 S. W. 244, holding that the constitutional requirement does not apply in a prosecution of a misdemeanor, upon the ground that the complaint in such cases was merely the basis for the information, and the information commenced with the language contained in the constitution. And see *City of Brownsville v. Cook*, 4 Neb. 101, holding under a similar constitutional provision that a prosecution for the violation of a city ordinance should run in the name of "The People of the State of Nebraska," and not in the name of the city.

[a] **Reason.**—A trial on a criminal charge by complaint before a justice of the peace for an offense cognizable

by him is a prosecution for an offense prescribed by statute. *Ex parte Fagg*, 38 Tex. Crim. 573, 44 S. W. 294, 40 L. R. A. 212.

[b] Where an information in justice court recited that A. B., prosecuting attorney within and for the county of B., in the state of Missouri, it was held that it was not subject to the objection that it did not run in the name of the state, the words, county of B., being mere surplusage. *State v. Murphy*, 49 Mo. App. 270.

7. As to conclusion to an indictment, see *supra*, VIII, A, 6; as to an information, see *supra*, VIII, B, 6.

8. **Ala.**—*Simpson v. State*, 111 Ala. 6, 20 So. 572; *Thomas v. State*, 107 Ala. 61, 17 So. 941 (omission to conclude against peace and dignity of state does not render complaint insufficient). **Ky.**—*Com. v. Clark*, 6 Ky. L. Rep. 301. **Ohio.**—*Fendrick v. State*, 9 Ohio C. C. (N. S.) 49, 18 Ohio Cir. Dec. 724, reversing 17 Ohio Dec. (N. P.) 73, affirmed, 77 Ohio St. 298, 82 N. E. 1078. **Tex.**—*Curry v. State* (Tex. Crim.), 24 S. W. 516. **Wis.**—See *State v. Tall*, 56 Wis. 577, 14 N. W. 596.

[a] A grand juror's complaint for a misdemeanor need not conclude contra pacem. *State v. Miller*, 24 Conn. 519, cited with approval in *State v. Holmes*, 26 Conn. 230.

9. **Cal.**—*Ex parte Mansfield*, 106 Cal. 400, 408, 39 Pac. 775. **Ga.**—*Downing v. State*, 66 Ga. 160, not demurrable because it does not conclude contra formam statuti. **Minn.**—*State v. Gill*, 89 Minn. 502, 95 N. W. 449, not necessary to conclude "contrary to the statute."

See also *State v. Brown*, 14 S. C. 380.

[a] The omission of conclusion contra formam from a grand juror's complaint is not fatal where the offense charged is a common-law offense. *State v. Holmes*, 28 Conn. 230.

[b] "The only purpose of such

a contrary rule has been laid down in some jurisdictions.¹⁰

Where necessary to conclude "contra formam," it is unnecessary to set forth the date of the statute,¹¹ or otherwise describe it.¹²

3. Signature.—The statutes require that the name of the party making the complaint must be signed at the foot thereof.¹³ A signature in a blank space in the body of the complaint is not a sufficient compliance with such a statute.¹⁴ Nor is it necessary that the name of the complainant be set out in the body of the complaint, where his signature is appended thereto;¹⁵ or to add the title of an officer,

concluding clause in an indictment or criminal complaint is to show that the prosecution is based upon a statute, and not upon a common-law offense; and since the repeal of all common-law offenses in this state (Gen. St., 1894, §6286) it is functionless, except in cases where the same acts are declared to be an offense and punishable both by statute and by a municipal ordinance. In such cases the indictment or the complaint ought to conclude contrary to the statute or the ordinance, as the case may be, so that the defendant may be advised under which the prosecution is brought, as all criminal cases are properly prosecuted in the name of the state." *State v. Gill*, 89 Minn. 502, 95 N. W. 449.

10. *Com. v. Gay*, 5 Pick. (Mass.) 44; *Com. v. Worcester*, 3 Pick. (Mass.) 462, 475; *State v. Bacon*, 40 Vt. 456; *State v. Soragan*, 40 Vt. 450. And see *Miller v. State*, 81 Miss. 162, 32 So. 951, citing *State v. Morgan*, 79 Miss. 659, 31 So. 338; *Love v. State* (Miss.), 8 So. 465.

[a] In North Carolina, (1) it has been held that the regularity required in indictments cannot be dispensed with in justice's warrants, and therefore, during the time it was necessary for every indictment founded upon a statute to conclude against the statute, it was required that a justice's warrant should so conclude. *State v. Lowder*, 85 N. C. 564; *State v. Luther*, 77 N. C. 492; *State v. Muse*, 20 N. C. 463. (2) It is doubtful whether such formality would now be required, it having been held unnecessary for indictments to so conclude. See *supra*, VIII, A, 6, c.

11. *Com. v. Keefe*, 7 Gray (Mass.) 332.

[a] A complaint, which charges the commission of an offense on a certain day "contrary to the forms of the

statutes in such cases made and provided" is good, after verdict, although a statute for the punishment of such offenses, which took effect before the day specified, and repealed an earlier statute imposing different penalties for like offenses, excepted from its operation offenses already committed. *Com. v. Hitchings*, 5 Gray. (Mass.) 482. And see *Com. v. Keefe*, 7 Gray (Mass.) 332.

12. *Com. v. Keefe*, 7 Gray (Mass.) 332.

13. See the statutes, and the following cases: *Com. v. Barhight*, 9 Gray (Mass.) 113 (under Rev. St., ch. 135, §2); *Malz v. State*, 36 Tex. Crim. 447, 34 S. W. 267, 37 S. W. 748 ("and not elsewhere").

[a] A complaint signed by the complainant's mark, and certified by the magistrate to whom it was addressed, is sufficient without an attesting witness to the mark. *Com. v. Sullivan*, 14 Gray (Mass.) 97.

14. *Com. v. Barhight*, 9 Gray (Mass.) 113.

15. See the following cases: Ia. *State v. McKinley*, 82 Iowa 445, 48 N. W. 804. Mass.—*Com. v. Eagan*, 103 Mass. 71, omission of complainant's name from the body of a complaint signed by him does not affect jurisdiction of court, and therefore objection cannot be taken advantage of in arrest of judgment. Tex.—*Dunn v. State* (Tex. Crim.), 158 S. W. 300; *Malz v. State*, 36 Tex. Crim. 447, 34 S. W. 267, 37 S. W. 748; *Curry v. State* (Tex. Crim.), 24 S. W. 516.

[a] **Variance Between Complaint and Signature.**—It is, therefore, no ground for objection that there is a variance between the name stated in the body of the complaint and the one signed thereto. *Dunn v. State* (Tex. Crim.), 158 S. W. 300; *Malz v. State*, 36 Tex. Crim. 447, 34 S. W. 267, 37

whose signature is appended thereto, when in the body of the complaint he describes himself as of a class entitled to make it.¹⁶

4. **Verification.**¹⁷—Where criminal prosecutions originate upon complaint, one made upon oath or affirmation is implied.¹⁸ Indeed, statutes sometimes require that the complaint shall be made on oath.¹⁹

S. W. 748. See also *Woody v. State*, 113 Ga. 927, 39 S. E. 297.

[b] Though there be a variance between the name of the complainant as it appears in the body of the complaint and as signed thereto, a certificate by the magistrate to whom it is addressed that it was "received and sworn to before said court" sufficiently shows that it was signed and sworn to by the complainant named in the body of the complaint. *Com. v. Wallace*, 14 Gray (Mass.) 382. And see *Com. v. Intoxicating Liquors*, 142 Mass. 470, 8 N. E. 421; *Com. v. Quin*, 5 Gray (Mass.) 478.

[c] **Grand Juror's Complaint.** Where the complaint was in the usual form, except that the grand juror's name was omitted from the body of the complaint, and appeared only at the end, by way of official signature thereto, it was sufficient, as it appeared to be addressed by a grand juror under his oath of office and official signature. *State v. Davis*, 52 Vt. 376.

16. *State v. Glennon*, 3 R. I. 276.

17. As to necessity for verification to information, see *supra*, VIII, B, 8.

18. *Campbell v. Thompson*, 16 Me. 117. See also *Eichenlaub v. State*, 36 Ohio St. 140, holding that an information for a misdemeanor must be upon the oath or affirmation of the prosecuting attorney to justify the issuance of a warrant of arrest. But see *O'Brien v. City of Cleveland*, 1 Cleve. L. Rep. 100, 4 Ohio Dec. (Reprint) 189 (holding that information in police court for violation of city ordinance sufficient with signature of prosecuting officer); *State v. Davie*, 62 Wis. 305, 22 N. W. 411.

[a] **In Michigan**, an information filed by the prosecuting attorney in the recorder's court of the city of Detroit need not be verified, by express provision of statute. *People v. Graney*, 91 Mich. 646, 52 N. W. 66.

[b] **Rule in Missouri.**—(1) The statute requires that an information filed in the circuit court shall be verified by the prosecuting attorney,

or supported by the affidavit of some other person. See *supra*, VIII, B, 8, a.

(2) The statute, in regard to filing informations before a justice of the peace, does not require a verification, and an information before a justice of the peace, signed and filed by the prosecuting attorney in his official capacity, is good without verification (*State v. Webster*, 206 Mo. 558, 570, 105 S. W. 705; *State v. Rausberger*, 106 Mo. 135, 145, 17 S. W. 290, s. c., 42 Mo. App. 466; *State v. Simpson*, 126 Mo. App. 169, 103 S. W. 592; *State v. Ostmann*, 123 Mo. App. 114, 100 S. W. 696; *State v. O'Kelley*, 121 Mo. App. 178, 98 S. W. 804; *State v. Blands*, 101 Mo. App. 618, 74 S. W. 3; *State v. Maupin*, 71 Mo. App. 54; *State v. O'Connor*, 58 Mo. App. 457; *State v. Sweeney*, 56 Mo. App. 409; *State v. Ramsey*, 52 Mo. App. 668; *State v. Haley*, 52 Mo. App. 520; *State v. Hart*, 47 Mo. App. 653; *State v. McCarver*, 47 Mo. App. 650; *State v. Davidson*, 44 Mo. App. 513; *State v. Buck*, 43 Mo. App. 443; *State v. Parker*, 39 Mo. App. 116; *State v. Wilkson*, 36 Mo. App. 373; *State v. Fletchall*, 31 Mo. App. 296); (3) especially where supported by an affidavit (*State v. Ostmann*, 123 Mo. App. 114, 100 S. W. 696; *State v. Davidson*, 44 Mo. App. 513), (4) though it is good if not accompanied by an affidavit. *State v. O'Kelley*, 121 Mo. App. 178, 98 S. W. 804. And see *State v. Ostmann*, 123 Mo. App. 114, 100 S. W. 696; *State v. McCarver*, 47 Mo. App. 650.

For rule under early Missouri statute, see *State v. Calfer*, 4 S. W. 418.

19. See the statutes, and *Hunter v. State*, 102 Ind. 428, 1 N. E. 361; *State v. Freeman*, 59 Vt. 661, 10 Atl. 752.

[a] **Omission Amendable Defect.** In the absence of prescribed form by statute, or of specific statutory requirement that such oath shall be certified thereon before issuing a warrant, the omission constitutes but a formal defect, which is amendable. *State v. Freeman*, 59 Vt. 661, 10 Atl. 752.

[b] **Reverification unnecessary where**

Who May Take.²⁰ — The oath need not be administered by the justice who is to hear the case,²¹ though a complaint sworn to before him is sufficient;²² but may be taken before another officer authorized to administer oaths,²³ such as the clerk of his court,²⁴ or of another court,²⁵ or another justice,²⁶ or before a notary public.²⁷ Whether it may be taken by one acting in the dual capacity of notary public and prosecuting attorney is a disputed question.²⁸

A verification on information and belief, although made by the prosecuting officer, is not deemed sufficient in some states.²⁹ In other states,

complaint is amended in unimportant particular. See *State v. Redford*, 32 Kan. 198, 4 Pac. 98.

20. For treatment of same question in connection with verification of information, see *supra*, VIII, B, 8, b.

21. *Hunter v. State*, 102 Ind. 428, 1 N. E. 361; *State v. Freeman*, 59 Vt. 661, 10 Atl. 752 (need not be sworn to before magistrate issuing warrant).

22. *Com. v. McGuire*, 11 Gray (Mass.) 459.

23. *State v. Freeman*, 59 Vt. 661, 10 Atl. 752.

24. See *Hunter v. State*, 102 Ind. 428, 1 N. E. 361; *Com. v. McGuire*, 11 Gray (Mass.) 459.

25. *State ex rel. Bryant v. Lauver*, 26 Neb. 757, 42 N. W. 762, complaint sworn before clerk of district court and filed in justice court.

26. *People v. Le Roy*, 65 Cal. 613, 4 Pac. 649, complaint filed in police court sworn to before justice of the peace. And see *Hunter v. State*, 108 Ind. 428, 1 N. E. 361; *Com. v. O'Connell*, 8 Gray (Mass.) 464.

27. Where the statutes give notaries public authority to administer oaths generally, pertaining to all matters where an oath is required. *Hunter v. State*, 102 Ind. 428, 1 N. E. 361. And see *Ga.*—*Mitchell v. State*, 126 Ga. 84, 54 S. E. 931; *Shuler v. State*, 125 Ga. 778, 54 S. E. 689 (under a statute giving notary authority to administer oaths in all matters incident to them as commercial oaths, and all other oaths which are not by law required to be administered by a particular officer). *Mo.*—*State v. Mullen*, 52 Mo. 430, under a statute authorizing notaries to take affidavits, and administer oaths and affirmations in like cases, and in like manner as justices of the peace. *Vt.*—*State v. Freeman*, 59 Vt. 661, 10 Atl. 752.

28. See *Shuler v. State*, 125 Ga.

778, 54 S. E. 689, holding question not properly presented for decision by demurrer, but should be presented by plea in abatement.

[a] Upon this point, see also *McNulty v. State*, 37 Ind. App. 612, 76 N. E. 547, 117 Am. St. Rep. 344, deciding question in Indiana.

[b] The mere identity of name appearing from the signature of the attesting officer and that of the person who signed the accusation as prosecuting attorney will not warrant the assumption, as matter of law, that the same individual acted not only as a notary public but also in the capacity of prosecuting attorney. *Shuler v. State*, 125 Ga. 778, 54 S. E. 689.

29. See the following cases: *Mich.* *People v. Heffron*, 53 Mich. 527, 19 N. W. 170, insufficient to confer any jurisdiction upon the justice to issue a warrant of arrest. *N. Y.*—*People v. Cramer*, 22 App. Div. 189, 47 N. Y. Supp. 1039; *People v. Gardner*, 71 Misc. 335, 130 N. Y. Supp. 202 (information made wholly upon information and belief, without stating the grounds or sources of such information and belief, is insufficient for purpose of issuing a warrant thereon); *In re Blum*, 9 Misc. 571, 30 N. Y. Supp. 396 (complaint upon information and belief, whether made by police officer or any other person, insufficient to confer jurisdiction upon a magistrate to issue a warrant of arrest). *N. D.*—*State v. McLain*, 13 N. D. 368, 102 N. W. 407.

See also *People ex rel. Cornett v. Warden of City Prison*, 60 Misc. 525, 112 N. Y. Supp. 492; *People v. Pratt*, 20 Hun (N. Y.) 300; *State v. Good*, 9 Lea (Tenn.) 240.

[a] The verification of a positive charge by an oath, according to the best knowledge and belief of the party, may be sufficient, upon inquiry into the circumstances, to satisfy the jus-

however, such a verification, especially where made by the prosecuting officer, is sufficient for nearly every purpose.³⁰

The Jurat.—The precision required in stating the offense in the complaint is not necessary in the jurat.³¹ Any form from which the

tice that an offense has been committed, and it may therefore be sufficient to authorize him to issue his warrant. *State v. Hobbs*, 39 Me. 212, *distinguishing* *Com. v. Phillips*, 16 Pick. (Mass.) 211, on the ground that in that case the complaint alleged only, that there was "probable cause to suspect" the accused to be guilty.

[b] Where a party who has been arrested upon a warrant which the magistrate had no jurisdiction to issue demands and stands trial without raising the objection, he cannot be heard after conviction to claim that the court had no jurisdiction of his person. *In re Blum*, 9 Misc. 571, 30 N. Y. Supp. 396, application for discharge on habeas corpus after conviction.

[c] **Positive Verification—Proof of Information and Belief.**—Jurisdiction to issue a warrant, acquired by a duly verified complaint in writing, charging an offense in direct and positive terms, is not lost by proof upon the trial that the complainant had no knowledge of the commission of the offense, except upon information and belief. *State v. Graffmuller*, 26 Minn. 6, 46 N. W. 445. And see *People v. Schottey*, 66 Mich. 708, 33 N. W. 810.

[d] It has been held that a complaint, purporting to be made upon the knowledge of affiant cannot be impeached upon arraignment by showing a lack of knowledge on the part of the complaining witness. *Potter v. Barry* Circuit Judge, 156 Mich. 183, 120 N. W. 586, *distinguishing* *People v. Heffron*, 53 Mich. 527, 19 N. W. 170, for the reason that the complaint in that case on its face showed that the affidavit was not made upon the knowledge of the affiant.

30. See the following: **Kan.**—*In re Lewis*, 31 Kan. 71, 1 Pac. 283 (sufficient to support a conviction and sentence where trial without attack); *State v. Tedger*, 6 Kan. App. 762, 59 Pac. 985 (such verification by prosecuting officer sufficient for every purpose except to sustain a warrant, when properly attacked on that ground). **Okla.**—*In re Cummings*, 11 Okla. 286,

66 Pac. 332, sufficient for every purpose except merely the issuing of the warrant for the arrest of the defendant. **Wis.**—*State v. Davie*, 62 Wis. 305, 22 N. W. 411 (complaint sufficient though made upon information and belief); *State v. Tall*, 56 Wis. 577, 14 N. W. 596.

[a] *Compare* *Mulkins v. United States*, 10 Okla. 288, 61 Pac. 925, holding that "A verification, on information and belief, to a complaint in a criminal case is not sufficient to authorize a court to put the defendant upon trial for the offense charged therein. Such complaint should be sworn to positively, or the facts upon which the warrant should issue ought to be presented to the court by a positive affidavit, or by competent evidence."

[b] Where the complaint charges the accused in positive terms with the commission of the offense, the addition of the words that "the affiant verily believes the defendant is guilty of the facts charged," does not render the complaint invalid as not being sworn to positively. *Brown v. State*, 16 Neb. 658, 21 N. W. 454.

[c] Where the statute does not require that the source of the prosecuting attorney's information be made to appear, an information in justice's court is not invalid as against the objection that it is "not based upon the knowledge, information, or belief of the prosecuting attorney as contemplated by law." *State v. Crider* (Mo. App.), 168 S. W. 315.

31. *Com. v. Keefe*, 7 Gray (Mass.) 332.

[a] **Date of Oath.**—(1) A jurat describing the date of the oath as "the third day of June, A. D. 1856" is sufficient. *Com. v. Keefe*, 7 Gray (Mass.) 332. (2) It has been held that the jurat would not be invalid if no date whatever were written in it. *Ross v. State*, 9 Ind. App. 35, 36 N. E. 167, holding also that a jurat in which the date is given as 189— will be considered on appeal as amended to show the correct date, and that the judge before whom the affidavit was made

idea can be collected is sufficient,³² as "taken and sworn before me,"³³ or the like.³⁴ It need not certify the mode and manner in which the officer administered the oath or affirmation,³⁵ or where the complainant affirms, that he was conscientiously scrupulous of taking an oath.³⁶

It is not necessary that the seal of the court, where the oath is taken before the justice, should be attached to the jurat.³⁷ Nor will the omission of the officer's signature to the jurat,³⁸ or of the officer to show his official title with his name in signing the jurat,³⁹ at the time

might properly have amended it by supplying the omitted figure at any time before or during the trial.

32. *State v. Freeman*, 59 Vt. 661, 10 Atl. 752.

33. *Com. v. Bennett*, 7 Allen (Mass.) 533; *Com. v. Sullivan*, 14 Gray (Mass.) 97. See also *State v. Freeman*, 59 Vt. 661, 10 Atl. 752.

34. A certificate that the complaint was "received, subscribed and sworn to" is sufficient. *Com. v. Dillane*, 11 Gray (Mass.) 67, following *Com. v. Keefe*, 7 Gray (Mass.) 332, holding "received and sworn to" sufficient.

[a] A certificate in the following words: "Subscribed and sworn to, etc.," is sufficient even on motion to quash without a formal commencement stating the name of an affiant and that he was sworn according to law. *Lay v. State*, 180 Ind. 1, 102 N. E. 274.

35. *State v. Adams*, 78 Me. 486, 7 Atl. 267.

[a] When it recites that the complainant either made oath or affirmation to the allegations in the complaint, the conclusive presumption is that it was done according to law. *State v. Adams*, 78 Me. 486, 7 Atl. 267.

36. *State v. Adams*, 78 Me. 486, 7 Atl. 267.

[a] The officer's certificate that the complainant affirms, necessarily and conclusively implies that he did entertain such scruples, and was therefore permitted to affirm. *State v. Adams*, 78 Me. 486, 7 Atl. 267.

37. *Rosenstein v. State*, 9 Ind. App. 290, 36 N. E. 652, *distinguishing* *Miller v. State*, 122 Ind. 355, 24 N. E. 156 (holding affidavit sworn to before a notary bad because there was no seal, upon the ground that holding therein was based upon a statute, which expressly declared "all notarial acts, not attested by such seal, shall be void," whereas as to the acts of the officer in this case, a police judge, in whose

court the cause was to be tried, there is no such statute); *Com. v. De Voe*, 159 Mass. 101, 34 N. E. 85.

38. In *People v. Lane*, 124 Mich. 271, 82 N. W. 896, it was contended "that the justice had no jurisdiction to issue a warrant in the assault and battery case, or to try the case, because there was no sworn complaint as a basis therefor. It appears that the jurat to the complaint had not been signed by the justice. He testifies that he swore the complaining witness to the complaint. The complaining witness also testifies that he was sworn thereto. It is evident from the complaint that the justice examined the complaining witness on oath touching the matters referred to in the complaint. This is sufficient, under section 1020, 1 Comp. Laws 1897."

[a] The signature of the officer taking the oath is sufficient where his given name is designated by the abbreviation therefor. *Com. v. Taber*, 155 Mass. 5, 28 N. E. 1056.

39. *City of Kingman v. Barry*, 40 Kan. 625, 20 Pac. 527. In this case, the police judge before whom the complaint was sworn to signed the jurat attached to the same, but the name of his office was not included in the signature; but it appeared from the transcript of the case brought up to the district court, and upon which the appeal was founded, that the person who signed the jurat was the police judge of the city, and therefore the omission of the officer to couple the name of his office with his signature did not invalidate the complaint. The court said: "The mere fact that the officer fails to couple his official title with his name in signing a jurat, or to attach a jurat at all, to the affidavit at the time the oath is administered, will not invalidate it. The officer may attach a jurat or his official signature thereto at a later time, when the affi-

the oath is administered, or an error in showing the same,⁴⁰ invalidate the complaint.

Where the oath is taken by a special justice or by a clerk pro tem, it is not necessary that the jurat should state the reason for the sitting of the special justice,⁴¹ or the appointment of the clerk pro tem.⁴²

5. Indorsement of Names of Witnesses.⁴³ — In a criminal prosecution commenced before a justice of the peace, it is not necessary that the names of the witnesses should be indorsed⁴⁴ upon the complaint

davit would be held sufficient. . . . In the present case, no objection was taken to the jurat during the trial, and if there had been it is shown by the record that the objection would have been unavailing. The transcript of the case brought up to the district court, and upon which the appeal was founded shows plainly enough that M. L. Mock was the acting police judge of the city of Kingman. Apart from this, the court could take judicial notice of the official character of Mock and of the tribunal over which he presided and from which the proceedings came."

40. A complaint, in a prosecution before a police judge, is not void because the letters "J. P." instead of "P. J." or the words "Police Judge," are attached to the name of the police judge where he signs the jurat attached thereto. *City of Cherokee v. Fox*, 34 Kan. 16, 7 Pac. 625.

[a] **Sufficient Showings.**—Where a statute provides that no one but a justice of the peace can be a trial justice, a signature as "trial justice" involves a signature as justice of the peace, and no separate designation of the inferior office is necessary. The signature as trial justice means that the signer is the legal holder of that office, that is, that he is a justice of the peace holding a commission as trial justice. *Com. v. Mosher*, 134 Mass. 226.

[b] A description "justice of the peace, authorized to issue warrants as aforesaid," refers back to the caption of the complaint, and is sufficient. *Com. v. Taber*, 155 Mass. 5, 28 N. E. 1056.

[c] The official character of the magistrate was sufficiently shown in *Com. v. Lynn*, 154 Mass. 405, 28 N. E. 289, by the complaint, which described him as "Special Justice of the District Court of Hampshire," and by the

words "Special Justice" appended to his signature to the jurat.

41. *Com. v. De Voe*, 159 Mass. 101, 34 N. E. 85.

[a] A certificate of the clerk of a police court that a certain complaint was sworn to "before said court," is sufficient evidence that it was duly sworn to, without stating whether it was before the standing justice, or one of the special justices. *Com. v. Wingate*, 6 Gray (Mass.) 485.

42. *Com. v. Connell*, 9 Allen (Mass.) 488.

[a] In the absence of evidence to the contrary, the party thus certifying is to be taken to have been appointed for sufficient cause. *Com. v. Connell*, 9 Allen (Mass.) 488.

43. As to indorsement of names of witnesses on indictment, see *supra*, VIII, A, 8, f; on information or accusation, see *supra*, VIII, B, 9, c.

44. *City of Topeka v. Briggs*, 90 Kan. 843, 135 Pac. 1184 (complaint in police court governed by same rule); *State v. Wood*, 49 Kan. 711, 31 Pac. 786; *State v. Heinze*, 45 Mo. App. 403.

[a] The provisions requiring such indorsement on an information or indictment are not applicable to a prosecution in a justice court. *City of Topeka v. Briggs*, 90 Kan. 843, 135 Pac. 1184. And see *State v. Heinze*, 45 Mo. App. 403.

[b] **Grand Juror's Complaint.**—The omission of such indorsement from a grand juror's complaint preferred to a police court was held not objectionable upon plea in abatement in *State v. Hanley*, 47 Vt. 290, *citing Downer v. Baxter*, 30 Vt. 467, wherein Judge Bennett, incidentally, and by way of analogy for illustration, said, the statute requiring the memorandum of names of witnesses to the presentment by town grand jurors, has always been held to be directory, and that

when filed, nor even in the district court on appeal, unless the district court should so order.⁴⁵

IX. CHARGING THE OFFENSE. — A. CONSTITUTIONAL REQUIREMENTS AS TO STATEMENT OF OFFENSE. — Not only the constitution of the United States,⁴⁶ but the constitutions of all the states,⁴⁷ provide

an omission to annex the names to the complaint, was no cause for quashing the proceedings.

[c] **Name of the prosecuting witness** need not be indorsed on information for a misdemeanor filed before a justice of the peace. *State v. Flowers*, 56 Mo. App. 502.

[d] **Manner of Taking Objection.** (1) Even if required and omitted, the objection on that account cannot be raised by objection to the evidence. *State v. Heinze*, 45 Mo. App. 403. (2) It should be taken advantage of by motion to quash. *State v. Heinze*, 45 Mo. App. 403; *State v. Davidson*, 44 Mo. App. 513. (3) It cannot be taken by motion in arrest (*State v. Davidson*, 44 Mo. App. 513), (4) or by assignment of error on appeal, where objection made for first time thereby. *State v. Davidson*, 44 Mo. App. 513. As to objections generally, see *infra*, XIV.

45. *City of Topeka v. Briggs*, 90 Kan. 843, 135 Pac. 1184 (refusal of court to require indorsement not error); *State v. Wood*, 49 Kan. 711, 31 Pac. 786.

46. **U. S.**—Const., Amendment 6; *Bartell v. United States*, 227 U. S. 427, 33 Sup. Ct. 383, 57 L. ed. 583; *Hendricks v. United States*, 223 U. S. 178, 32 Sup. Ct. 313, 56 L. ed. 394; *Burton v. United States*, 202 U. S. 344, 26 Sup. Ct. 688, 50 L. ed. 1057; *Bergemann v. Backer*, 157 U. S. 655, 15 Sup. Ct. 727, 39 L. ed. 845; *Ex parte Virginia*, 100 U. S. 339, 352, 25 L. ed. 676 (Field, J., dissenting); *United States v. Cruikshank*, 92 U. S. 542, 557, 23 L. ed. 588, a leading case upon subject. And see: **Colo.**—*Fehring v. People*, 147 Pac. 361. **D. C.**—*Dufour v. United States*, 37 App. Cas. 497. **Mass.**—*Com. v. Farmer*, 218 Mass. 507, 106 N. E. 150. **Pa.**—*Com. v. Francies*, 53 Pa. Super. 278, 287.

47. See the constitutions of the several states, and the following: **Ala.** Const., 1901, §6; *Walker v. State*, 150 Ala. 87, 43 So. 188; *Coleman v. State*, 150 Ala. 64, 43 So. 715; *Jones v. State*,

136 Ala. 118, 34 So. 236; *Grattan v. State*, 71 Ala. 344; *Schwartz v. State*, 37 Ala. 460; *Noles v. State*, 24 Ala. 672. **Colo.**—Const., art. 2, §16; *Fehring v. People*, 147 Pac. 361; *Lace v. People*, 43 Colo. 199, 95 Pac. 302. **Del.** *State v. Donovan*, 90 Atl. 220 (§7, art. 1, Const. 1897); *State v. Oleksy*, 3 Boyce 253, 84 Atl. 7. **Fla.**—*Brass v. State*, 45 Fla. 1, 34 So. 307. **Ill.**—*Bill of Rights*, §9; *People v. Clark*, 256 Ill. 14, 99 N. E. 866, 1913E, Ann. Cas. 214; *People v. Becker*, 179 Ill. App. 446. **Ind.**—*Riggs v. State*, 104 Ind. 261, 3 N. E. 886; *McLaughlin v. State*, 45 Ind. 338. **Ky.** *Conner v. Com.*, 13 Bush 714. **Me.** Const., art. 1, §6; *State v. Doran*, 99 Me. 329, 59 Atl. 440, 105 Am. St. Rep. 278; *State v. Verrill*, 54 Me. 408, 414; *State v. Learned*, 47 Me. 426. **Md.** *Declaration of Rights*, art. 21; *Goeller v. State*, 119 Md. 61, 85 Atl. 954. **Mass.** *Bill of Rights*, art. 12; *Com. v. Farmer*, 218 Mass. 507, 106 N. E. 150; *Com. v. Jordan*, 207 Mass. 259, 266, 93 N. E. 809; *Com. v. Robertson*, 162 Mass. 90, 38 N. E. 25; *Com. v. Bennett*, 118 Mass. 443; *Com. v. Gardner*, 11 Gray 438, 445. **Mich.**—*Brown v. People*, 29 Mich. 232. **Miss.**—*Newcomb v. State*, 37 Miss. 383; *Norris v. State*, 33 Miss. 373; *Murphy v. State*, 2 Cushm. 590. **Mo.** Const., art. 2, §22; *State v. Griffin*, 249 Mo. 624, 155 S. W. 432; *State v. Hilton*, 248 Mo. 522, 154 S. W. 729; *State v. Plant*, 209 Mo. 307, 107 S. W. 1076; *State v. Terry*, 109 Mo. 601, 614, 19 S. W. 206; *State v. Harmon*, 106 Mo. 635, 651, 18 S. W. 128; *State v. Fancher*, 71 Mo. 460; *State v. Williams*, 12 Mo. App. 415, 423, *affirmed*, 77 Mo. 310. **Neb.**—*Moline v. State*, 67 Neb. 164, 93 N. W. 228. **N. H.**—*Bill of Rights*, art. 15; *State v. Silverman*, 76 N. H. 309, 82 Atl. 536; *State v. Piper*, 73 N. H. 226, 60 Atl. 742. **N. J.**—*Ketline v. State*, 59 N. J. L. 468, 36 Atl. 1033; *Graves v. State*, 45 N. J. L. 203. **N. C.** *State v. Cline*, 150 N. C. 854, 64 S. E. 591; *State v. Harris*, 145 N. C. 456, 59 S. E. 115; *State v. Cole*, 132 N. C. 1069, 44 S. E. 391; *State v. Shade*, 115 N. C. 757, 20 S. E. 537. **Ohio.**—*Tur-*

that the defendant is entitled to be informed of the nature and cause of the accusation against him, repeating in this respect the doctrine of the common law.⁴³ Such provisions guarantee to the accused that

pin v. State, 19 Ohio St. 540; *Wolf v. State*, 19 Ohio St. 248, 254; *Groenland v. State*, 4 Ohio N. P. 122. **Ore.**—*State v. Hosmer*, 142 Pac. 581; *State v. Steeves*, 29 Ore. 85, 43 Pac. 947; *State v. Doty*, 5 Ore. 491. **Pa.**—*Goersen v. Com.*, 99 Pa. 388, 398; *Campbell v. Com.*, 84 Pa. 187, 198; *Cathcart v. Com.*, 37 Pa. 108; *Com. v. Francies*, 53 Pa. Super. 278, 287. **R. I.**—*Const.*, art. 1, §10; *State v. Smith*, 29 R. I. 513, 72 Atl. 710; *State v. Smith*, 29 R. I. 245, 69 Atl. 1061; *State v. McKenna*, 16 R. I. 398, 17 Atl. 51; *State v. Murphy*, 15 R. I. 543, 10 Atl. 585; *State v. Beswick*, 13 R. I. 211, 43 Am. Rep. 26. **S. D.**—*Const.*, art. 6, §7; *State v. Morse*, 150 N. W. 293; *State v. Stewart*, 30 S. D. 585, 139 N. W. 371; *State v. Burchard*, 4 S. D. 548, 57 N. W. 491. **Tenn.**—*State v. Stephens*, 127 Tenn. 282, 154 S. W. 1149; *State v. Quartemus*, 3 Heisk. 65; *Sizemore v. State*, 3 Head 26. **Tex.**—*Allen v. State*, 13 Tex. App. 28; *Huntsman v. State*, 12 Tex. App. 619. **Vt.**—*State v. Webber*, 78 Vt. 463, 62 Atl. 1018. **Wash.**—*State v. Muller*, 80 Wash. 368, 141 Pac. 910. **Wis.**—*Rowan v. State*, 30 Wis. 129, 11 Am. Rep. 559.

[a] **The Bill of Rights for the Philippines** gives the accused the right to demand the nature and cause of the accusation against him. See *Paraiso v. United States*, 207 U. S. 368, 28 Sup. Ct. 127, 52 L. ed. 249.

[b] "The object of the constitutional guaranty is doubtless for the purpose of having the accused informed of the precise offense for which he must answer, and thus enable him to meet and defend against that particular accusation, when judicially called upon to do so. Speaking of the purpose of such constitutional provisions and guaranties it is observed by a well-known author on criminal jurisprudence: 'Standing beside the presumption that the defendant is innocent, they have compelled from the prosecuting power such a statement of the nature and cause of the accusation as would impart to him, who is supposed to know nothing of it outside of the written words, reasonable information of what

he is to encounter at the trial; thus enabling him to collect his proofs, and avoid the injury of a surprise. Therefore the wisdom of the past—the rules which the common law has established for the indictment—should, as respects the substance of the accusation, be the chief guide to what this constitutional provision permits or forbids.' Bishop, *New Criminal Procedure*, sec. 110. The following authorities are also pertinent: *People v. Olmstead*, 30 Mich. 431; *Mott v. State*, 29 Ark. 147; *Conner v. Commonwealth*, 76 Ky. 714; *State v. Mace*, 76 Me. 64; *Norris v. State*, 33 Miss. 373; *State v. O'Flaherty*, 7 Nev. 153." *Moline v. State*, 67 Neb. 164, 171, 93 N. W. 228.

[c] For similar statement of the object and purpose of such requirements, see: *Ala.*—*Grattan v. State*, 71 Ala. 344. **D. C.**—*Dufour v. United States*, 37 App. Cas. 497. **Md.**—*Goeller v. State*, 119 Md. 61, 85 Atl. 954. **Mass.**—*Com. v. Jordan*, 207 Mass. 259, 266, 93 N. E. 809, *citing Com. v. Robertson*, 162 Mass. 90, 38 N. E. 25. **Miss.**—*Murphy v. State*, 2 Cushm. 590. **Okla.**—*Slover v. Ter.*, 5 Okla. 506, 49 Pac. 1007.

[d] **Such constitutional provision is not a rule of pleading** in criminal cases, but it does require that the statute prescribing rules of pleading in criminal cases shall be sufficient, when complied with, to apprise the accused of the nature and cause of the accusation against him. *State v. Stewart*, 30 S. D. 585, 139 N. W. 371.

[e] **Such provisions apply to all crimes** alike of whatever grade. *State v. Verrill*, 54 Me. 408, 414.

[f] **Waiver.**—Right of the accused "to demand the nature and cause of the accusation against him" cannot be waived or surrendered by him. *Newcomb v. State*, 37 Miss. 383.

48. **Ala.**—*Grattan v. State*, 71 Ala. 344, *citing 3 Greenl. Ev.*, §10. **Colo.**—*Fehringer v. State*, 147 Pac. 361. **Me.**—*State v. Verrill*, 54 Me. 408, 414. **Md.**—*Goeller v. State*, 119 Md. 61, 85 Atl. 954.

[a] "The aforesaid constitutional

the indictment or information shall state every fact and circumstance necessary to a certain, specific and complete description of the particular offense, so as to characterize it and make it judicially appear upon the record of the cause;⁴⁹ and require that every ingredient of which the offense is composed must be accurately and clearly alleged.⁵⁰

They entitle him to insist that the indictment or information shall apprise him of the offense charged with such reasonable certainty that he can make his defense and protect himself after judgment against another prosecution for the same offense.⁵¹ No more than this is generally required, however.⁵²

provisions are substantially a redeclaration and affirmation of the ancient rule of the common law that no one shall be held to answer to an indictment or information unless the crime with which it is intended to charge him is set forth with precision and fullness, to the end that he may have opportunity to make his defense and avail himself of his conviction or acquittal in a subsequent prosecution for the same cause." *Fehringer v. People* (Colo.), 147 Pac. 361. See also dissenting opinion by Field, J., in *Ex parte Virginia*, 100 U. S. 339, 352, 25 L. ed. 676.

49. *United States v. Cruikshank*, 92 U. S. 542, 557, 23 L. ed. 588; *United States v. Cook*, 17 Wall. (U. S.) 174, 21 L. ed. 538; *United States v. Mills*, 7 Pet. (U. S.) 138, 8 L. ed. 636; *Huntsman v. State*, 12 Tex. App. 619.

[a] Statutory provisions that indictments must be specific only voice the command of constitutional provisions that in all criminal cases the accused shall have the right "to demand the nature and cause of the accusation" against him. *State v. Griffin*, 249 Mo. 624, 155 S. W. 432.

50. *State v. Verrill*, 54 Me. 408, 414; *Huntsman v. State*, 12 Tex. App. 619.

That legislature cannot dispense with such requirement, see *infra*, this section.

As to manner of charging offense generally, see *infra*, IX, C.

As to subject-matter of allegations, see *infra*, IX, D.

51. **U. S.**—*Bartell v. United States*, 227 U. S. 427, 33 Sup. Ct. 383, 57 L. ed. 583; *Rosen v. United States*, 161 U. S. 29, 40, 16 Sup. Ct. 434, 480, 40 L. ed. 606. **Colo.**—*Fehringer v. People*, 147 Pac. 361. **Me.**—*State v. Doran*, 99 Me. 329, 59 Atl. 440, 105 Am. St. Rep. 278. **Miss.**—*Norris v. State*, 33 Miss. 373; *Murphy v. State*, 2 Cushm. 590.

As to definiteness and certainty in charging offense, see *infra*, IX, C, 4.

[a] "All the essential ingredients of the offense charged must be stated in the indictment, embracing with reasonable certainty the particulars of time and place, that the accused may be enabled to prepare his defense and avail himself of his acquittal or conviction against any further prosecution for the same cause." *Ball v. United States*, 140 U. S. 118, 136, 11 Sup. Ct. 761, 35 L. ed. 377; *Ex parte Virginia*, 100 U. S. 339, 352, 25 L. ed. 676, Field, J., dissenting.

[b] **This right is not infringed by the omission of indecent and obscene matter**, not proper to be spread upon the records of the court, provided the crime charged, however general the language used, is yet so described as reasonably to inform the accused of the nature of the charge sought to be established against him; and that, in such case, the accused may apply to the court before the trial is entered upon for a bill of particulars, showing what matter is so relied upon by the prosecution. *Rosen v. United States*, 161 U. S. 29, 40, 16 Sup. Ct. 434, 480, 40 L. ed. 606, followed in *Bartell v. United States*, 227 U. S. 427, 33 Sup. Ct. 383, 57 L. ed. 583, indictment for sending obscene matter through the mail.

52. *Paraiso v. United States*, 207 U. S. 368, 28 Sup. Ct. 127, 52 L. ed. 249; *Burton v. United States*, 202 U. S. 344, 372, 26 Sup. Ct. 688, 50 L. ed. 1057; *Com. v. Farmer*, 218 Mass. 507, 106 N. E. 150; *Com. v. Robertson*, 162 Mass. 90, 38 N. E. 25.

[a] Where the words of the indictment directly and without ambiguity disclose all the elements essential to the commission of the offense charged, the defendant is informed of the na-

May Legislature Dispense With Requirements of Indictment. — It is not in the power of the legislature to deprive an accused of the constitutional right to demand information of the nature of the crime with which he is charged.⁵³ It cannot dispense with a statement in the indictment or information of the essential elements of the offense charged against the accused,⁵⁴ but it can dispense with some of its technical formalities.⁵⁵

The constitutional right of the defendant is not infringed, however, by statutes dispensing with any allegation as to time, when it is not a material element of the offense,⁵⁶ or as to the place of the alleged acts,⁵⁷ or as to the manner or means by which the offense is com-

ture and cause of the accusation against him, within the meaning of the constitutional provisions. *Burton v. United States*, 202 U. S. 344, 372, 26 Sup. Ct. 688, 50 L. ed. 1057.

53. *Fehringer v. People* (Colo.), 147 Pac. 361; *Riggs v. State*, 104 Ind. 261, 3 N. E. 886, a statute attempting to do so would be void.

[a] "Without questioning the power of the general assembly, within certain limits, to prescribe the technical sufficiency of an indictment or information, its power in that regard cannot deprive a defendant of his right to demand and have furnished the nature and cause of the accusation against him. This right is interwoven into the fundamental principles of the common law, embodied in Magna Charta, and guaranteed in both the state and federal constitutions." *Fehringer v. People* (Colo.), 147 Pac. 361.

54. **Ark.**—*Mott v. State*, 29 Ark. 147, the substance of a good common law indictment should be preserved. **Fla.**—*Brass v. State*, 45 Fla. 1, 34 So. 307. **Ill.**—*People v. Clark*, 256 Ill. 14, 99 N. E. 866, 1913E, Ann. Cas. 214. **Ind.**—*Axtell v. State*, 173 Ind. 711; *Riggs v. State*, 104 Ind. 261, 3 N. E. 886; *Miller v. State*, 79 Ind. 198; *McLaughlin v. State*, 45 Ind. 338. **Me.** *State v. Mace*, 76 Me. 64; *State v. Learned*, 47 Me. 426. **Md.**—*Goeller v. State*, 119 Md. 61, 85 Atl. 954. **Miss.** *Murphy v. State*, 2 Cushm. 590. **Mo.** *State v. Terry*, 109 Mo. 601, 614, 19 S. W. 206 (cannot change the substance of its material averments); *State v. Fancher*, 71 Mo. 460. **Nev.**—*State v. O'Flaherty*, 7 Nev. 153. **N. H.**—*State v. Silverman*, 76 N. H. 309, 82 Atl. 336. **N. C.**—*State v. Harris*, 145 N. C. 456, 59 S. E. 115. **Ohio.**—*Lougee v. State*,

11 Ohio 68 (cannot dispense with the indictment itself), followed in *Wolf v. State*, 19 Ohio St. 248. **Tex.**—*State v. Wilburn*, 25 Tex. 738; *Hewitt v. State*, 25 Tex. 722; *State v. Horan*, 25 Tex. Supp. 271; *Slack v. State*, 61 Tex. Crim. 372, 136 S. W. 1073; *Huntsman v. State*, 12 Tex. App. 619.

[a] "The legislature cannot relieve the state of the necessity of so framing the indictment as to charge the accused with all the acts and intents which constitute the offense." *Slack v. State*, 61 Tex. Crim. 372, 136 S. W. 1073; *Williams v. State*, 37 Tex. Crim. 238, 39 S. W. 664.

55. **Ark.**—*Mott v. State*, 29 Ark. 147, may dispense with mere matters of form. **Ga.**—*Hardin v. State*, 106 Ga. 384, 32 S. E. 365, 71 Am. St. Rep. 269, can declare that no particular form is essential to the validity of such instruments. **Me.**—*State v. Mace*, 76 Me. 64; *State v. Learned*, 47 Me. 426. **Mich.** *Brown v. People*, 29 Mich. 232. **Mo.** *State v. Terry*, 109 Mo. 601, 614, 19 S. W. 206, legislature may change indictment in form. **Ohio.**—*Wolf v. State*, 19 Ohio St. 248, 255; *Lougee v. State*, 11 Ohio 68. **Tex.**—*Caldwell v. State*, 28 Tex. App. 566, 14 S. W. 122.

[a] "Useless forms, and redundant expressions, and minute specifications, may, doubtless, be dispensed with." *State v. Learned*, 47 Me. 426, 434.

As to statutory forms, see *infra*, IX. B.

56. *Coleman v. State*, 150 Ala. 64, 43 So. 715; *Thompson v. State*, 25 Ala. 41; *Ketline v. State*, 59 N. J. L. 468, 36 Atl. 1033. See also *People v. Kelly*, 6 Cal. 210.

57. *Walker v. State*, 150 Ala. 87, 43 So. 188; *Coleman v. State*, 150 Ala. 64, 43 So. 715; *Jones v. State*, 136 Ala.

mitted,⁵⁸ or as to the name of third persons involved,⁵⁹ or dispensing with any degree of particularity in description, which is not essential to give the defendant substantial and reliable information of the particular offense intended to be proved.⁶⁰

118, 34 So. 236; *Elam v. State*, 25 Ala. 53; *Noles v. State*, 24 Ala. 672; *State v. Quartemus*, 3 Heisk. (Tenn.) 65.

58. **U. S.**—*Burton v. United States*, 202 U. S. 344, 372, 26 Sup. Ct. 688, 50 L. ed. 1057; *Bergemann v. Backer*, 157 U. S. 655, 15 Sup. Ct. 727, 39 L. ed. 845, under New Jersey statute. **Me.**—*State v. Verrill*, 54 Me. 408. **Mass.**—*Com. v. Jordan*, 207 Mass. 259, 267, 93 N. E. 809. **Miss.**—*Newcomb v. State*, 37 Miss. 383. **N. J.**—*Graves v. State*, 45 N. J. L. 347, 358, 46 Am. Rep. 778. **Ohio.**—*Wolf v. State*, 19 Ohio St. 248. **Pa.**—*Goersen v. Com.*, 99 Pa. 388, 398; *Campbell v. Com.*, 84 Pa. 187, 199; *Cathcart v. Com.*, 37 Pa. 108. **Tex.**—*Caldwell v. State*, 28 Tex. App. 566, 581, 14 S. W. 122. **Wis.**—*Rowan v. State*, 30 Wis. 129, 11 Am. Rep. 559.

[a] "The argument (that such a statute is unconstitutional) is based on the assumption that 'nature and cause' are equivalent to 'mode or manner.' They are clearly distinct. The nature and cause of a criminal prosecution is sufficiently averred by charging the crime alleged to have been committed. This must be done. The mode or manner refers to the instrument, with which it was committed, or the specific agency used to accomplish the result. It is not necessary to aver either of these in the indictment. The 20th section of the act is, therefore, not in conflict with the organic law." *Goersen v. Com.*, 99 Pa. 388, 398.

[b] As a rule, the means by which the offense is committed is no part thereof. It may be made so, however. *State v. Verrill*, 54 Me. 408, 414.

[c] "They are rather matters of evidence to establish the charge." *Newcomb v. State*, 37 Miss. 383, 398.

As to averment of means generally, see *infra*, IX, E, 5, b.

59. *Coleman v. State*, 150 Ala. 64, 43 So. 715. And see *Hirschfelder v. State*, 19 Ala. 534.

[a] A statute, declaring that it shall be sufficient "to allege that the party accused did the act with intent to defraud, without alleging an intent to defraud any particular person or

body corporate," etc., has been held constitutional. *Turpin v. State*, 19 Ohio St. 540.

[b] **Intoxicating Liquors.**—As to whether a statute can dispense with averments as to name of person to whom intoxicating liquors are sold in a prosecution for an illegal sale thereof, see the title "Intoxicating Liquors."

60. **Ill.**—*People v. Clark*, 256 Ill. 14, 99 N. E. 866, 1913E, Ann. Cas. 214. **Ind.**—*Riggs v. State*, 104 Ind. 261, 3 N. E. 886. **Mass.**—*Com. v. Bennett*, 118 Mass. 443. **Mich.**—*Brown v. People*, 29 Mich. 232.

[a] **Describing Property by Words of General Description.**—It may provide that the property, which is the subject of the crime, may be described by words of general description. Thus, a statute, providing that it shall be sufficient to describe "money, bills, notes or currency" simply as "money," has been held constitutional. **Ill.**—*People v. Clark*, 256 Ill. 14, 99 N. E. 866, 1913E, Ann. Cas. 214. **Ind.**—*Randall v. State*, 132 Ind. 539, 32 N. E. 305; *Riggs v. State*, 104 Ind. 261, 3 N. E. 886. See also *Lewis v. State*, 113 Ind. 59, 14 N. E. 892. **Mass.**—*Com. v. Bennett*, 118 Mass. 443. **Mich.**—*People v. Hanaw*, 107 Mich. 337, 65 N. W. 231 (last two cases holding that accused may have charge made certain by examination or bill of particulars); *Brown v. People*, 29 Mich. 232.

[b] **There is a difference between dispensing with particularity of statement in describing the property, and dispensing with all statement in respect thereto.** In the latter case, the statute would be unconstitutional. See *State v. Silverman*, 76 N. H. 309, 82 Atl. 536.

[c] Such constitutional provisions are not infringed by statutes, authorizing the charging of obtaining property by a "confidence game," (1) instead of averring the facts constituting the elements of the offense. *Lace v. People*, 43 Colo. 199, 95 Pac. 302 (following *Morton v. People*, 47 Ill. 468); *DuBois v. People*, 200 Ill. 157, 65 N. E.

Statutes dispensing with the necessity of negating exceptions of any kind, are not in conflict with such constitutional provisions.⁶¹

B. STATUTORY FORMS.—Statutes in many states provide a general form of an indictment or information,⁶² as well as specific forms thereof for the various offenses.⁶³ It is quite competent for the legislature to

658, 93 Am. St. Rep. 183; *Maxwell v. People*, 158 Ill. 248, 41 N. E. 995. (2) The nature and character of the so called confidence game has become popularized in most of the cities and large towns, and even in the rural districts, and is so well understood as to sufficiently advise the defendant of what he is called upon to defend. *Morton v. People*, 47 Ill. 468.

[d] As to what may be dispensed with in describing various offenses, without violating such constitutional provisions, see the specific titles of this work, such as "Obtaining Property by False Pretenses."

61. **Ala.**—*Hirschfelder v. State*, 19 Ala. 534. **Del.**—*State v. Oleksy*, 3 Boyce 353, 84 Atl. 7. **R. I.**—*State v. Beswick*, 13 R. I. 211, 43 Am. Rep. 26. **Tex.**—*Slaek v. State*, 61 Tex. Crim. 372, 136 S. W. 1073, 1913B, Ann. Cas. 112.

62. **Ala.**—Code, 1907, §7161; *Noles v. State*, 24 Ala. 672, 688. **Alaska.** *Carter's Ann. Codes*, 1900, Code Civ. Proc., §39. **Ark.**—*Kirby's Digest* (1907), §2244; *Lacefield v. State*, 34 Ark. 275. **Cal.**—Pen. Code, §951; *People v. O'Brien*, 64 Cal. 53, 28 Pac. 59. **Colo.**—St. Ann., 1911, §1950. **Ga.** Code, 1910, vol. II, §954; *Tarver v. State*, 123 Ga. 494, 51 S. E. 501; *Hardin v. State*, 106 Ga. 384, 32 S. E. 365, 71 Am. St. Rep. 269 (statute mandatory); *Flanders v. State*, 9 Ga. App. 820, 72 S. E. 286. **Idaho.**—Rev. Codes, 1908, §7678; *State v. Smith*, 25 Idaho 541, 138 Pac. 1107. **Ind.**—*Burns' Ann. St.*, 1914, §2041; *Dillon v. State*, 9 Ind. 408; *State v. Miller*, 6 Ind. App. 653, 34 N. E. 27. **Ia.**—Code, 1897, §5284. **Minn.**—Rev. Laws, 1905, §5298; *State v. Sharp*, 121 Minn. 381, 141 N. W. 526; *State v. Hinckley*, 4 Minn. 345. **Mont.**—Rev. Codes, 1907, §9118; *State v. Stickney*, 29 Mont. 523, 75 Pac. 201. **Neb.**—*Kruget v. State*, 1 Neb. 365. **Nev.** *Comp. Laws*, 1900, §4200 (being §235, Crim. Prac. Act); *State v. Chamberlain*, 6 Nev. 257 (holding form insufficient in so far as it omits "venue"). **N. Y.**—Code Crim. Proc., §276; *People v. Corbalis*, 178 N. Y. 516, 71 N. E.

106; *People v. Dumar*, 106 N. Y. 502, 13 N. E. 325; *People v. Seldner*, 62 App. Div. 357, 360, 71 N. Y. Supp. 35; *People v. Everest*, 51 Hun 19, 24, 3 N. Y. Supp. 612; *People v. Peck*, 2 N. Y. Crim. 314. **Ore.**—*State v. Hosmer*, 142 Pac. 581; *State v. Martin*, 54 Ore. 403, 100 Pac. 1106, 103 Pac. 512; *State v. Guglielmo*, 46 Ore. 250, 79 Pac. 577, 80 Pac. 103, 69 L. R. A. 466. **Tex.** *Code Crim. Proc.*, §458. **Utah.**—*Comp. Laws*, 1907, §4731. **Wash.**—*Rem. & Ball. Ann. Codes*, §2056.

See also *Bulloch v. State*, 10 Ga. 47, 61, 54 Am. Dec. 369.

[a] The object of statutes prescribing the forms of the indictment is to simplify the pleadings in criminal as well as civil actions, and do away with the technicalities and repetitions which obtained and more or less were held necessary under the former practice. *State v. Hinckley*, 4 Minn. 345. See also *People v. Seldner*, 62 App. Div. 357, 71 N. Y. Supp. 35.

63. See the statutes, and the following: **Ala.**—*Coleman v. State*, 150 Ala. 64, 43 So. 715; *Frederick v. State*, 39 So. 915; *Tallent v. State*, 142 Ala. 47, 38 So. 841; *Johnson v. State*, 142 Ala. 1, 37 So. 937 (obtaining money under false pretenses); *Jones v. State*, 136 Ala. 118, 34 So. 236; *Grattan v. State*, 71 Ala. 344; *Billingslea v. State*, 68 Ala. 486; *Drake v. State*, 60 Ala. 62; *Aikin v. State*, 35 Ala. 399 (indictment for murder); *Noles v. State*, 24 Ala. 672; *Boyd v. State* (Ala. App.), 67 So. 806; *Spigener v. State*, 11 Ala. App. 296, 66 So. 896; *Harris v. State*, 11 Ala. App. 314, 66 So. 876; *Newsum v. State*, 10 Ala. App. 124, 65 So. 87; *Smith v. State*, 8 Ala. App. 352, 63 So. 28; *Williams v. State*, 4 Ala. App. 92, 58 So. 925, arson. **Fla.**—*Brass v. State*, 45 Fla. 1, 34 So. 307. **Ill.**—*People v. Clark*, 256 Ill. 14, 99 N. E. 866, 1913E, Ann. Cas. 214; *People v. Goodhart*, 248 Ill. 373, 94 N. E. 148. **Me.**—*State v. Mace*, 76 Me. 64; *State v. Learned*, 47 Me. 426. **Mass.**—Rev. Laws, 1902, ch. 218; *Com. v. Farmer*, 218 Mass. 507, 106 N. E. 150; *Com. v. Jordan*, 207

do this,⁶⁴ provided the form established is sufficient to apprise the defendant with reasonable certainty of the nature of the crime of which he stands charged,⁶⁵ and that in so doing it does not contravene any

Mass. 259, 266, 93 N. E. 809.. **Mo.**—State v. Clay, 100 Mo. 571, 578, 13 S. W. 827; State v. Fancher, 71 Mo. 460, obtaining money by false pretenses. **N. C.**—State v. Cline, 150 N. C. 854, 64 S. E. 591; State v. Harris, 145 N. C. 456, 59 S. E. 115 (perjury); State v. Thompson, 113 N. C. 638, 18 S. E. 211; State v. Peters, 107 N. C. 876, 12 S. E. 74; State v. Gates, 107 N. C. 832, 12 S. E. 319. **Ore.**—State v. Hosmer, 142 Pac. 581; State v. Martin, 54 Ore. 403, 100 Pac. 1106, 103 Pac. 512; Wong Sing v. Independence, 47 Ore. 231, 83 Pac. 387; State v. Ah Lee, 18 Ore. 540, 23 Pac. 424. **Tenn.**—State v. Stephens, 127 Tenn. 282, 154 S. W. 1149; Sizemore v. State, 3 Head 26. **Tex.**—Burrus v. State (Tex. Crim.), 172 S. W. 981 (theft from person); Wharton v. State (Tex. Crim.), 152 S. W. 1082 (forgery); Hartsell v. State (Tex. Crim.), 68 S. W. 285; Esser v. State (Tex. Crim.), 66 S. W. 776 (bigamy); Cudd v. State, 28 Tex. App. 124, 12 S. W. 1010, murder. **Vt.**—State v. Hodgson, 66 Vt. 134, 146, 28 Atl. 1089.

And see generally the specific titles in this work.

[a] These statutes do not lessen the proof necessary to a conviction; each constituent of the offense must be proved, although only implied in the brief language of the indictment. *Smith v. State*, 63 Ala. 55.

64. **U. S.**—See *Ex parte Reggel*, 114 U. S. 642, 651, 5 Sup. Ct. 1148, 29 L. ed. 250. **Ala.**—Billingslea v. State, 68 Ala. 486. **Fla.**—Brass v. State, 45 Fla. 1, 34 So. 307. **Ga.**—Hardin v. State, 106 Ga. 384, 32 S. E. 365, 71 Am. St. Rep. 269. **Me.**—State v. Mace, 76 Me. 64; State v. Learned, 47 Me. 426. **Md.**—Goeller v. State, 119 Md. 61, 85 Atl. 954, 1914C, Ann. Cas. 562. **Mich.**—People v. Hanaw, 107 Mich. 337, 65 N. W. 231. **Mo.**—State v. Morgan, 112 Mo. 202, 20 S. W. 456. **Nev.**—State v. O'Flaherty, 7 Nev. 153. **N. C.**—State v. Harris, 145 N. C. 456, 59 S. E. 115, to modify old forms or establish new ones. **Ohio.**—Wolf v. State, 19 Ohio St. 248; Lougee v. State, 11 Ohio 68. **Vt.**—State v. Webber, 78 Vt. 463, 62 Atl. 1018; State v. Hodgson, 66 Vt. 134,

153, 28 Atl. 1089; State v. Comstock, 27 Vt. 553.

[a] It can dispense with all forms and provide new ones. It can declare that no particular form is essential to the validity of such instruments, or it can imperatively require that they shall contain certain words and allegations. *Hardin v. State*, 106 Ga. 384, 32 S. E. 365, 71 Am. St. Rep. 269.

65. **Fla.**—Brass v. State, 45 Fla. 1, 34 So. 307. **Me.**—State v. Mace, 76 Me. 64; State v. Learned, 47 Me. 426. **Mo.**—State v. Morgan, 112 Mo. 202, 20 S. W. 456. **N. C.**—State v. Harris, 145 N. C. 456, 59 S. E. 115. **Ore.**—State v. Steeves, 29 Ore. 85, 92, 43 Pac. 947. See *supra*, IX, A.

[a] "The limitation and only limitation is that the indictment must furnish to the accused 'the nature and cause of the accusation.'" *State v. Morgan*, 112 Mo. 202, 20 S. W. 456.

[b] "It has been held that a statute prescribing the form of the indictment which does not inform the accused of the nature and cause of the accusation against him was violative of the organic law of a state which guaranteed such a right. *McLaughlin v. State*, 45 Ind. 338; *People v. Olmstead*, 30 Mich. 432." *State v. Steeves*, 29 Ore. 85, 92, 43 Pac. 947.

[c] It is not necessary in order to inform the accused of the nature and cause of the accusation against him that an indictment which preserves the substance of the offense and pursues the form prescribed by the legislature, should descend to a minute detail of facts and circumstances, which, during the progress of the trial, would be requisite to be proved. *State v. Fancher*, 71 Mo. 460, wherein the court said: "In Nevada, it is held that an indictment is sufficient in pursuing the prescribed statutory form in the description of an offense, if the substance be preserved; and that, subject to that condition, the power of the legislature as to the fashion and form of an indictment is plenary. *State v. O'Flaherty*, 7 Nev. 153. Mr. Justice Cooley holds the same view, saying in effect that legislative forms of indictments are sufficient, if furnishing reasonable

constitutional provision.⁶⁶ Indeed, the form in which the crime is to be charged and what shall constitute it are left to the legislature to prescribe.⁶⁷ It can prescribe a form which omits many averments that, at common law, were necessary,⁶⁸ or it can imperatively require

information to the accused of the accusation preferred against him. *Cooley's Const. Lin.*, 309, note."

[d] **Bill of Particulars.**—Especially is this true, where accused is entitled to have the charge made certain by a bill of particulars. *People v. Hanaw*, 107 Mich. 337, 65 N. W. 231. And see *Com. v. Bennett*, 118 Mass. 443, 452; *State v. Hodgson*, 66 Vt. 134, 147, 28 Atl. 1089. But see *State v. Cline*, 150 N. C. 854, 64 S. E. 591; *State v. Van Pelt*, 136 N. C. 633, 49 S. E. 177, both holding that a bill of particulars cannot supply a defect in the indictment. See generally the title "**Bills of Particulars.**"

66. **U. S.**—*Ex parte Reggel*, 114 U. S. 642, 651, 5 Sup. Ct. 1148, 29 L. ed. 250. **N. C.**—*State v. Harris*, 145 N. C. 456, 59 S. E. 115. **Vt.**—*State v. Webber*, 78 Vt. 463, 62 Atl. 1018; *State v. Comstock*, 27 Vt. 553.

[a] **Effect of Federal Constitution.** A state "has the right to establish the forms of pleadings and process to be observed in her own courts, in both civil and criminal cases, subject only to those provisions of the constitution of the United States involving the protection of life, liberty and property in all the states of the Union." *Ex parte Reggel*, 114 U. S. 642, 651, 5 Sup. Ct. 1148, 29 L. ed. 250.

[b] **The constitutional provisions that the accused is entitled to be informed of the nature and cause of the accusation against him do not preclude the legislature from prescribing a statutory form of indictment or information which contains the elements of the offense.** **Ala.**—*Grattan v. State*, 71 Ala. 344; *Billingslea v. State*, 68 Ala. 486. **Miss.**—*Newcomb v. State*, 37 Miss. 383. **Nev.**—*State v. O'Flaherty*, 7 Nev. 153. **N. C.**—*State v. Harris*, 145 N. C. 456, 59 S. E. 115. **Ohio.**—*Wolf v. State*, 19 Ohio St. 248, 255; *Lougee v. State*, 11 Ohio 68. **Ore.**—*State v. Hosmer*, 142 Pac. 581. **Tenn.**—*State v. Stephens*, 127 Tenn. 282, 154 S. W. 1149; *Sizemore v. State*, 3 Head 26. **Vt.**—*State v. Webber*, 78 Vt. 463, 62 Atl. 1018; *State v. Comstock*, 27 Vt. 553. **Wis.**

Rowan v. State, 30 Wis. 129, 11 Am. Rep. 559.

[a] The court said, in *State v. Hosmer (Ore.)*, 142 Pac. 581: "Admittedly the fundamental law guarantees to a defendant the right to 'determine the nature and cause of the accusation against him;' and any form of indictment outlined by the legislature abridging this right would be violative of a sacred right vouchsafed by the constitution. However, we cannot concede that the section of the constitution referred to requires the lawmaking body to adopt a form of indictment embodying every phrase in the definition of a crime, but simply means that the form prescribed shall furnish the accused reasonable information of what he is called upon to answer, by setting forth sufficient of the elements of the offense to give it form and character. An indictment for larceny cannot, under a legislative enactment, be made an indictment for murder without violating the plain meaning of this provision of the constitution; but, if the indictment following the form prescribed by the legislature sets forth with reasonable certainty the crime for which the accused is to be tried, the mandate of the constitution is satisfied."

[b] Nor do constitutional provisions, requiring prosecutions to be by indictment or information, prevent the legislature from prescribing the forms thereof. **Ala.**—*Noles v. State*, 24 Ala. 672, followed in *Aikin v. State*, 35 Ala. 399. **Ky.**—*Janes v. Com.*, 3 Mete. 18, 5th amendment to constitution of United States does not restrict the states. **La.**—*State v. Mullen*, 14 La. Ann. 570. **Tex.**—*Caldwell v. State*, 28 Tex. App. 566, 14 S. W. 122, affirmed, 137 U. S. 692, 11 Sup. Ct. 224, 34 L. ed. 816.

67. *State v. Stephens*, 127 Tenn. 282, 154 S. W. 1149; *Sizemore v. State*, 3 Head (Tenn.) 26.

68. *Noles v. State*, 24 Ala. 672, followed in *Schwartz v. State*, 37 Ala. 460; *Aikin v. State*, 35 Ala. 399; *State v. Morgan*, 112 Mo. 202, 20 S. W. 456.

that they shall contain certain words and allegations.⁶⁹ But without such legislative sanction, courts have not the power to relax the strictness required by the common law in framing indictments.⁷⁰

Necessity of Following Statutory Forms.⁷¹ — If the indictment or information follows the specific form provided for the particular offense,⁷² or, indeed, if it complies substantially therewith,⁷³ it is sufficient. And

And see *State v. Harris*, 145 N. C. 456, 59 S. E. 115; also *Goeller v. State*, 119 Md. 61, 85 Atl. 954, 1914C, Ann. Cas. 562; *Slack v. State*, 61 Tex. Crim. 372, 136 S. W. 1073, 1913B, Ann. Cas. 112.

[a] **That legislature may dispense** with averments in indictment and information, without violating constitutional provision that accused is entitled to be informed of the nature and cause of the accusation against him, see *supra*, IX, A.

69. *Hardin v. State*, 106 Ga. 384, 32 S. E. 365, 71 Am. St. Rep. 269.

70. *Cain v. State*, 18 Tex. 387.

71. As to necessity for following statute in charging a statutory offense, see *infra*, IX, E, 5, f, (III), (A).

72. **Ala.**—*Kelly v. State*, 171 Ala. 44, 55 So. 141; *Davis v. State*, 165 Ala. 93, 51 So. 239; *Coleman v. State*, 150 Ala. 64, 43 So. 715; *Frederick v. State* (Ala.), 39 So. 915; *Tallent v. State*, 142 Ala. 47, 38 So. 841; *Johnson v. State*, 142 Ala. 1, 37 So. 937; *Jones v. State*, 136 Ala. 118, 34 So. 236; *Bailey v. State*, 99 Ala. 143, 13 So. 566; *Boyd v. State* (Ala. App.), 67 So. 634; *Spigener v. State*, 11 Ala. App. 296, 66 So. 896; *Harris v. State*, 11 Ala. App. 314, 66 So. 876; *Newsom v. State*, 10 Ala. App. 124, 65 So. 87; *Smith v. State*, 8 Ala. App. 352, 63 So. 28; *Jefferson v. State*, 8 Ala. App. 364, 62 So. 313; *Campbell v. State*, 4 Ala. App. 104, 58 So. 125; *Williams v. State*, 4 Ala. App. 92, 58 So. 925; *Boyd v. State*, 3 Ala. App. 178, 57 So. 1019; *Hankinson v. State*, 2 Ala. App. 110, 57 So. 61. **Nev.**—*State v. O'Flaherty*, 7 Nev. 153, sufficient to pursue prescribed statutory form in description of offense, if substance of offense be preserved. **Ore.**—*State v. Hosmer*, 142 Pac. 581; *State v. Dodson*, 4 Ore. 65. **Tex.**—*Shettlers v. State* (Tex. Crim.), 147 S. W. 582; *Hartsel v. State* (Tex. Crim.), 68 S. W. 285. **Vt.**—*State v. Hodgson*, 66 Vt. 134, 151, 25 Atl. 1089.

73. **Ala.**—*Redd v. State*, 169 Ala. 6, 53 So. 903 (wherein instead of alleging

probable cause, for the belief that defendant had committed the offense, the affidavit charged actual commission thereof); *Richmond v. State*, 4 Ala. App. 139, 58 So. 973. **Ark.**—*Lacefield v. State*, 34 Ark. 275, 36 Am. Rep. 8, form given in statute need not be strictly followed. **Cal.**—*People v. Mahlman*, 82 Cal. 585, 23 Pac. 145; *People v. O'Brien*, 64 Cal. 53, 28 Pac. 59; *People v. Potter*, 35 Cal. 110; *People v. Rodriguez*, 10 Cal. 50. **Ga.**—*Tarver v. State*, 123 Ga. 494, 51 S. E. 501. **Mont.**—*State v. Stiekney*, 29 Mont. 523, 75 Pac. 201. **Neb.**—*Kruget v. State*, 1 Neb. 365. **N. Y.**—*People v. Peck*, 2 N. Y. Crim. 314. **Ore.**—*State v. Hosmer*, 142 Pac. 581; *State v. Martin*, 54 Ore. 403, 100 Pac. 1106, 103 Pac. 512. **Tex.**—*Farell v. State*, 64 Tex. Crim. 200, 141 S. W. 535; *Whorton v. State* (Tex. Crim.), 152 S. W. 1082.

[a] **The failure to insert the statutory** appellation of the crime in accordance with the prescribed form, or the insertion of a wrong name for the offense charged does not vitiate the indictment, where the facts alleged show the offense charged. *People v. Phipps*, 39 Cal. 326.

[b] **Though the form contains an averment of residence** of defendant, its omission is immaterial where it conforms in other respects with the statutory form and states an offense. *Tarver v. State*, 123 Ga. 494, 51 S. E. 501.

[c] **Analogous form** may, by express provision of statute, be used in cases in which those forms provided are not applicable. *Brantley v. State*, 91 Ala. 47, 51, 8 So. 816; *Jackson v. State*, 91 Ala. 55, 8 So. 773, 24 Am. St. Rep. 860; *Allen v. State*, 79 Ala. 34, 37; *Smith v. State*, 63 Ala. 55; *Drake v. State*, 60 Ala. 62.

[d] **Though some matters of substance** (1) are omitted (*Weed v. State*, 55 Ala. 13, *overruling Bryan v. State*, 45 Ala. 86; *Noles v. State*, 24 Ala. 672. See also *Hankinson v. State*, 2 Ala. App. 110, 57 So. 61), (2) since the

on account of their generality, the courts should require the indictment to conform in every substantial particular to the statutory form, when drawn thereunder.⁷⁴

Such statutes do not ordinarily require the use of these forms; they simply provide them, to be used if preferred.⁷⁵ An indictment for a common-law offense, good at common law, is still good under such statutes.⁷⁶ If the indictment is not framed in the form provided by the statute, however, it must aver every material constituent of the offense.⁷⁷

C. MANNER OF CHARGING. — 1. **In General.** — The same rules in reference to charging an offense in an indictment are also applicable to informations or affidavits,⁷⁸ by express provision of statute in some states.⁷⁹

2. Language, Spelling and Grammatical Errors and Omissions.

a. *In General.*⁸⁰ — The nicety and strictness in framing indictments, which was formerly required, is now considered excessive, and therefore has been much relaxed,⁸¹ statutes now declaring that the state-

legislative direction that such indictment shall be sufficient is controlling. *McCullough v. State*, 63 Ala. 75; *Smith v. State*, 63 Ala. 55; *Wilson v. State*, 61 Ala. 151.

74. **Ala.** — *Sanders v. State*, 2 Ala. App. 13, 56 So. 69. **Mo.** — *State v. Clay*, 100 Mo. 571, 579, 13 S. W. 827, unless the statutory form is followed, the indictment is bad. **Tex.** — *Thomas v. State*, 18 Tex. App. 213, 221, all requisites, whether formal or substantial, should be complied with.

[a] Such forms are not applicable to prosecutions by affidavit or complaint in municipal courts, and need not be followed. They merely furnish a general outline as to how such accusations should be drawn. *Flanders v. State*, 9 Ga. App. 820, 72 S. E. 286.

75. *State v. Learned*, 47 Me. 426, 435. See also *Estes v. State*, 10 Tex. 300.

76. *Sparks v. State*, 59 Ala. 82; *Diggs v. State*, 49 Ala. 311; *Snow v. State*, 85 Ark. 203, 107 S. W. 980, 122 Am. St. Rep. 23.

Allegations sufficient for a common-law indictment for murder are sufficient for an information under the statute. *State v. McGowan*, 36 Mont. 422, 93 Pac. 552.

77. *Smith v. State*, 63 Ala. 55. See also *Grattan v. State*, 71 Ala. 344.

[a] This is the only safe rule to follow in such a case: for if the form provided is not followed, an indictment, though containing all the averments of

fact which the form contains, but in different language and in different form, is not sufficient. *Smith v. State*, 63 Ala. 55.

78. See the following: **Ill.** — *People v. Weinstein*, 255 Ill. 530, 99 N. E. 589; *Gould v. People*, 89 Ill. 216; *Parris v. People*, 76 Ill. 274, 276; *People v. Miller*, 178 Ill. App. 292; *Avery v. People*, 11 Ill. App. 332. **Ind.** — *Strader v. State*, 92 Ind. 376; *Sovine v. State*, 85 Ind. 576; *State v. Beebe*, 83 Ind. 171. **Kan.** — *State v. Barnett*, 3 Kan. 250, 87 Am. Dec. 471. **Mich.** — *Merwin v. People*, 26 Mich. 298, 12 Am. Rep. 314. **Miss.** — *Harkness v. State*, 95 Miss. 506, 48 So. 294. **Ohio.** — *Kern v. State*, 7 Ohio St. 411; *Dillingham v. State*, 5 Ohio St. 280. **Tex.** — *State v. Elliott*, 41 Tex. 224.

79. See generally the statutes.

80. As to statutory forms, see *supra*, IX, B.

As to charging statutory offense, see *infra*, IX, E, 5, f.

81. **U. S.** — *Fitzpatrick v. United States*, 178 U. S. 304, 310, 20 Sup. Ct. 944, 44 L. ed. 1078; *Cannon v. United States*, 116 U. S. 55, 76, 6 Sup. Ct. 278, 29 L. ed. 561. **Conn.** — *State v. McGee*, 81 Conn. 696, 72 Atl. 141 (especially in case of misdemeanor created by statute); *Barth v. State*, 18 Conn. 432, 438. **Ia.** — *State v. Rankin*, 150 Iowa 701, 180 N. W. 732; *State v. Shunka*, 116 Iowa 206, 89 N. W. 977. **Ky.** — *Ruark v. Com.*, 150 Ky. 47, 150 S. W. 5 (especially in indictments for minor offenses).

ment of the offense may be in any words sufficient to give the accused notice of the offense with which he is charged,⁸² or as is the more general provision, that the statement of the acts constituting the offense shall be in ordinary and concise language,⁸³ or in plain and

N. M.—State *v. Lucero*, 146 Pac. 407.
Okla.—Arnold *v. State* (Okla. Crim.), 132 Pac. 1123; Deen *v. State*, 7 Okla. Crim. 150, 122 Pac. 941.

[a] **The modern rule of criminal pleading** does not require the use of ancient forms, crude phraseology, prolix and abstruse expressions to accompany the averments in an information, if the charge is set forth in plain, common sense English language. No greater particularity is required than is necessary to express the same fact in everyday parlance. Arnold *v. State* (Okla. Crim.), 132 Pac. 1123; Deen *v. State*, 7 Okla. Crim. 150, 122 Pac. 941. As to particularity required, see *infra*, IX, C, 4.

82. Queen *v. Weir*, 3 Can. Cr. Cas. 102, and generally the statutes.

83. See the following: **U. S.**—Weems *v. United States*, 217 U. S. 349, 361, 30 Sup. Ct. 544, 54 L. ed. 793 (under Philippine Code Crim. Proc.); Davis *v. Utah Territory*, 151 U. S. 262, 14 Sup. Ct. 328, 38 L. ed. 153, under Utah statute. **Ala.**—Code, 1907, §7134; Clarke *v. State*, 117 Ala. 1, 23 So. 671, 67 Am. St. Rep. 157; Wilson *v. State*, 61 Ala. 151; Nowlin *v. State*, 49 Ala. 41; Cheshire *v. State*, 8 Ala. App. 253, 62 So. 994; Lewis *v. State*, 3 Ala. App. 133, 57 So. 1035. **Ariz.**—Rodriguez *v. Territory*, 14 Ariz. 166, 125 Pac. 878; Marquez *v. Territory*, 13 Ariz. 135, 108 Pac. 258; Ortega *v. Territory*, 8 Ariz. 37, 68 Pac. 544; Brady *v. Territory*, 7 Ariz. 12, 60 Pac. 698. **Ark.**—Ray *v. State*, 102 Ark. 594, 145 S. W. 881; Winn *v. State*, 55 Ark. 360, 18 S. W. 375; Dixon *v. State*, 29 Ark. 165. **Cal.** Penal Code, §950; People *v. Mahoney*, 145 Cal. 104, 78 Pac. 354; People *v. Silva*, 8 Cal. App. 349, 97 Pac. 202. **Idaho.**—Rev. Codes, 1907, §7677; State *v. Smith*, 25 Idaho 541, 138 Pac. 1107; State *v. O'Neil*, 24 Idaho 582, 135 Pac. 60. **Ind.**—Burns' Ann. St., 1914, §2040; Regadanz *v. State*, 171 Ind. 387, 86 N. E. 449. **Ia.**—Code, 1897, §5280; State *v. Rankin*, 150 Iowa 701, 130 N. W. 732. **Kan.**—Gen. St., 1905, §5991; Smith *v. State*, 1 Kan. 365; Madden *v. State*, 1 Kan. 340. **Ky.**—Crim. Code, §122;

Terhune *v. Com.*, 144 Ky. 370, 138 S. W. 274; Smith *v. Com.*, 141 Ky. 534, 133 S. W. 228. **Minn.**—Rev. Laws, 1905, §5297. **Mont.**—Rev. Codes, 1907, §9147; State *v. McGowan*, 36 Mont. 422, 93 Pac. 552. **Nev.**—Rev. L., 1912, §7050; State *v. Raymond*, 34 Nev. 198, 117 Pac. 17. **N. Y.**—Code Crim. Proc., §275; People *v. Knapp*, 147 App. Div. 436, 447, 132 N. Y. Supp. 747; People *v. Gregg*, 59 Hun 107, 13 N. Y. Supp. 114; People *v. Foster*, 60 Misc. 3, 112 N. Y. Supp. 706; People *v. Bellows*, 2 N. Y. Crim. 12. **N. D.**—Rev. Codes, 1905, §9848; State *v. Longstreth*, 19 N. D. 268, 121 N. W. 1114, Ann. Cas. 1912D, 1317. **Okla.**—Comp. Laws, 1909, §6696; Deen *v. State*, 7 Okla. Crim. 150, 122 Pac. 941. **Ore.**—Lord's Laws, §1437. **S. D.**—Code Crim. Proc., §221; State *v. Stewart*, 30 S. D. 585, 139 N. W. 371; State *v. McPherson*, 30 S. D. 547, 139 N. W. 368. **Tenn.**—Shannon's Code, §7077; State *v. Stephens*, 127 Tenn. 282, 154 S. W. 1149. **Utah.** Comp. Laws, 1907, §4730; State *v. Topham*, 41 Utah 39, 123 Pac. 888. **Wash.** Rem. & Ball. Ann. Codes & St., §2055; State *v. Johnson*, 82 Wash. 347, 144 Pac. 57.

[a] "This means that it shall state in a plain and concise way the manner in which it is claimed the crime was committed." People *v. Knapp*, 147 App. Div. 436, 447, 132 N. Y. Supp. 747; People *v. Foster*, 60 Misc. 3, 112 N. Y. Supp. 706. "It is the manner of the commission of the crime charged in the indictment which is to be plainly and concisely stated, and not the manner in which some other crime has been committed." People *v. Foster*, 60 Misc. 3, 112 N. Y. Supp. 706.

[b] "The purpose of this statutory requirement is not only to protect the defendant from further prosecution for the same offense, but to apprise him of the nature and character of the offense charged and of the facts which may be proved so as to enable him to prepare his defense." People *v. Knapp*, 147 App. Div. 436, 447, 132 N. Y. Supp. 747.

intelligible words,⁸⁴ without prolixity or repetition,⁸⁵ and in such a manner as to enable a person of common understanding to know what is intended.⁸⁶

No technical or formal manner of doing this need be observed or followed, as a rule,⁸⁷ an indictment or information containing all the necessary allegations being sufficient, though inartistically and clumsily

84. Tex. Penal Code, art. 439, subd. 7; *State v. Edmondson*, 43 Tex. 162; *Gray v. State*, 7 Tex. App. 10.

85. See the following: **Ala.**—Code, 1907, §7134; *Clarke v. State*, 117 Ala. 1, 23 So. 671, 67 Am. St. Rep. 157; *Wilson v. State*, 61 Ala. 151; *Nowlin v. State*, 49 Ala. 41; *Cheshire v. State*, 8 Ala. App. 253, 62 So. 994; *Lewis v. State*, 3 Ala. App. 133, 57 So. 1035. **Ind.**—Burns' Ann. St., 1914, §2040 (without unnecessary repetition); *Regadanz v. State*, 171 Ind. 387, 86 N. E. 449. **Ia.**—Code, 1897, §5280; *State v. Rankin*, 150 Iowa 701, 130 N. W. 732. **Kan.**—Gen. St., 1905, §5991. **Minn.**—Rev. Laws, 1905, §5297. **N. Y.**—Code Crim. Proc., §275; *People v. Knapp*, 147 App. Div. 436, 447, 132 N. Y. Supp. 747; *People v. Gregg*, 59 Hun 107, 13 N. Y. Supp. 114; *People v. Foster*, 60 Misc. 3, 112 N. Y. Supp. 706; *People v. Bellows*, 2 N. Y. Crim. 12. **Tenn.**—Shannon's Code, §7077; *State v. Stephens*, 127 Tenn. 282, 154 S. W. 1149. **Wash.**—Rem. & Ball Ann. Codes & St., §2055; *State v. Johnson*, 82 Wash. 347, 144 Pac. 57.

That allegations must be direct and positive, see *infra*, IX, C, 3, a.

86. See the following: **U. S.**—Weems v. United States, 217 U. S. 349, 361, 30 Sup. Ct. 544, 54 L. ed. 793 (under Philippine Code Crim. Proc.); *Davis v. Utah Territory*, 151 U. S. 262, 14 Sup. Ct. 328, 38 L. ed. 153, under Utah statute. **Ala.**—Code, 1907, §7134; *Clarke v. State*, 117 Ala. 1, 23 So. 671, 67 Am. St. Rep. 157; *Wilson v. State*, 61 Ala. 151; *Nowlin v. State*, 49 Ala. 41; *Cheshire v. State*, 8 Ala. App. 253, 62 So. 994; *Lewis v. State*, 3 Ala. App. 133, 57 So. 1035. **Ariz.**—Rodriguez v. Territory, 14 Ariz. 166, 125 Pac. 878; *Marquez v. Territory*, 13 Ariz. 135, 108 Pac. 258; *Ortega v. Territory*, 8 Ariz. 37, 68 Pac. 544; *Brady v. Territory*, 7 Ariz. 12, 60 Pac. 698. **Ark.**—Ray v. State, 102 Ark. 594, 145 S. W. 881; *Winn v. State*, 55 Ark. 360, 18 S. W. 375; *Dixon v. State*, 29 Ark. 165. **Cal.**—Penal Code, §950; *People v. Mahony*,

145 Cal. 104, 78 Pac. 354; *People v. Silva*, 8 Cal. App. 349, 97 Pac. 202. **Idaho.**—Rev. Codes, 1907, §7677; *State v. Smith*, 25 Idaho 541, 138 Pac. 1107; *State v. O'Neil*, 24 Idaho 582, 135 Pac. 60. **Ia.**—Code, 1897, §5280; *State v. Rankin*, 150 Iowa 701, 130 N. W. 732. **Ky.**—Crim. Code, §122; *Com. v. Ransdall*, 153 Ky. 334, 155 S. W. 1117; *Terhune v. Com.*, 144 Ky. 370, 138 S. W. 274. **Mont.**—Rev. Codes, 1907, §9147; *State v. McGowan*, 36 Mont. 422, 93 Pac. 552. **Nev.**—Rev. Laws, 1912, §7050; *State v. Raymond*, 34 Nev. 198, 117 Pac. 17. **N. D.**—Rev. Codes, 1905, §9848; *State v. Longstreth*, 19 N. D. 268, 121 N. W. 1114, Ann. Cas. 1912D, 1317. **Okla.**—Comp. Laws, 1909, §6696; *Deen v. State*, 7 Okla. Crim. 150, 122 Pac. 941. **Ore.**—Lord's Laws, §1437. **S. D.**—Code Crim. Proc., §221; *State v. Stewart*, 30 S. D. 585, 139 N. W. 371; *State v. McPherson*, 30 S. D. 547, 139 N. W. 368. **Utah.**—Comp. Laws, 1907, §4730; *State v. Topham*, 41 Utah 39, 123 Pac. 888. **Wash.**—Rem. & Ball. Ann. Codes & St., §2055; *State v. Johnson*, 82 Wash. 347, 144 Pac. 57.

[a] An indictment need only be sufficient to apprise a person of ordinary understanding (1) of the nature of the charge against him. *Com. v. Ransdall*, 153 Ky. 334, 155 S. W. 1117. (2) Although a person of common understanding may know what is intended to be charged, that knowledge must be based upon the language employed; otherwise, the statute is not satisfied. *State v. McGowan*, 36 Mont. 422, 93 Pac. 552.

As to certainty, see *infra*, IX, C, 4. 87. *State v. Edmondson*, 43 Tex. 162. And see *United States v. Howard*, 132 Fed. 325, 334; *State v. Sharp*, 121 Minn. 381, 141 N. W. 526.

[a]. "The clear and simple detail of the facts showing the act or omission declared by law to constitute the offense with which it is sought to charge the defendant is all that is required." *State v. Edmondson*, 43 Tex. 162.

[b] "All that is required is a state-

drawn,⁸⁸ especially where statutes provide that no indictment shall be deemed invalid or in any manner affected by any defect or imperfection which does not tend to the prejudice of the substantial rights of the defendant upon the merits.⁸⁹

Effect of Statutory Provisions.—The substance of the indictment is the same under statutes modifying the rules as to the manner of charging the offense as at common law, every material ingredient of the offense being required to be averred, as at common law;⁹⁰ such statutes merely dispense with much of the particularity and unnecessary strictness required at common law,⁹¹ but the sufficiency of the averments is to be determined by the statutes, and not by the rules of the common law.⁹²

ment in plain and unambiguous language. Technical form is not important." *State v. Sharp*, 121 Minn. 381, 141 N. W. 526.

As to necessity for following approved precedents, see *infra*, this section; for following statutory forms, see *supra*, IX, B.

88. See the following cases: **Ind.** *Heath v. State*, 101 Ind. 512; *McMillen v. State*, 60 Ind. 216. **Kan.**—*Mad-den v. State*, 1 Kan. 340. **Ky.**—*Com. v. Schatzman*, 26 Ky. L. Rep. 508, 82 S. W. 238. **La.**—*State v. Cox*, 68 So. 107. **Mo.**—*State v. Coulter*, 46 Mo. 564. **Okla.**—*Smythe v. State*, 2 Okla. Crim. 286, 299, 101 Pac. 611. **Tex.** *Dawson v. State*, 33 Tex. 491.

[a] When an indictment contains all the essential allegations, and is therefore sufficient, it is immaterial in what part thereof a necessary averment is made. **U. S.**—*United States v. Howard*, 132 Fed. 325, 334. **N. H.** *State v. Divoll*, 44 N. H. 140. **Can.** *Queen v. Weir*, 3 Can. Cr. Cas. 102.

[a] In *State v. Coulter*, 46 Mo. 564, the court said: "Notwithstanding the want of orderly arrangement, and the prolix and involved manner in which the charge is set forth, we think it is substantially good. Although the pleading is technically faulty and unscientific, yet all the averments required by the statute are sufficiently made."

89. See *State v. Coulter*, 46 Mo. 564.

As to statutory provisions for cure of defects, see *infra*, XIV, and XVII.

90. **Cal.**—*People v. Lloyd*, 9 Cal. 54; *People v. Cox*, 9 Cal. 32; *People v. Wallace*, 9 Cal. 30. **Ia.**—*State v. Clark*, 141 Iowa 297, 119 N. W. 719. **N. C.** *State v. Peters*, 107 N. C. 876, 12 S. E.

74. **Ore.**—*State v. Ah Lee*, 18 Ore. 540, 23 Pac. 424, code has wrought no change in the substance of the crime; it has only abolished useless forms.

91. See the following cases: **Ala.** *Jackson v. State*, 91 Ala. 55, 8 So. 773, 24 Am. St. Rep. 860; *Drake v. State*, 60 Ala. 62; *Boyd v. State*, 3 Ala. App. 178, 57 So. 1019. **Cal.**—*People v. Ah Sing*, 95 Cal. 654, 30 Pac. 796; *People v. Rozelle*, 78 Cal. 84, 20 Pac. 36; *People v. Saviers*, 14 Cal. 29; *People v. Dolan*, 9 Cal. 576. **Conn.**—*Barth v. State*, 18 Conn. 438. **Ga.**—*Burkes v. State*, 7 Ga. App. 39, 65 S. E. 1091; *Youmans v. State*, 7 Ga. App. 101, 113, 66 S. E. 383. **Ind.**—*Agar v. State*, 176 Ind. 234, 94 N. E. 819, technical language which prevailed at common law not required. **Ia.**—*State v. Rankin*, 150 Iowa 701, 130 N. W. 732; *State v. Clark*, 141 Iowa 297, 119 N. W. 719. **N. Y.**—*People v. Gregg*, 59 Hun 107, 13 N. Y. Supp. 114. **N. D.**—*State v. Longstreth*, 19 N. D. 268, 121 N. W. 1114, Ann. Cas. 1912D, 1317. **Pa.** *Com. v. Hill*, 2 Pears. 432; *Com. v. Wilson*, 2 Chester Co. 164.

[a] "The statutes of this state have changed the common-law rules of criminal pleading, dispensing with many averments which were regarded as indispensable, reducing indictments rather to a statement of legal conclusions than of facts." *Jackson v. State*, 91 Ala. 55, 8 So. 773, 24 Am. St. Rep. 860; *Drake v. State*, 60 Ala. 62.

92. **Cal.**—*People v. Mahlman*, 82 Cal. 585, 23 Pac. 145; *People v. Murphy*, 39 Cal. 52; *People v. Dick*, 37 Cal. 277; *People v. Ah Woo*, 28 Cal. 205. **Ga.** *Studstill v. State*, 7 Ga. 2. **Idaho.** *State v. O'Neil*, 24 Idaho 582, 135 Pac.

It is true that by virtue of express provision of statute in some states, an indictment good at common law is still good under statutes punishing the same offense;⁹³ but such statutes do not apply where the grade of the common-law offense has been increased by the statute from a misdemeanor to a felony.⁹⁴

When the statute does not prescribe the form of indictment, or the words that shall be used, it is only necessary that it conform to the general rules of law applicable to such indictments, and be so plain and explicit that there cannot be any reasonable doubt as to its meaning.⁹⁵

Following Approved Precedents.—While the better rule in preparing indictments and informations is to follow approved precedents when it can be done,⁹⁶ they are not necessarily defective because they fail to do so,⁹⁷ but if they contain all necessary averments though couched in different language from approved forms and precedents, they will be held good.⁹⁸

60. **Ind.**—State *v.* Record, 56 Ind. 107; Dillon *v.* State, 9 Ind. 408. **Kan.** State *v.* White, 14 Kan. 538; Smith *v.* State, 1 Kan. 365; Madden *v.* State, 1 Kan. 340. **Ky.**—Com. *v.* Patterson, 2 Mete. 374. **Minn.**—State *v.* Holong, 38 Minn. 368, 37 N. W. 587. **N. Y.** People *v.* Dumar, 106 N. Y. 502, 13 N. E. 325; People *v.* Gregg, 59 Hun 107, 13 N. Y. Supp. 114. **Utah.**—People *v.* Kerm, 8 Utah 268, 30 Pac. 988.

[a] In State *v.* Holong, 38 Minn. 368, 37 N. W. 587, the court said, that the old form of pleading in criminal actions has been abolished, and the rules by which the sufficiency of such pleadings is to be determined, are those prescribed by the statute. That an indictment is sufficient if it can be understood therefrom that the act or omission charged as the crime is stated with such a degree of certainty as to enable the court to pronounce judgment upon conviction, according to the right of the case. That it was the intent of the legislature to free criminal pleading from the technical rules (many of which are senseless) which had grown up on the subject. That where the criminal character of the act is as strongly stated in the words used in the indictment as those given in the statute, they are the words used in the statute defining the offense, and mean as much in the indictment as in the statute, and in either they describe the offense.

93. Ala.—Code, 1907, §7137; Sparks *v.* State, 59 Ala. 82. **Miss.**—Wile *v.* State, 60 Miss. 260; Bowler *v.* State, 41

Miss. 570. **Tenn.**—Shannon's Code, §7082.

94. Wile *v.* State, 60 Miss. 260; Bowler *v.* State, 41 Miss. 570.

95. Smith *v.* Com., 141 Ky. 534, 133 S. W. 228.

96. **D. C.**—Davis *v.* United States, 16 App. Cas. 442, 450. **Fla.**—Newton *v.* State, 51 Fla. 82, 41 So. 19. **Miss.** Kline *v.* State, 44 Miss. 317. **Mo.** State *v.* Privitt, 175 Mo. 207, 225, 75 S. W. 457; State *v.* Reakey, 62 Mo. 40. **Nev.**—State *v.* Harkin, 7 Nev. 377, 384.

[a] In Davis *v.* United States, 16 App. Cas. (D. C.) 442, 450, which was a prosecution for assault with intent to kill, and it was objected that indictment did not aver the means or instruments by which the assault was made, the court said: "Whatever might be thought of the form of the indictment, if it were now for the first time to be passed upon, that form (one used in this case) has been so long accepted, and so often approved, by the courts of this district that nothing short of an apparent danger that it might operate to the prejudice of the defendant, would justify a disturbance of the settled practice."

As to necessity for following statutory forms, see *supra*, IX, B.

97. Kline *v.* State, 44 Miss. 317; State *v.* Privitt, 175 Mo. 207, 225, 75 S. W. 457.

98. State *v.* Privitt, 175 Mo. 207, 225, 75 S. W. 457. And see Newton *v.* State, 51 Fla. 82, 41 So. 19.

[a] In Kline *v.* State, 44 Miss. 317, the court said: "While it is the better

b. *English Language*.—Statutes in some states expressly require that indictments shall, except technical terms, be in the English language.⁹⁹ Statutes, providing that an indictment or information must contain a statement of the acts constituting the offense, in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is intended,¹ also contemplate a pleading entirely in the English language.² And a constitutional provision, requiring judicial proceedings to be conducted, preserved, and published in no other than the English language, imperatively requires an indictment in such language.³

An omission of one or more letters in a word, which changes the word to one of another language of the same meaning as that intended to be used, is not fatal under such constitutional provisions, however.⁴ Nor does the use of the ordinary abbreviations or symbols, or numerals render it invalid because not in the English language.⁵

It would seem that matter in a foreign language, set up in an indictment or information, should be translated.⁶

c. *Use of Technical Terms and Words*.—The offense should be set forth in unambiguous words, not in slang words or vulgarisms, or words used in a technical sense in some particular employment or business, but in words belonging to the plain and proper language of the community.⁷ There were, of course, at the common law, certain

and safer practice to follow approved precedents, and to adhere closely and precisely to the statutory description of offenses, nevertheless the indictment would be good, 'so the offense be certainly and substantially described therein,' although, there be absent from it words 'merely formal and technical.'

99. See the following: N. H. Pub. St., 1901, ch. 218, §1; Vt. Pub. St., 1906, §1222; State v. Hodgeden, 3 Vt. 481, and generally the statutes.

As to use of technical terms and words, see *infra*, IX, C, 2, c.

1. For references to such statutes, see *supra*, IX, C, 2, a.

2. An information partly in English and partly in Chinese cannot be said to be in *ordinary* language. People v. Ah Sum, 92 Cal. 648, 28 Pac. 680.

3. See People v. Ah Sum, 92 Cal. 648, 28 Pac. 680; also State v. Hornsby, 8 Rob. (La.) 554, 41 Am. Dec. 305.

4. State v. Hornsby, 8 Rob. (La.) 554, 41 Am. Dec. 305, as where an indictment for murder charges that the mortal blow caused "an *extravasation* (for extravasation) of blood," etc., the former being a French term of same meaning.

As to effect of omissions of letters generally, both where sense is not ob-

scured and where it renders indictment unintelligible, see *infra*, IX, C, 2, e.

5. See *infra*, IX, C, 2, d.

[a] The words "Anno Domini," in stating the date, do not render the indictment defective. State v. Gilbert, 13 Vt. 647.

6. See the following cases: Cal. People v. Ah Sum, 92 Cal. 648, 28 Pac. 680. Mo.—State v. Marlier, 46 Mo. App. 233. Eng.—Rex v. Goldstein, 3 Brod. & B. 201, 7 E. C. L. 685.

[a] The matter should be first set out in the foreign language, and then followed by a proper translation. State v. Marlier, 46 Mo. App. 233. And see Stichtd v. State, 25 Tex. App. 420, 8 S. W. 477, 8 Am. St. Rep. 444. Compare State v. Willers, 27 La. Ann. 246.

[b] The word "guilder" is sufficiently an English word to justify its use in an indictment as a translation of the Polish word "zlotych," which is also called a guilder and a florin. Rex v. Harris, 7 Car. & P. 416, 32 E. C. L. 684.

7. Daniel v. State, 61 Ala. 4, words understood by the court and jury, and people generally.

[a] "Sand packing" in cotton pack-

technical words essential to the statement of some offenses in an indictment, and the omission of which rendered it fatal." But statutes have to a certain extent eliminated them by expressly providing that no indictment or information shall be deemed invalid by reason of the omission to use such words as are designated therein," such as "with force and arms," or words of similar import,¹⁰ or "as appears by the

ing states is not a word of technical character. *Daniel v. State*, 61 Ala. 4.

8. *Lambertson v. People*, 5 Park. Crim. (N. Y.) 200.

[a] "As in murder, the word murdered; in rape, the word ravished; and in larceny, 'feloniously took and carried away.'" *Lambertson v. People*, 5 Park. Crim. (N. Y.) 200. And see *Caldwell v. State*, 28 Tex. App. 566, 577, 14 S. W. 122; also the various criminal titles throughout this work.

As to the necessity for using certain words, such as "feloniously," "unlawfully," "knowingly," "maliciously," "wilfully," see *infra*, IX, E, 5, c.

[b] "These are spoken of by Blackstone (4 Bl. Com. 307), as 'particular words of art which are so appropriated by the law to express the precise idea which it entertains of the offense, that no other words, however synonymous they may seem, are capable of doing it.'" *Lambertson v. People*, 5 Park. Crim. (N. Y.) 200.

[c] **Vi et Armis.**—(1) "At common law these words were considered to be necessary in indictments for offenses, which amount to an actual disturbance of the peace. Bacon's Abridgement, vol. 3, p. 564." *Brckett v. State*, 2 Tyler (Vt.) 152. And see 2 Hawk. P. C., ch. 25, §90; *State v. Kean*, 10 N. H. 347, 34 Am. Dec. 162. (2) But they were not necessary where it would be absurd to use them, as indictments for conspiracies, slander, cheats, escapes, and such like. 2 Hawk. P. C., ch. 25, §90; *State v. Kean*, 10 N. H. 347, 34 Am. Dec. 162.

9. See generally the statutes.

10. See the following: Ala.—Code, 1907, §7134. Colo.—St. Ann., 1911, §1956. Ill.—Hurd's Rev. St., 1913, §411. Ind.—Burns' Ann. St., §2003, subd. 4. Ia.—Code, 1897, §5290, subd. 2. Kan.—Gen. St., 1905, §5998. Me.—Rev. St., 1903, ch. 132, §13. Md.—Pub. Gen. Laws, 1904, art. 27, §438. Mass.—Rev. Laws, 1902, ch. 218, §33; Com. v. Scannel, 11 Cush. 547. Mich.—Howell's

Ann. St., §15,079. Miss.—Code, 1906, §1423. Mo.—Rev. St., 1903, §5115. Neb.—Rev. St., 1913, §9050. N. C.—Rev., 1905, §3255; *State v. Harris*, 106 N. C. 682, 11 S. E. 377; *State v. Duncan*, 28 N. C. 236; *State v. Moses*, 13 N. C. 452. Ohio.—Gen. Code, §13,581. Tenn.—Shannon's Code, §7078; *Taylor v. State*, 6 Humph. 285. Tex.—Penal Code, §448. Vt.—Pub. St., 1906, §2272. Va.—Code, 1904, §3999. Wash.—Rem. & Ball. Ann. Codes & St., §2066. W. Va.—Code, 1913, §5559. Wis.—St., 1898, §4659. Wyo.—Comp. St., 1910, §6165. Eng.—St., 37 Hen. VIII, ch. 8; *Rex v. Burks*, 7 T. R. 4, 101 Eng. Reprint 825.

[a] In *State v. Harris*, 106 N. C. 682, 11 S. E. 377, the court said: "As to the omission of the words 'with force and arms,' sixty years ago Chief Justice Ruffin, in *State v. Moses*, 2 Dev. 452, said that those words have been 'superfluous since the Statute 37, Henry VIII.' We are as much bound to dispense with unnecessary and immaterial averments, when permitted by the statute, as if commanded by it, and if the one in question be not of that character, it is difficult to say to what 'unseemly nicety' (as Lord Hale calls it), 'formality or refinement the act can extend.' In *State v. Duncan*, 6 Fred. 236, which, like the case just cited was an indictment for murder, the court reiterates that the words 'force and arms' are mere-surplusage. The Statute 37, Henry VIII, was passed in the year 1546. It would seem that this point should be held as settled. The statute is set out in Whart. Cr. Pl. and Pr., §271, and the learned author says that even prior thereto these words were never necessary in a charge like this, where no actual force was used."

[b] In Vermont, (1) prior to a statutory provision upon the subject, the court had "adopted the distinction known in the English practice, under the statute 37th Henry VIII, cap. 8, that it is not necessary to insert these words where they may be fairly implied

record,"¹¹ or "moved and instigated by the devil,"¹² or other words not essential to constitute the offense;¹³ and the same effect is obtained under statutory provisions for the cure of defects in matters of form.¹⁴

Where the offense is defined by statute, it is sufficient, as a rule, in charging the same, to follow the language of the statute,¹⁵ and technical words formerly used, if not found in the statute, need not be used in the indictment or information.¹⁶

d. *Abbreviations, Numerals and Symbols.*—It is now well settled that the use of Arabic numerals, instead of letters or words, as to dates and figures, does not vitiate an indictment or information,¹⁷ though it is undoubtedly not the best practice.¹⁸ Likewise, the use of well

from other words in the complaint, information or indictment." Brackett v. State, 2 Tyler 152, 166. And see State v. Pratt, 54 Vt. 484; State v. Hanley, 47 Vt. 290. (2) Said the court in Brackett v. State, 2 Tyler (Vt.) 152: "The words *vi et armis* are implied in an indictment for a riot in the words *riote se ceperunt, frugerunt, et prostraverunt*. Rex v. Wind, 2 Stra. 834. The words *vi et armis* are implied in various expressions and words in this complaint. The word *feloniously* in itself sufficiently implies them."

[c] **The Statute of 37 Hen. VIII**, ch. 8, (1) did not apply to informations. Rex v. Burks, 7 T. R. 4, 101 Eng. Reprint 825. (2) The provisions of this statute are a part of our common law. State v. Temple, 12 Me. 214.

11. See generally the statutes cited in the preceding note.

12. Shannon's Code (Tenn.), §7078.

13. Shannon's Code (Tenn.), §7078. And see 11 STANDARD PROC. 574, et seq.

14. Anderson v. State, 5 Ark. 444, 453, omission of word "murder" in indictment for murder regarded as a matter "of form not tending to the prejudice of the defendant," and cured by statute curing defects.

As to statutory provisions for cure of defects, see *infra*, XIV; XVII.

15. See *infra*, IX, E, 5, f, (III), (B).

16. See Guest v. State, 19 Ark. 405; Caldwell v. State, 28 Tex. App. 566, 14 S. W. 122.

17. See the following cases: U. S. Peters v. United States, 94 Fed. 127, 36 C. C. A. 105. Ala.—State v. Diggs, 49 Ala. 311; State v. Raiford, 7 Port. 101. Conn.—Rawson v. State, 19 Conn. 292. Ind.—Hizer v. State, 12 Ind. 330; Hampton v. State, 8 Ind. 336. Ia.

Winfield v. State, 3 Greene 339; State v. Seamons, 1 Greene 418, "A. D. 1847," in describing date, not defective. La.—State v. Eagan, 10 La. Ann. 698. Me.—State v. Reed, 35 Me. 489, 58 Am. Dec. 727. Mass.—Com. v. Smith, 153 Mass. 97, 26 N. E. 436; Com. v. Hagarman, 10 Allen 401. N. J.—Johnson v. State, 29 N. J. L. 453. Tenn. State v. Smith, Peek 165, last two cases holding that dates in caption in Arabic figures and not in Roman numerals or words not defective. Tex.—Earl v. State, 33 Tex. Crim. 570, 28 S. W. 469. Vt.—State v. Hodgeden, 3 Vt. 481, "A. D. 1830," in describing date, not defective. Va.—Cady v. Com., 10 Gratt. 776; Lazier v. Com., 10 Gratt. 708.

[a] **Figures are a part of the English language**, and are admissible in indictments. Mass.—Com. v. Smith, 153 Mass. 97, 26 N. E. 436. Miss. Kelly v. State, 3 Smed. & M. 518, 525. Vt.—State v. Hodgeden, 3 Vt. 481.

[b] **If, however, the figures are illegible**, the indictment is bad for uncertainty. Kelly v. State, 3 Smed. & M. (Miss.) 518, 525.

[c] **An indictment which designates a house by its street number** need not set forth that number in words at length. It is an arbitrary symbol and should be set forth in accordance with the fact. State v. Castle, 75 N. J. L. 187, 66 Atl. 1059.

18. State v. Diggs, 49 Ala. 311; Raiford v. State, 7 Port. (Ala.) 101.

[a] It is undoubtedly the better practice in criminal pleading to write out in words, at length, the day of the month and the year, when time is alleged. Com. v. Smith, 153 Mass. 97, 26 N. E. 436.

understood abbreviations or symbols,¹⁹ such as "&" instead of "and,"²⁰ or the dollar mark, instead of the word "dollars,"²¹ or "sd" for "said,"²² or the initials "A. D.,"²³ does not render an indictment defective, although the better practice in indictments is to write all the words in full,²⁴ especially where the full word or words would require but little more writing than the abbreviation.²⁵ The signs of degrees and minutes, however, are not a part of the English language within the meaning of a statute requiring pleadings, including indictments, to be in such language, and therefore they are not properly used therein.²⁶

e. *Effect of Errors and Mistakes in Writing, Grammar, Spelling or Punctuation.*—It is well settled that bad or awkward writing will not vitiate an otherwise good indictment, information or complaint, provided it is not illegible on account thereof;²⁷ that tautology or

As to averment of date of commission of offense generally, see *infra*, IX, E, 5, d.

19. *Purdy v. State*, 50 Tex. Crim. 318, 97 S. W. 480 (use of "Aug." for "August" permissible); *Earl v. State*, 33 Tex. Crim. 570, 28 S. W. 469; *Malton v. State*, 29 Tex. App. 527, 16 S. W. 423.

[a] Where surnames, with a prefix to them, are ordinarily written with an abbreviation, the names thus written are sufficient. *State v. Kean*, 10 N. H. 347, 34 Am. Dec. 162.

As to use of abbreviations in designating accused or third person, see *infra*, IX, E, 1, c; IX, E, 2, c.

20. Ala.—*Pickens v. State*, 58 Ala. 364. Ia.—*State v. McPherson*, 114 Iowa 492, 87 N. W. 421. Mass.—*Com. v. Clark*, 4 Cush. 596. Tex.—*Malton v. State*, 29 Tex. App. 527, 16 S. W. 423; *Brown v. State*, 16 Tex. App. 245.

[a] Speaking of this, the supreme court of Alabama said that "the sign '&' for 'and' has been used in practice too long for a court now to entertain an objection to its employment." *Pickens v. State*, 58 Ala. 364.

[b] This style of abbreviation has come down to us sanctioned by age and common use for perhaps centuries, and is used even at this day in written instruments, in daily transactions, with such frequency that it may be said to be a part of our language when it is written. *Brown v. State*, 16 Tex. App. 245, 247.

21. *Earl v. State*, 33 Tex. Crim. 570, 28 S. W. 469.

22. *Com. v. Desmarteau*, 16 Gray

(Mass.) 1, not ground for arrest of judgment.

23. *State v. Hodgeden*, 3 Vt. 481.

24. *Purdy v. State*, 50 Tex. Crim. 318, 97 S. W. 480; *Earl v. State*, 33 Tex. Crim. 570, 28 S. W. 469; *Malton v. State*, 29 Tex. App. 527, 16 S. W. 423; *Brown v. State*, 16 Tex. App. 245.

25. *Brown v. State*, 16 Tex. App. 245.

26. *State v. Jericho*, 40 Vt. 121, 94 Am. Dec. 387.

27. *State v. Morris*, 43 Tex. 372; *Cheesebourn v. State* (Tex. Crim.), 157 S. W. 761; *McGee v. State* (Tex. Crim.), 46 S. W. 930; *Hudson v. State*, 10 Tex. App. 215; *Irwin v. State*, 7 Tex. App. 109; *Witten v. State*, 4 Tex. App. 109.

[a] "As was said by this court in *Witten v. The State*, 4 Tex. Ct. App. 70, 'it has been held time and again that bad spelling will not vitiate an indictment (nor information), and we can perceive no good reason why bad or awkward writing should. The legislature has not, in providing the requisites for an indictment (or information), established a standard of penmanship in which it must be prepared, as one of the number.'" *Irwin v. State*, 7 Tex. App. 109.

[b] Illustrations.—(1) In *Witten v. State*, 4 Tex. App. 70, an indictment was sustained where it was uncertain whether the month "February" was spelled with a "T" or an "F." (2) In *Dodson v. State* (Tex. Crim.), 66 S. W. 1098, an information was held sufficiently certain as to the name "Dodson," though the letter "D" was not completely made, by reason

repetition,²⁸ and, where the meaning is clear, that mere grammatical²⁹

of the failure of the ink to trace a portion thereof.

[c] In *Pierce v. State*, 75 Ind. 199, the objection to the indictment was that the letters and characters used to form the word probably intended to be known as, and to stand for, "malice," do not spell and constitute the word "malice," and that in consequence the indictment did not contain a good charge of an intention to commit murder in any degree. The court said: "While there is a defect in the spelling, and in the construction, of the word formed by the letters and characters above referred to, that word evidently represents, and stands for, the word 'malice,' wherever it occurs in the indictment, and ought to be so read and construed. This construction is made obvious by the relations of this word to the accompanying words and phrases in the indictment."

Writing with a pencil, see *supra*, VIII, A, 2.

28. *Taylor v. State*, 29 Tex. App. 466, 501, 16 S. W. 302; *Richardson v. State*, 2 Tex. App. 322.

29. **Ala.**—*Fuller v. State*, 117 Ala. 200, 23 So. 73; *Pond v. State*, 55 Ala. 196 (use of "was" instead of "were"); *Brazier v. State*, 44 Ala. 387, use of "charged" instead of "charge." **Cal.**—*People v. Haagen*, 139 Cal. 115, 72 Pac. 836, verbs not used in their proper sense. **Fla.**—*Strobbhar v. State*, 55 Fla. 167, 47 So. 4. **Ga.**—*Dickson v. State*, 62 Ga. 583, 589. **Ill.**—*People v. Hallberg*, 259 Ill. 502, 102 N. E. 1005; *People v. Potempa*, 181 Ill. App. 457; *People v. De Mas*, 173 Ill. App. 130. **Ind.**—*Bader v. State*, 176 Ind. 268, 94 N. E. 1009; *Peacock v. State*, 174 Ind. 185, 91 N. E. 597; *Miller v. State*, 107 Ind. 152, 7 N. E. 898; *State v. Hedge*, 6 Ind. 330. **Ia.**—*State v. Pennell*, 56 Iowa 29, 8 N. W. 68, 41 Am. Rep. 81. **Ky.**—*Gaither v. Com.*, 28 Ky. L. Rep. 1345, 91 S. W. 1124; *Newman v. Com.*, 28 Ky. L. Rep. 81, 88 S. W. 1089. **Me.**—*State v. Adams*, 78 Me. 486, 7 Atl. 267. **Mass.**—*Com. v. Call*, 21 Pick. 515. **Minn.**—*State v. Sharp*, 121 Minn. 381, 141 N. W. 526, indictment not subject to demurrer because of mere breaches of grammatical construction. **Mo.**—*State v. West*, 202 Mo. 128, 100 S. W. 478; *State v. Zorn*, 202 Mo. 12, 45, 100 S. W. 591; *State*

v. Schomers, 176 Mo. App. 271, 161 S. W. 1177; *State v. Willis*, 16 Mo. App. 553, use of an improper pronoun to denote the sex of the person whose property was taken does not render an indictment for theft bad after verdict where there is no question of surprise. **Mont.**—*State v. Bloor*, 20 Mont. 574, 52 Pac. 611. **N. J.**—*State v. Parks*, 61 N. J. L. 438, 39 Atl. 1023. **Okla.** *Blair v. State*, 4 Okla. Crim. 359, 111 Pac. 1003; *Clark v. State* (Okla. Crim.), 106 Pac. 803. **Ore.**—*State v. Lee Ping Bow*, 10 Ore. 27, use of "is" instead of "are." **Pa.**—*Perdue v. Com.*, 96 Pa. 311. **S. C.**—*State v. Wimberly*, 3 McCord 190. **S. D.**—*State v. Flute*, 20 S. D. 562, 108 N. W. 248. **Tex.**—*Dawson v. State*, 33 Tex. 491, 504; *Thompson v. State* (Tex. Crim.), 152 S. W. 893; *Lewis v. State*, 55 Tex. Crim. 167, 115 S. W. 577; *Wilson v. State*, 49 Tex. Crim. 50, 90 S. W. 312 (well-known rule that ungrammatical construction will not vitiate an indictment); *Francis v. State*, 44 Tex. Crim. 246, 70 S. W. 751; *Funderburk v. State* (Tex. Crim.), 61 S. W. 393; *Taylor v. State*, 29 Tex. App. 466, 501, 16 S. W. 302; *Hudson v. State*, 10 Tex. App. 215, 228; *Scales v. State*, 7 Tex. App. 361; *Snow v. State*, 6 Tex. App. 284; *Stinson v. State*, 5 Tex. App. 31; *Gay v. State*, 2 Tex. App. 127. **Vt.**—*State v. Brady*, 14 Vt. 353. **W. Va.**—*State v. Halida*, 28 W. Va. 499. **Eng.**—*Reg. v. Stokes*, 1 Den. C. C. 307, indictment ungrammatical not bad, if real meaning sufficiently expressed. **Can.**—*Reg. v. Weir*, 3 Can. Cr. Cas. 102.

[a] **Plural for Singular and Vice Versa.**—(1) The use of the plural instead of the singular personal pronoun in an indictment against one person will not vitiate it. *Jackson v. State*, 88 Ga. 784, 15 S. E. 677; *Snow v. State*, 6 Tex. App. 284. (2) Likewise, the use of a singular personal pronoun, where the sense calls for a pronoun in the plural number, is not a fatal defect. **Ga.**—*Dickson v. State*, 62 Ga. 583, 589. **N. J.**—*State v. Parks*, 61 N. J. L. 438, 39 Atl. 1023. **Tex.** *Hollins v. State* (Tex. Crim.), 69 S. W. 594; *Funderburk v. State* (Tex. Crim.), 61 S. W. 393, use of singular "it" instead of plural "them" not objectionable in last two cases.

or rhetorical,³⁰ mistakes, or improper punctuation,³¹ will not vitiate such a pleading. Nor will a mistake in spelling, not obscuring the sense, vitiate such a pleading,³² unless it is such as might mislead the

[b] Though it was sought in an indictment for perjury to charge the defendant with the making of two "statements," the omission of the letter "s" from the word "statement," making it singular instead of plural, was not fatal to the indictment. *Freeman v. State*, 44 Tex. Crim. 496, 502, 72 S. W. 1001.

[c] There is no reason why the statutory provisions that, "the use of the singular number includes the plural, and the plural the singular; and words used in the masculine gender include the feminine also, unless, by reasonable construction, it appears that such was not the intention of the language," "should not apply as well to the phraseology of indictments as to the construction of words in which the law defining the offense is couched, since it is ordinarily sufficient if the indictment follows the language of the statute." *Snow v. State*, 6 Tex. App. 234.

[d] Use of "It."—(1) In *Goodson v. State*, 32 Tex. 121, in an indictment for the theft of two animals, the singular pronoun "it," in reference to them, was used in charging the intent. It was held that the pronoun was to be referred to the "property" in the animals; and therefore its use correct. (2) In *Pate v. State*, 47 Tex. Crim. 373, 83 S. W. 695, an indictment for the theft of several hogs alleged that accused took said hogs with intent to deprive said owner of the value of the same, and to appropriate said hogs to his use and benefit; it was contended that it should have used the pronoun "it" instead of the word "hogs," and that "it" in this connection refers to the value of said hogs and not to the hogs themselves. The court said: "We are inclined to believe that 'it' refers to the property stolen,—but whether it refers to the property stolen or to the value thereof, makes no difference. An intent to deprive the owner of the property itself, embraces the intent to deprive such owner of the value thereof. The court did not err in refusing to quash the indictment."

That a mere verbal inaccuracy will not, where the meaning is clear, vitiate a criminal pleading, see *infra*, this section.

30. *State v. Zorn*, 202 Mo. 12, 45, 100 S. W. 591.

[a] Want of rhetorical exactness and finish will not vitiate indictments, unless the words are so inartistically arranged as to make the charge uncertain. *Taylor v. State*, 29 Tex. App. 466, 501, 16 S. W. 302.

[b] Awkwardly constructed sentences will not vitiate an indictment, where the meaning is plain. *Regadan v. State*, 171 Ind. 387, 86 N. E. 449.

31. Ala.—*Fuller v. State*, 117 Ala. 200, 23 So. 73; *Ward v. State*, 50 Ala. 120. Ind.—*Bader v. State*, 176 Ind. 268, 94 N. E. 1009. Ky.—*Gaither v. Com.*, 28 Ky. L. Rep. 1345, 91 S. W. 1124.

[a] Improper punctuation does not vitiate indictment unless sense is destroyed. *Ward v. State*, 50 Ala. 120.

[b] Omissions of punctuation, (1) which any intelligent reader can supply, does not vitiate the indictment. *Webster v. Com.*, 80 Va. 598. (2) The entire omission of quotation marks from before and after matter quoted in the indictment or information is not fatal, where the accused could not have been misled or injured thereby. *Bader v. State*, 176 Ind. 268, 94 N. E. 1009.

32. Ala.—*Bell v. State*, 139 Ala. 124, 35 So. 1021 ("fraudulently" for "fraudulently"); *Grant v. State*, 55 Ala. 201; *Holland v. State*, 11 Ala. App. 134, 66 So. 126 ("di" for "did"); *Couch v. State*, 6 Ala. App. 43, 60 So. 539; *Sanders v. State*, 2 Ala. App. 13, 56 So. 69. Cal.—*People v. St. Clair*, 56 Cal. 406. Ga.—*Kincaid v. State*, 14 Ga. App. 544, 81 S. E. 910, inadvertent substitution of the letter "f" for "d" in the word "drunk" not fatal objection. Ind.—*Bader v. State*, 176 Ind. 268, 94 N. E. 1009; *Peacock v. State*, 174 Ind. 185, 91 N. E. 597; *Lefler v. State*, 122 Ind. 206, 23 N. E. 154; *Myers v. State*, 101 Ind. 379 (groceries spelled "grociars"); *State v. Hedges*, 6 Ind. 330 (fifty-too for fifty-two); *State v. Clark*, 3 Ind. 451, "spiritual"

for "spirituous." **Ky.**—Gaither v. Com., 28 Ky. L. Rep. 1345, 91 S. W. 1124; Scott v. Com., 7 Ky. L. Rep. 369. **La.**—State v. Karm, 16 La. Ann. 183; State v. Hornsby, 8 Rob. 554, 41 Am. Dec. 305. **Mo.**—State v. Griffin, 249 Mo. 624, 155 S. W. 432 (holding letter "h" omitted from word "child" did not mislead or prejudice the substantial rights of defendant upon the merits, and *distinguishing* State v. Campbell, 210 Mo. 202, 109 S. W. 706, 14 Ann. Cas. 403, and State v. Skillman, 209 Mo. 408, 107 S. W. 1071, on the ground that therein one whole word was omitted, while in this case only a word was misspelled); State v. Lucas, 147 Mo. 70, 47 S. W. 1067; State v. Clinkerbeard, 135 Mo. App. 189, 115 S. W. 1059. **Mont.**—State v. Lu Sing, 34 Mont. 31, 85 Pac. 521. **N. C.**—State v. Shepherd, 30 N. C. 195 (twelfth for twelfth); State v. Molier, 12 N. C. 263. **Okla.**—Smith v. Territory, 14 Okla. 162, 77 Pac. 187, mere mistake in spelling or use of word does not render indictment invalid. **S. C.**—State v. White, 15 S. C. 381, 388 (rayson for razor); State v. Coleman, 8 S. C. 237. **Tenn.**—State v. Myers, 85 Tenn. 203, 5 S. W. 377, "mair" for "mare." **Tex.**—State v. Williamson, 43 Tex. 500; Koontz v. State, 41 Tex. 570; State v. Earp, 41 Tex. 487 (wherein the letter "u" was entirely omitted in spelling "fraud," yet the indictment was held good); Qualls v. State (Tex. Crim.), 153 S. W. 539 (misspelling of word "woman" in one place would not render indictment fatally defective, where it was alleged in several places that she was a female); Cheesebourn v. State (Tex. Crim.), 157 S. W. 761; Wright v. State (Tex. Crim.), 156 S. W. 624 (word "monet" being used where it was intended to say "money"); Hart v. State (Tex. Crim.), 154 S. W. 553 (last "t" omitted from word "street" did not mislead accused); Pye v. State (Tex. Crim.), 151 S. W. 222; Bailey v. State, 63 Tex. Crim. 584, 141 S. W. 224; Monroe v. State, 56 Tex. Crim. 244, 119 S. W. 1116; Lewis v. State, 55 Tex. Crim. 167, 115 S. W. 577; Wilson v. State, 49 Tex. Crim. 50, 90 S. W. 312; Francis v. State, 44 Tex. Crim. 246, 70 S. W. 751; Taylor v. State, 29 Tex. App. 466, 501, 16 S. W. 302; Keller v. State, 25 Tex. App. 325, 8 S. W. 275; Brumley v. State, 11 Tex. App. 111; Somerville v. State, 6 Tex. App. 433;

Stinson v. State, 5 Tex. App. 31; Witten v. State, 4 Tex. App. 70; Thomas v. State, 2 Tex. App. 293. **W. Va.**—State v. Halida, 28 W. Va. 499, wherein "seventy-five" was erroneously spelled "sunt-y-five," and the word "dignity" was written without crossing "t," appearing to be "dignily." **Wis.**—State v. Crane, 4 Wis. 499, "assatt" for "assault." **Eng.**—Rex v. Beach, 1 Cowp. 229, 98 Eng. Reprint 1059.

[a] "If the sense be clear, nice exceptions ought not to be regarded. And even when the sense or the word may be ambiguous, this will not be fatal, if it is sufficiently shown by the context in what sense the phrase or word was intended to be used." State v. Halida, 28 W. Va. 499.

[b] **Other Illustrations.**—(1) In the application of this rule, it has been held that "gol" should be read "gold" (Grant v. State, 55 Ala. 201, 207); (2) that "peurson" should be read "person" and "pestol" should be read "pistol" (Hampton v. State, 133 Ala. 180, 32 So. 230); (3) that "gencose" should be read "glucose" (Elder v. State, 162 Ala. 41, 50 So. 370); (4) that "of forethought" should be read "aforethought" (Flowers v. State, 2 Ala. App. 65, 56 So. 98); (5) that "maltous" should be read "malt" (Couch v. State, 6 Ala. App. 43, 60 So. 539); (6) that "stal" should be read "steal" (Mills v. State, 4 Blackf. [Ind.] 457), (7) as should "stael" (State v. Lockwood, 58 Vt. 378, 3 Atl. 539), (8) that "laden" should be read "leaden" (State v. Elkins, 101 Mo. 344, 14 S. W. 116), (9) that "dring" should be read "drink" (Brumley v. State, 11 Tex. App. 114). (10) Nor was it objectionable that the month "February" was written "February" (Witten v. State, 4 Tex. App. 70), (11) or that the month "January" was spelled "Janury" (Hutto v. State, 7 Tex. App. 44), (12) that the word "gelding" was spelled "gilding" (Thomas v. State, 2 Tex. App. 293), (13) that "gilt" was spelled "guilt" (State v. Lucas, 147 Mo. 70, 47 S. W. 1067), (14) "inhabitants" was spelled "inhabitanse" (Keller v. State, 25 Tex. App. 325, 8 S. W. 275), (15) or that "tenty" was used for "twenty" (Allen v. State [Tex. App.], 28 S. W. 474), (16) "eiget" instead of "eight" (Somerville v. State, 6 Tex. App. 433),

defendant,³³ or has actually prejudiced the defendant or tended to his prejudice in respect to a substantial right.³⁴ Thus, a mere error in spelling a proper name is not fatal,³⁵ unless it changes the entire sound

(17) "eigh" for "eight" (State v. Coleman, 8 S. C. 237), (18) "shorting" for "shooting" (Francis v. State, 44 Tex. Crim. 246, 70 S. W. 751), (19) "frausulently" for "fraudulently" (St. Louis v. State [Tex. App.], 59 S. W. 889), (20) "farudulently" for "fraudulently" (Wells v. State, 50 Tex. Crim. 499, 98 S. W. 851), (21) "spiritous" instead of "spirituous" (Brumley v. State, 11 Tex. App. 114), (22) that the word "offense" is written "offince" (Gaither v. Com., 28 Ky. L. Rep. 1345, 91 S. W. 1124), (23) that "bullet" is spelled "bulet" (Gaither v. Com., 28 Ky. L. Rep. 1345, 91 S. W. 1124). (24) Where the word "incestuous" was spelled "incestous," a letter "u" being omitted by chance, the omission was not fatal. State v. Carville (Me.), 11 Atl. 601. (25) So too, where the word "carnally" was spelled "canally," the letter "r" being omitted in the first syllable of the word, the omission was not fatal. Bailey v. State, 63 Tex. Crim. 584, 141 S. W. 224.

[c] The indictment was quashed (1) in Jones v. State, 25 Tex. App. 621, 8 S. W. 801, 8 Am. St. Rep. 449, because the word "appropriate" was misspelled. (2) But in the later case of Francis v. State, 44 Tex. Crim. 246, 70 S. W. 751, where the same word was again misspelled, the court held that this did not vitiate the indictment.

[d] **Misspelling of the word "grand"** in a recital in the second count that "grand jurors aforesaid" is not fatal, since if word had been omitted entirely count would have been good. In such case it would have read, "the jurors aforesaid," which would relate back to beginning of indictment where it is recited that "the grand jurors," etc. Gardner v. State, 56 Tex. Crim. 594, 120 S. W. 895.

As to misspelling of word against, see *supra*, VIII, A, 6, (II), note 35, [h].

33. State v. Crane, 4 Wis. 400.

34. Smith v. Territory, 14 Okla. 162, 77 Pac. 187.

35. Watkins v. State, 89 Ala. 82, 8 So. 134; Pye v. State (Tex. Crim.), 154 S. W. 222.

[a] It has been held that the following names have the same sound:

(1) Amel and Amiel (People v. Gosch, 82 Mich. 22, 46 N. W. 101), (2) Antrum and Antrim (State v. Scurry, 3 Rich. L. [S. C.] 69), (3) Chattan and Chatham (Roth v. State, 10 Tex. App. 27), (4) Chicopee and "Chickopee" (Com. v. Desmarteau, 16 Gray [Mass.] 1), (5) Garzia and Garcia (Rape v. State, 34 Tex. Crim. 615, 31 S. W. 652), (6) George and Georg (Hall v. State, 32 Tex. Crim. 594, 25 S. W. 292), (7) Helmer and Hillmer (Cline v. State, 34 Tex. Crim. 415, 31 S. W. 175), (8) Hix Nowels and Hicks Nowells (Spoonemore v. State, 25 Tex. App. 358, 8 S. W. 280), (9) Ichman v. Eichman (Eichman v. State, 22 Tex. App. 137, 2 S. W. 538), (10) Isreal and Israel (Boren v. State, 32 Tex. Crim. 637, 25 S. W. 775), (11) Jin White and Jim White (White v. State, 32 Tex. Crim. 625, 25 S. W. 784), (12) July and Julia (Dickson v. State, 34 Tex. Crim. 1, 28 S. W. 815, 30 S. W. 807, 53 Am. St. Rep. 694), (13) Mary Etta and Marietta (Goode v. State, 2 Tex. App. 520), (14) Noberto and Norberto (Salinas v. State, 39 Tex. Crim. 319, 45 S. W. 900), (15) "Pittis" and "Pettis" (Hutto v. State, 7 Tex. App. 44), (16) Reder and Redus (Hunter v. State, 8 Tex. App. 75), (17) Rene and Reen (Pye v. State [Tex. Crim.], 154 S. W. 222), (18) Sofra and Sofia (Owen v. State, 7 Tex. App. 329), (19) Whitman and Whiteman (Henry v. State, 7 Tex. App. 388), (20) John William and John Williams (Williams v. State, 5 Tex. App. 226), (21) Woodlin and Woodline; Woodlow and Woodlone (Dawson v. State, 33 Tex. 491).

As to idem sonans in designating name of accused, see *infra*, IX, E, 1, g; in designating name of third party, see *infra*, IX, E, 2, g.

[b] Where the name of the accused is properly set out, a subsequent reference to that name using the word "said," although the name may be spelled differently in subsequent portions of the indictment, does not vitiate it. Bartley v. State, 47 Tex. Crim. 41, 83 S. W. 190; Chesley v. State (Tex. Crim.), 74 S. W. 548.

of the name. Likewise verbal inaccuracies,³⁶ mere clerical omissions,³⁷ or clerical errors or mistakes, which are explained or corrected by necessary intendment from other parts of the indictment,³⁸ do not vitiate such a pleading, unless such clerical error or omission changes the word into one of different import, or so changes the sense that one

36. See the following cases: **U. S.** Hogue v. United States, 192 Fed. 918, 114 C. C. A. 11, use of "clerk" instead of "court." **Ala.**—Davis v. State (Ala. App.), 67 So. 770 (use of word "is" instead of "in"); Couch v. State, 6 Ala. App. 43, 60 So. 539; Witt v. State, 5 Ala. App. 137, 59 So. 715, use of word "on" in lieu of word "one." **Ark.**—Blais v. State, 94 Ark. 327, 126 S. W. 1064 ("or" instead of "on"); State v. Perry, 94 Ark. 215, 126 S. W. 717 ("and" instead of "of"); Evans v. State, 58 Ark. 47, 22 S. W. 1026, "defendants" instead of "defendants." **Cal.**—People v. Hitchcock, 104 Cal. 482, 38 Pac. 198, "manner material to issue" instead of "matter material to issue" in indictment for perjury. **Ga.**—Dickson v. State, 62 Ga. 583; Mixon v. State, 7 Ga. App. 805, 68 S. E. 315. **Ill.**—Krueger v. People, 141 Ill. App. 510, use of "have" for "had." **Ind.**—Peacock v. State, 174 Ind. 185, 91 N. E. 597 ("felon" for "feloniously"); Billings v. State, 107 Ind. 54, 6 N. E. 914, 7 N. E. 763, 57 Am. Rep. 77 (affiant used for prosecuting attorney); Jay v. State, 69 Ind. 158. **Ky.**—Paducah, etc. R. Co. v. Com., 80 Ky. 147. **Minn.**—State v. Sharp, 121 Minn. 381, 141 N. W. 526. **Mont.** State v. Bloor, 20 Mont. 574, 583, 52 Pac. 611. **Okla.**—Smith v. Territory, 14 Okla. 162, 77 Pac. 187, "affect" for "effect." **S. C.**—State v. Coleman, 8 S. C. 237, "statue" for "statute" in conclusion. **Tex.**—Martin v. State, 40 Tex. 19 (use of "and" for "an"); Schapiro v. State (Tex. Crim.), 169 S. W. 683 ("therefore" used where the word "theretofore" was intended); Compton v. State (Tex. Crim.), 148 S. W. 580 (that "respectfully" was used for "respectively" not fatal); Lewallen v. State, 48 Tex. Crim. 283, 87 S. W. 1159 (use of "is," instead of "his"); Wood v. State (Tex. App.), 51 S. W. 235 ("nine" for "ninety," in averment that offense was committed in "one thousand eight hundred and ninety-seven"); Peters v. State (Tex. App.), 23 S. W. 683, use of word "avocation" for "vocation." **W. Va.** State v. Halida, 28 W. Va. 499.

[a] "A clerical error in writing a name in an indictment cannot be invoked as vitiating the proceeding." State v. Morgan, 35 La. Ann. 293, quoted in State v. Ford, 38 La. Ann. 797.

[b] Though, by reason of verbal inaccuracies, an indictment may be in part unintelligible, yet where, either by disregarding the unintelligible portion as surplusage, or by considering it along with the rest of what is said, the language of the indictment plainly, clearly, definitely, and accurately charges a particular offense, it is not subject to be quashed on demurrer. Mixon v. State, 7 Ga. App. 805, 68 S. E. 315.

That mere mistakes in grammar are not fatal, see *supra*, this section.

37. **Ala.**—Stallworth v. State, 155 Ala. 14, 46 So. 518 ("ed" omitted from "killed"); Holland v. State, 11 Ala. App. 134, 66 So. 126, "d" omitted from "did," thus, "di." **Ind.**—Ward v. State, 8 Blackf. 101, "his" omitted before "hands" in charging shooting with gun held in both hands. **La.** State v. Hornsby, 8 Rob. 554, 41 Am. Dec. 305, omission of one or more letters in a word, which does not change the word into another of a different signification will not vitiate indictment. **Mo.**—State v. Duvenick, 237 Mo. 185, 140 S. W. 897, omission of letter "t" from word "against" in conclusion. **Tex.**—Stinson v. State (Tex. Crim.), 173 S. W. 1039, omission of letter "t" from intent, thus, "inten."

As to effect of omission of entire words, see *infra*, IX, C, 2, f.

38. See the following cases: **U. S.** Hogue v. United States, 192 Fed. 918, 114 C. C. A. 11. **Ala.**—Stallworth v. State, 155 Ala. 14, 46 So. 518; Ward v. State, 50 Ala. 120; Davis v. State (Ala. App.), 67 So. 770; Couch v. State, 6 Ala. App. 43, 60 So. 539; Witt v. State, 5 Ala. App. 137, 59 So. 715; Sanders v. State, 2 Ala. App. 13, 56 So. 69. **Ark.**—Blais v. State, 94 Ark.

of ordinary intelligence cannot from the context determine with certainty the meaning.³⁰

327, 126 S. W. 1064; *State v. Perry*, 94 Ark. 215, 126 S. W. 717; *Evans v. State*, 58 Ark. 47, 22 S. W. 1026. **Ill.** *Krueger v. People*, 141 Ill. App. 510. **Ind.**—*Billings v. State*, 107 Ind. 54, 6 N. E. 914, 7 N. E. 763, 57 Am. Rep. 77. **Ia.**—*State v. Thompson*, 19 Iowa 299. **Mich.**—*People v. Duford*, 66 Mich. 90, 33 N. W. 28. **Miss.**—*Greeson v. State*, 5 How. 33, 42. **Mo.**—*State v. Eaton*, 75 Mo. 586; *State v. Feitz*, 154 Mo. App. 578, 136 S. W. 746. **N. M.** *State v. Cabodi*, 18 N. M. 513, 138 Pac. 262. **Okla.**—*Smith v. Territory*, 14 Okla. 162, 77 Pac. 187. **Tex.**—*Hinson v. State*, 51 Tex. Crim. 102, 100 S. W. 939. **Vt.**—*State v. Brady*, 14 Vt. 353. **Va.**—*Com. v. Ailstock*, 3 Gratt. 620. **Can.**—*Reg. v. Weir*, 3 Can. Cr. Cas. 102.

[a] **Illustrations.**—(1) The use of "August" for "September" (*State v. Eaton*, 75 Mo. 586, 595), (2) or of "May" for "November" (*Com. v. Ailstock*, 3 Gratt. [Va.] 620), where it appears on the face of the indictment that it is a clerical mistake, is not ground for arresting judgment.

[b] **The mere transposition of the word "did" from before "feloniously" to after "aforethought" in the averment that the defendant "did feloniously, fully, and of his mance aforethought kill and murder the deceased," does not in any way affect the validity of the indictment.** *State v. Max*, 129 La. 546, 56 So. 503. As to effect of omission of word "did," see *infra*, IX, C, 2, f.

[c] **The use of superfluous words by a clerical mistake will not invalidate an indictment, if such words do not in any sense obscure the meaning thereof.** Thus, an indictment was not rendered defective by the use of the words, "against the peace and dignity of the state of Arkansas," following the part of the indictment which set forth an alleged forged instrument, where the use did not obscure the meaning of the indictment, and was a clerical mistake. *Bennett v. State*, 96 Ark. 101, 131 S. W. 213.

39. **Ala.**—*Griffith v. State*, 90 Ala. 583, 8 So. 812; *Grant v. State*, 55 Ala. 201; *Sanders v. State*, 2 Ala. App. 13, 56 So. 69. **Ind.**—*Regadanz v. State*,

171 Ind. 387, 86 N. E. 449. **Vt.**—*State v. Brady*, 14 Vt. 353.

[a] **"Before an objection** because of false grammar, incorrect spelling, or mere clerical errors, is entertained, the court should be satisfied of the tendency of the error to mislead, or to leave in doubt as to the meaning, a person of common understanding, reading, not for the purpose of finding defects, but to ascertain what is intended to be charged." *Grant v. State*, 55 Ala. 201; *Witt v. State*, 5 Ala. App. 137, 59 So. 715; *Sanders v. State*, 2 Ala. App. 13, 56 So. 69.

[b] **If by misspelling, another word different from the one intended was formed, (1) and it occurs in a material part of an indictment, the defect is fatal to the indictment.** *State v. Caspary*, 11 Rich. (S. C.) 356, wherein the word "farther" was used for "father" in an indictment for bastardy. (2) Likewise an indictment charging a breaking and entering a "dwell-house" instead of "dwelling" is fatal (*Parker v. State*, 114 Ala. 690, 22 So. 791), (3) as is the omission of "ing" from the word "dwelling" in an indictment for burglary. *Parker v. State*, *supra*. (4) So too, the charging of an entry into a stable with intent to commit "larcey" instead of "larceny," is fatal (*People v. St. Clair*, 56 Cal. 406). (5) It has also been held that the word "burgerally" is not idem sonans with "burglary" (*Haney v. State*, 2 Tex. App. 504); (6) that the word "possession" is not sufficient for word "possession" in indictment for robbery (*Evans v. State*, 34 Tex. Crim. 110, 29 S. W. 266), (7) and that the word "congration" is not sufficient for the word "congregation" in an indictment for disturbing a congregation of people meeting for religious worship. *State v. Mitchell*, 25 Mo. 420.

[c] **Mistake in Name.**—Where, in an indictment for murder, the name of the deceased is substituted for that of the accused in a material clause thereof, the mistake can neither be corrected nor ignored, and is fatal to the indictment. *State v. Edwards*, 70 Mo. 180. *Compare* *State v. Craighead*, 32 Mo. 561.

f. *Effect of Omission of Words.*⁴⁰—The omission of an immaterial word, or group of words, where the omission does not render the averment misleading or destroy its sense, is not a fatal defect.⁴¹ It is otherwise, where an essential word or group of words is omitted, however.⁴² The difficulty arises in the application of these rules—what constitutes a material or an immaterial word depending as a rule upon the circumstances of each particular case.⁴³ Statutes sometimes

40. As to effect of mere clerical omissions, see *supra*, IX, C, 2, e.

41. See the following cases: **Ala.** *Stallworth v. State*, 155 Ala. 14, 46 So. 518; *Abernathy v. State*, 78 Ala. 411. **Ind.**—*State v. Rhodes*, 2 Ind. 321; *Ward v. State*, 8 Blackf. 101. **Ky.**—*Scott v. Com.*, 7 Ky. L. Rep. 369. **Mass.**—*Com. v. Butler*, 1 Allen 4. **Mo.**—*State v. Perrigin*, 258 Mo. 233, 167 S. W. 573; *State v. Burns*, 99 Mo. 471, 542, 12 S. W. 801, 13 S. W. 686. **N. Y.**—*Shay v. People*, 22 N. Y. 317. **N. C.**—*State v. Burke*, 108 N. C. 750, 12 S. E. 1000. **S. C.**—*State v. Washington*, 13 S. C. 453. **Tex.**—*Stephens v. State* (Tex. Crim.), 154 S. W. 996; *Stanfield v. State*, 43 Tex. Crim. 10, 62 S. W. 917; *Caskey v. State* (Tex. Crim.), 50 S. W. 703.

42. See the following cases: **Ark.** *Cannon v. State*, 60 Ark. 564, 31 S. W. 150, 32 S. W. 128. **La.**—*State v. Graham*, 49 La. Ann. 1524, 22 So. 807. **Miss.**—*Cook v. State*, 72 Miss. 517, 17 So. 228. **Mo.**—*State v. Hagan*, 164 Mo. 654, 660, 65 S. W. 249; *State v. Rector*, 126 Mo. 328, 23 S. W. 1074; *State v. Raymond*, 54 Mo. App. 425. **Tex.** *State v. Daugherty*, 30 Tex. 360; *State v. Huston*, 12 Tex. 245; *Riley v. State*, 27 Tex. App. 606, 11 S. W. 642; *Jones v. State*, 21 Tex. App. 349, 17 S. W. 424. **Vt.**—*State v. Leach*, 27 Vt. 317.

[a] In such a case, although it be but a preposition or a helping verb, the court will not, from a knowledge of the language, supply the missing word, so as to supply the probable intention of the grand jury, but will sustain a judgment quashing the indictment. *State v. Daugherty*, 30 Tex. 360.

43. **Immaterial Omission.**—The omission of the following words has been held not to render the indictment or information fatally defective: (1) of word “for” in recital that “the grand jurors within and for the body of the county,” etc. (*State v. Brady*, 14 Vt. 353), (2) of word “is” in usual formula, “whose name is to the grand

jury unknown” (*Stallworth v. State*, 155 Ala. 14, 46 So. 518), (3) of word “an” before word “unmarried” in averment that accused had “carnal knowledge of unmarried female” (*State v. Perrigin*, 258 Mo. 233, 167 S. W. 573), (4) of word “was” before the word “willfully” in averment in indictment for perjury, that accused made a statement “which said statement willfully . . . false,” etc. (*Chase v. State* [Tex. App.], 28 S. W. 952), (5) of word “his” before word “hands” in indictment for murder, alleging that defendant, with a certain gun which he in both hands then and there held, etc., feloniously did shoot, etc. (*Ward v. State*, 8 Blackf. [Ind.] 101), (6) of word “said,” before word “mule” in averment “whereas, in truth and fact, mule was not sound,” etc., in indictment for obtaining money under false pretenses (*State v. Burke*, 108 N. C. 750, 12 S. E. 1000), (7) of word “attorney” in recital of presentment of information by county attorney. *Caskey v. State* (Tex. App.), 50 S. W. 703.

[a] **Material Omission.**—The omission of the following words has been held to render it fatally defective: (1) the word “at” before the words “a certain public house” in an indictment for playing at a game with cards upon which money was bet, at a certain public house (*State v. Huston*, 12 Tex. 245), (2) the word “to” before the word “kill,” in an averment that defendant made an assault in and upon person of L., “with intent him, the said L., then and there kill and murder” (*Jones v. State*, 21 Tex. App. 349, 17 S. W. 424), (3) the word “deliberately,” in indictment for murder in first degree. *Cannon v. State*, 60 Ark. 564, 31 S. W. 150, 32 S. W. 128. But see 11 STANDARD PROC. 621, et seq.

[b] **The omission of the word “with”** (1) in stating the means by which a homicide was committed has been held not to obscure the sense and

expressly provide that the omission of certain words or phrases shall not render the pleading defective.⁴⁴

The omission of the word "did" in the charging part of an indictment or information for a felony, has been held fatal in some jurisdictions,⁴⁵ but in misdemeanors, where a more liberal rule of pleading prevails, such an omission, appearing to be purely clerical, is not deemed fatal,⁴⁶ and, if desirable for completeness of statement, will be supplied by intendment,⁴⁷ though here again the authorities are not in accord, some holding that even in misdemeanor cases, such omission is fatal.⁴⁸

meaning of the accusation (*Shay v. People*, 22 N. Y. 317); (2) but upon this proposition there is authority to the contrary. *State v. Rector*, 126 Mo. 328, 23 S. W. 1074. And see *State v. Furgerson*, 152 Mo. 92, 53 S. W. 427.

[c] **The omission of the word "of"**

(1) "presents no error, when, by reading the entire indictment, the intent and meaning is made perfectly clear." *Stephens v. State* (Tex. Crim.), 154 S. W. 996. And see *State v. Rhodes*, 2 Ind. 321; *Stanfield v. State*, 43 Tex. Crim. 10, 62 S. W. 917. (2) Thus, its omission in the description of the ownership of stolen property has been held not to render indictment defective (*Abernathy v. State*, 78 Ala. 411), (3) though here again there is authority to the contrary. *Riley v. State*, 27 Tex. App. 606, 11 S. W. 642, holding omission of word "of" from averment that an article was taken "from the possession H." fatal.

[d] **Omission of dollar sign not a fatal defect.** *State v. Wainwright*, 128 Tenn. 544, 162 S. W. 583.

44. See generally the statutes, and *supra*, IX, C, 2, c.

45. **La.**—*State v. Graham*, 49 La. Ann. 1524, 22 So. 807, fatal on motion to quash. **Miss.**—*McCearley v. State*, 97 Miss. 556, 52 So. 796; *Cook v. State*, 72 Miss. 517, 17 So. 228. **Mo.**—*State v. Hagan*, 164 Mo. 654, 660, 65 S. W. 249. **N. M.**—*Territory v. Church*, 14 N. M. 226, 91 Pac. 720. **S. C.**—*State v. Halder*, 2 McCord 377, 13 Am. Dec. 738. **Tex.**—*Edmondson v. State*, 41 Tex. 496; *State v. Daugherty*, 30 Tex. 360 (fatal on motion to quash); *Jester v. State*, 26 Tex. App. 369, 9 S. W. 616; *Ewing v. State*, 1 Tex. App. 362.

[a] **Conviction cannot be sustained** (1) where indictment or information omits such word. *State v. Halder*, 2

McCord (S. C.) 377, 13 Am. Dec. 738; *Jester v. State*, 26 Tex. App. 369, 9 S. W. 616; *Moore v. State*, 7 Tex. App. 42. (2) Thus, in *State v. Halder*, 2 McCord (S. C.) 377, 13 Am. Dec. 738, the indictment, which was for passing counterfeit money, charged that the defendant "feloniously utter and publish, dispose and pass," etc., but omitted the word "did," before *utter*, and the court arrested the judgment because no charge was made that the defendant *did* the act. (3) Compare *People v. Duford*, 66 Mich. 90, 33 N. W. 28, wherein the court refused to arrest judgment on account of clerical omission of such word. It said: "If the respondent desired to take advantage of the defect relied upon, he should have demurred or moved to quash."

[b] **Omission cannot be supplied by intendment** (1) **La.**—*State v. Graham*, 49 La. Ann. 1524, 22 So. 807. **Miss.** *Cook v. State*, 72 Miss. 517, 17 So. 228. **Tex.**—*Ewing v. State*, 1 Tex. App. 362, (2) or amendment. *State v. Graham*, 49 La. Ann. 1524, 22 So. 807; *Cook v. State*, 72 Miss. 517, 17 So. 228. As to amendments generally, see *infra*, XII.

46. **Cal.**—*People v. Haagen*, 139 Cal. 115, 72 Pac. 836. **Fla.**—*Caesar v. State*, 50 Fla. 1, 39 So. 470, 7 Am. & Eng. Ann. Cas. 45. **Mo.**—*State v. Edwards*, 19 Mo. 674. **N. M.**—*Territory v. Church*, 14 N. M. 226, 91 Pac. 720, not ground for a motion in arrest of judgment. **Vt.**—*State v. Whitney*, 15 Vt. 298.

47. **Mo.**—*State v. Edwards*, 19 Mo. 674, 675. **N. M.**—*Territory v. Church*, 14 N. M. 226, 91 Pac. 720. **Vt.**—*State v. Whitney*, 15 Vt. 298.

48. *State v. Hutchinson*, 26 Tex. 111; *Barfield v. State*, 39 Tex. Crim. 342, 45 S. W. 1015 (both holding omission fatal on motion to quash); *Menasco v. State* (Tex. App.), 11 S. W. 828;

g. *Interlineations, Erasures and Insertion of Words.*⁴⁹ — The insertion of a material word in an indictment after its finding renders the indictment fatally defective,⁵⁰ as words cannot be interpolated in the indictment so as to change the offense charged therein to another than that for which the grand jury indicted the defendant,⁵¹ even by his consent.⁵²

The indictment does not import such verity that defendant should not be permitted to show that an alteration was made by one not authorized to make it and after the finding of the indictment and the discharge of the grand jury.⁵³ Such alteration of the record should be brought to the attention of the court promptly and at the earliest opportunity at which it can be done, after the alteration has come to the knowledge of either party;⁵⁴ but the failure of the defendant to do so does not give the court jurisdiction to try defendant for an offense other than that for which the grand jury indicted him.⁵⁵

An indictment is not vitiated, however, where it is conveniently legible, simply because it contains interlineations,⁵⁶ or erasures,⁵⁷ especially where such interlineations or erasures were apparently made before it was acted upon by the grand jury.⁵⁸

Erasures,⁵⁹ or interlineations, in the absence of anything appearing upon the face of a written instrument, or being shown extrinsically

Walker v. State, 9 Tex. App. 177;
Moore v. State, 7 Tex. App. 42.

49. As to amendments generally, see *infra*, XII.

50. State v. Vest, 21 W. Va. 796, wherein it was contended that the word "feloniously" had been inserted and interlined after finding of indictment.

51. People v. Granice, 50 Cal. 447, wherein offense was changed from manslaughter to murder.

But the insertion of pencil memoranda in an indictment, made without intent to alter it, however, does not render the indictment bad, and require a new trial upon motion in arrest of judgment where the words inserted were erased and the cause tried upon the indictment as originally found. Bostock v. State, 61 Ga. 635.

52. People v. Granice, 50 Cal. 447.

53. State v. Vest, 21 W. Va. 796. See also People v. Granice, 50 Cal. 447.

[a] **Parol Evidence.**—Such alteration may be shown by parol. State v. Vest, 21 W. Va. 796.

[b] **The proper method of making the objection** is by motion to restore the indictment to the condition it was in before the interlineation or insertion of words was made. Such an objection may be raised, however, on motion in arrest of judgment showing the

insertion of words necessary to charge an offense. State v. Vest, 21 W. Va. 796.

[c] **Such a motion is not an impeachment** of the verity of the record, but is simply proving that such fraudulent interlineation or insertion was really never a part of the record. State v. Vest, 21 W. Va. 796.

54. People v. Granice, 50 Cal. 447.

55. People v. Granice, 50 Cal. 447; State v. Vest, 21 W. Va. 796.

56. Allen v. State, 123 Ga. 499, 51 S. E. 506; Cook v. State, 119 Ga. 108, 46 S. E. 64; French v. State, 12 Ind. 670, 74 Am. Dec. 229.

57. Clemmons v. State, 43 Fla. 200, 30 So. 699, wherein words "with intent" and "to" were stricken out.

58. Ga.—Jones v. State, 99 Ga. 46, 25 S. E. 617. Ind.—French v. State, 12 Ind. 670, 74 Am. Dec. 229. La.—State v. Florez, 5 La. Ann. 429. Ohio.—See May v. State, 14 Ohio 462.

[a] **Erasures and interlineations** in an indictment, though without any note or certificate to show when or by whom they were made, afford no ground of arresting judgment. Com. v. Fagan, 15 Gray (Mass.) 194.

59. Fla.—Clemmons v. State, 43 Fla. 200, 30 So. 699. Ga.—Cook v. State, 119 Ga. 108, 46 S. E. 64; Jones v. State,

tending to prove that they were made subsequently to the execution of the instrument will be presumed to have been made before or at its execution,⁶⁰ and by the proper authority.⁶¹

An alteration in the name of the defendant in order to conform to the facts, made at the time of arraignment is not ground for a motion in arrest of judgment,⁶² and under the modern statutes directing the indictment to be corrected by the insertion of the defendant's right name where it appears he has been indicted by the wrong name, this is the only procedure possible; if the court refuses to do this the error necessitates a reversal.⁶³

3. Offense Must Be Positively and Directly Alleged.—a. *In General.*—Every material fact and circumstance necessary to constitute the offense charged must be apparent upon the face of the indictment, information or complaint, by positive and direct allegations,⁶⁴ and

99 Ga. 46, 25 S. E. 617. **Ia.**—*State v. Hatlestad*, 132 Iowa 188, 109 N. W. 613. **Tex.**—*Jacobs v. State*, 42 Tex. Crim. 353, 59 S. W. 1111.

60. **Ga.**—*Allen v. State*, 123 Ga. 499, 51 S. E. 506; *Crawford v. State*, 4 Ga. App. 789, 62 S. E. 501. **Ind.**—*French v. State*, 12 Ind. 670, 74 Am. Dec. 229. **La.**—*State v. Florez*, 5 La. Ann. 429.

[a] The court will take for granted without statement or proof, on behalf of the state, until the defendant shall establish the contrary by irresistible proof, that the indictment appears on the record verbatim et literatim as it was presented by the attorney general and found by the grand jury. *State v. Florez*, 5 La. Ann. 429. See also *French v. State*, 12 Ind. 670.

[b] If an indictment have an interlineation and have a caret at the proper place where the interlined words are to come in, the court will take notice of the caret and read the indictment correctly. *Cook v. State*, 119 Ga. 108, 46 S. E. 64; *Rex v. Davis*, 7 Car. & P. 319, 32 E. C. L. 634.

[c] Though the name of person alleged to have been murdered has been crossed out, and another name in different ink and different handwriting, is written in, the indictment, a demurrer (1) upon the ground that the person alleged to have been murdered is not sufficiently identified (*Cook v. State*, 119 Ga. 108, 46 S. E. 64), or (2) on the ground that "said indictment shows upon its face interlineations, substitutions and changes from the form in which it was originally drawn" (*Allen v. State*, 123 Ga. 499, 51 S. E. 506), is without merit.

61. *Allen v. State*, 123 Ga. 499, 51 S. E. 506; *Crawford v. State*, 4 Ga. App. 789, 62 S. E. 501.

62. *State v. Turner*, 25 La. Ann. 573, wherein indictment charging "Albert" Turner with offense was changed to "John" Turner.

63. *Myatt v. State*, 31 Tex. Crim. 523, 21 S. W. 256.

[a] An alteration by the clerk by changing defendant's name from "John" to "Marion," is a nullity and does not affect the judgment where made without authority of the court. *Myatt v. State*, 31 Tex. Crim. 523, 21 S. W. 256.

64. **U. S.**—*Davis v. Utah Territory*, 151 U. S. 262, 14 Sup. Ct. 328, 38 L. ed. 153; *Pettibone v. United States*, 148 U. S. 197, 13 Sup. Ct. 542, 37 L. ed. 419; *United States v. Hess*, 124 U. S. 483, 8 Sup. Ct. 571, 31 L. ed. 516; *United States v. Louisville*, etc. R. Co., 165 Fed. 936; *United States v. Post*, 113 Fed. 852. **Ark.**—*Quertermous v. State*, 95 Ark. 48, 127 S. W. 951; *Williams v. State*, 93 Ark. 81, 123 S. W. 780. **D. C.**—*Hyde v. United States*, 27 App. Cas. 362; *United States v. Johnson*, 26 App. Cas. 136. **Fla.**—*Thomas v. State*, 58 Fla. 120, 50 So. 954; *Fudge v. State*, 57 Fla. 7, 49 So. 128. **Ill.** *People v. Trumbley*, 252 Ill. 29, 96 N. E. 573; *Prichard v. People*, 149 Ill. 50, 36 N. E. 103; *Parris v. People*, 76 Ill. 274; *People v. Ellis*, 185 Ill. App. 417; *Wabash, etc. R. Co. v. People*, 12 Ill. App. 448. **Ind.**—*State v. Rodgers*, 175 Ind. 25, 93 N. E. 223; *Axtell v. State*, 173 Ind. 711, 91 N. E. 354; *Hewitt v. State*, 171 Ind. 283, 86 N. E. 63; *State v. Metsker*, 169 Ind. 555, 89

not merely by way of recital;⁶⁵ nor merely by inference or implica-

N. E. 241; *Terre Haute Brew. Co. v. State*, 169 Ind. 242, 82 N. E. 81; *State v. Trueblood*, 25 Ind. App. 437, 57 N. E. 975, *Comstock, J. Ia.*—*State v. Clark*, 141 Iowa 297, 119 N. W. 719. **Ky.**—*Com. v. Tobin*, 140 Ky. 261, 130 S. W. 1116. **Me.**—*State v. Paul*, 69 Me. 215. **Md.**—*State v. Edwards*, 124 Md. 592, 92 Atl. 1037; *Phipps v. State*, 22 Md. 380, 85 Am. Dec. 654. **Minn.**—*State v. MacDonald*, 105 Minn. 251, 117 N. W. 482; *State v. Nelson*, 79 Minn. 388, 82 N. W. 650. **Miss.**—*Harkness v. State*, 95 Miss. 506, 48 So. 294; *Breeland v. State*, 79 Miss. 527, 31 So. 104; *Fire Ins. Co. v. State*, 75 Miss. 24, 39, 22 So. 99. **Mo.**—*State v. Hall*, 130 Mo. App. 170, 108 S. W. 1077. **Neb.**—*Gaweka v. State*, 94 Neb. 53, 142 N. W. 287; *Moline v. State*, 67 Neb. 164, 93 N. W. 228; *O'Connor v. State*, 46 Neb. 157, 64 N. W. 719; *State v. Hughes*, 38 Neb. 366, 56 N. W. 982; *Smith v. State*, 21 Neb. 552, 32 N. W. 594. **Nev.**—*People v. Logan*, 1 Nev. 89. **N. J.**—*State v. Hatfield* (N. J. L.), 93 Atl. 677. **N. Y.**—*People v. Lewis*, 111 App. Div. 558, 98 N. Y. Supp. 83; *People v. Rouss*, 63 Misc. 135, 118 N. Y. Supp. 433. **Ore.**—*State v. Townsend*, 60 Ore. 223, 118 Pac. 1020. **Pa.**—*Sherban v. Com.*, 8 Watts 212, 34 Am. Dec. 460. **R. I.**—*State v. Smith*, 29 R. I. 513, 526, 72 Atl. 710; *State v. Eastern Coal Co.*, 29 R. I. 254, 70 Atl. 1, 132 Am. St. Rep. 817. **S. C.**—*State v. Perry*, 2 Bailey 17. **Tenn.**—*Kit v. State*, 11 Humph. 167. **Tex.**—*State v. Powell*, 28 Tex. 626; *State v. Smith*, 25 Tex. Supp. 64; *Bush v. Republic*, 1 Tex. 455; *Beasley v. State*, 39 Tex. Crim. 688, 47 S. W. 991; *Woodward v. State*, 33 Tex. Crim. 554, 28 S. W. 204; *Dwyer v. State*, 24 Tex. App. 132, 5 S. W. 662; *Strickland v. State*, 19 Tex. App. 518; *Trimble v. State*, 16 Tex. App. 115, 120; *Caldwell v. State*, 14 Tex. App. 171; *Houston v. State*, 13 Tex. App. 595; *Allen v. State*, 13 Tex. App. 28; *Proffit v. State*, 12 Tex. App. 233; *Hunt v. State*, 9 Tex. App. 404; *Marwilsky v. State*, 9 Tex. App. 377; *Parker v. State*, 9 Tex. App. 351; *Moore v. State*, 7 Tex. App. 608; *White v. State*, 3 Tex. App. 605. **Vt.**—*State v. Webber*, 78 Vt. 463, 62 Atl. 1018; *State v. La Bore*, 26 Vt. 765. **W. Va.**—*State v. Welch*, 69 W. Va. 547,

72 S. E. 649. **Eng.**—*Reg. v. Collingwood*, 6 Mod. 288, 87 Eng. Reprint 1029; *Rex v. Moorehouse*, Cald. 554, 4 Doug. 388, 99 Eng. Reprint 936; *Vaux's Case*, 4 Co. Rep. 44a, 76 Eng. Reprint 992.

[a] **Insufficient.**—(1) To charge that defendant is guilty of a certain offense "as he (the district attorney) verily believes" (*Vannatta v. State*, 31 Ind. 210), (2) or as he "has reason to believe and does believe" (*Sothman v. State*, 66 Neb. 302, 92 N. W. 303), (3) or as "he has just and reasonable grounds to suspect" (*Parris v. People*, 76 Ill. 274) is insufficient, (4) though it has been held that a charge on oath "that the complainant has probable cause to suspect" that the accused has committed the crime charged, while not sufficient to support a conviction, is sufficient for purpose of arrest and examination. *Com. v. Phillips*, 16 Pick. (Mass.) 211.

[b] **Where the charge is equivocal**, and subject to more than one interpretation, it is insufficient. *State v. Charles*, 18 La. Ann. 720.

65. **U. S.**—*United States v. Hess*, 124 U. S. 483, 8 Sup. Ct. 571, 31 L. ed. 516; *United States v. Louisville, etc. R. Co.*, 165 Fed. 936; *United States v. Post*, 113 Fed. 852, 854. **Ark.**—*Gage v. State*, 67 Ark. 308, 55 S. W. 165. **Cal.**—*People v. Emnis*, 137 Cal. 263, 70 Pac. 84; *People v. Piggott*, 126 Cal. 509, 59 Pac. 31. **D. C.**—*United States v. Johnson*, 26 App. Cas. 136. **Ill.**—*People v. Ellis*, 185 Ill. App. 417; *Wabash, etc. R. Co. v. People*, 12 Ill. App. 448. **Ind.**—*Axtell v. State*, 173 Ind. 711, 91 N. E. 354; *Hewitt v. State*, 171 Ind. 283, 86 N. E. 63; *Terre Haute Brew. Co. v. State*, 169 Ind. 242, 82 N. E. 81; *State v. Trueblood*, 25 Ind. App. 437, 57 N. E. 975. **Ia.**—*State v. Clark*, 141 Iowa 297, 119 N. W. 719. **Minn.**—*State v. Nelson*, 79 Minn. 388, 82 N. W. 650. **Miss.**—*Shanks v. State*, 51 Miss. 464. **Neb.**—*Gaweka v. State*, 94 Neb. 53, 142 N. W. 287. **Nev.**—*People v. Logan*, 1 Nev. 89. **N. Y.**—*People v. Rouss*, 63 Misc. 135, 118 N. Y. Supp. 433. **Tex.**—*Marwilsky v. State*, 9 Tex. App. 377. **Eng.**—*Rex v. Crowhurst*, 2 Ld. Raym. 1363, 92 Eng. Reprint 388; *Rex v. Whitehead*, 1 Salk. 371, 91 Eng. Reprint 322.

tion,⁶⁶ or by way of argument,⁶⁷ or merely by the process of exclu-

[a] That a material fact is stated only by recital is fatal on motion to quash. *Axtell v. State*, 173 Ind. 711, 91 N. E. 354; *Dillon v. State*, 9 Ind. 408.

[b] Matters of inducement may be stated by way of recital. *Axtell v. State*, 173 Ind. 711, 91 N. E. 354; *Rex v. Crowhurst*, 2 Ld. Raym. 1363, 92 Eng. Reprint 388.

[c] Whereas.—(1) A criminal charge cannot be alleged with a "that whereas." *Axtell v. State*, 173 Ind. 711, 91 N. E. 354. (2) But the word "whereas" may be used in such a sense that what follows may be positive averment, and not recital. *People v. Ennis*, 137 Cal. 263, 70 Pac. 84; *People v. Fitzgerald*, 92 Mich. 328, 52 N. W. 726. (3) In *People v. Ennis*, 137 Cal. 263, 70 Pac. 84, the court said: "It is better, no doubt, to avoid the use of the word 'whereas' in a pleading; but it may be observed that whatever is in itself a positive averment is not turned into recital by the mere fact that somewhere preceding the averment the word 'whereas' is used. The effect of that word depends upon how it is connected with the succeeding part of the sentence. 'That whereas' is the form generally held objectionable in the older decisions. But the word may be used in the sense given to it in the dictionaries as synonymous with 'when in fact,' 'while the contrary,' 'the fact is,' etc.; and when used in that sense, as shown by the context, what follows may be positive averment, and not recital."

[d] An indictment for using the mails with intent to effect a scheme to defraud was not bad because the scheme or artifice was pleaded by way of recital and not by direct averment, where it was charged that on a given day the defendants had devised a fraudulent scheme, such charge sufficiently showing that the defendants theretofore did devise such scheme. *Wilson v. United States*, 190 Fed. 427, 111 C. C. A. 231.

56. U. S.—*Pettibone v. United States*, 148 U. S. 197, 13 Sup. Ct. 542, 37 L. ed. 449; *United States v. Hess*, 124 U. S. 483, 8 Sup. Ct. 571, 31 L. ed. 516; *United States v. Louisville*, etc. R. Co., 165 Fed. 936; *United States*

v. Post, 113 Fed. 852, 854. Ala.—*State v. Seay*, 3 Stew. 123, 20 Am. Dec. 66. Ark.—*Williams v. State*, 93 Ark. 81, 123 S. W. 780; *Gage v. State*, 67 Ark. 308, 55 S. W. 165; *State v. Ellis*, 43 Ark. 93. D. C.—*United States v. Johnson*, 26 App. Cas. 136; *Tyner v. United States*, 23 App. Cas. 324. Ill.—*Priehard v. People*, 149 Ill. 59, 36 N. E. 103; *Wabash, etc. R. Co. v. People*, 12 Ill. App. 448. Ind.—*Hewitt v. State*, 171 Ind. 283, 86 N. E. 63; *Riley v. State*, 168 Ind. 657, 81 N. E. 726; *Vinnedge v. State*, 167 Ind. 415, 79 N. E. 353. Ia.—*State v. Clark*, 141 Iowa 297, 119 N. W. 719; *State v. Gallagher*, 123 Iowa 378, 98 N. W. 906; *State v. Jamison*, 110 Iowa 337, 81 N. W. 594. Me.—*State v. Paul*, 69 Me. 215. Md.—*Phipps v. State*, 22 Md. 380, 85 Am. Dec. 654. Miss.—*Harkness v. State*, 95 Miss. 506, 48 So. 294; *Fire Ins. Co. v. State*, 75 Miss. 24, 39, 22 So. 99. Mo.—*State v. Jump*, 176 Mo. App. 294, 162 S. W. 633; *State v. Clinkenbeard*, 135 Mo. App. 189, 115 S. W. 1059. Mont.—*State v. McGowan*, 36 Mont. 422, 93 Pac. 552. Neb.—*Gaweka v. State*, 94 Neb. 53, 142 N. W. 287; *Moline v. State*, 67 Neb. 164, 93 N. W. 228. N. Y.—*People v. Lewis*, 111 App. Div. 558, 98 N. Y. Supp. 83; *People v. Rouss*, 63 Misc. 135, 118 N. Y. Supp. 433. Ore.—*State v. Townsend*, 60 Ore. 223, 118 Pac. 1020. R. I.—*State v. Smith*, 29 R. I. 513, 526, 72 Atl. 710; *State v. Eastern Coal Co.*, 29 R. I. 254, 70 Atl. 1, 132 Am. St. Rep. 817. Tex.—*State v. Powell*, 28 Tex. 626; *Bush v. Republic*, 1 Tex. 455; *Beasley v. State*, 39 Tex. Crim. 688, 47 S. W. 991; *Woodward v. State*, 33 Tex. Crim. 554, 28 S. W. 204; *Dwyer v. State*, 24 Tex. App. 132, 5 S. W. 662; *Strickland v. State*, 19 Tex. App. 518; *Trimble v. State*, 16 Tex. App. 115, 120; *Caldwell v. State*, 14 Tex. App. 171; *Houston v. State*, 13 Tex. App. 595; *Proffit v. State*, 12 Tex. App. 233; *Hunt v. State*, 9 Tex. App. 404; *Marwilsky v. State*, 9 Tex. App. 377; *Parker v. State*, 9 Tex. App. 357; *White v. State*, 3 Tex. App. 605.

[a] Pleading the evidence instead of the acts by the accused, constituting the offense, will not suffice. *Dwyer v. State*, 24 Tex. App. 132, 5 S. W. 662.

67. Ill.—*Wabash, etc. R. Co. v. Peo-*

sion,⁶⁸ the rule being that an indictment cannot be aided by intentions.⁶⁹

It is not always necessary that a verb be used to make an allegation direct and positive;⁷⁰ there is in this respect no particular or set form of expression which is required to be used.⁷¹

b. *Use of Participles.*—While the use of the participial form in alleging facts necessary to the statement of the offense, instead of positive verbs, is not to be commended,⁷² in matter not constituting the main charge such form is sufficient, if the intention of the indict-

ple, 12 Ill. App. 448. **Ind.**—Hewitt v. State, 171 Ind. 283, 287, 86 N. E. 63. **Miss.**—Harkness v. State, 95 Miss. 506, 48 So. 294; Fire Ins. Co. v. State, 75 Miss. 24, 39, 22 So. 99. **Nev.**—People v. Logan, 1 Nev. 89. **Tex.**—State v. Powell, 28 Tex. 626; Bush v. Republic, 1 Tex. 455; Woodward v. State, 33 Tex. Crim. 554, 28 S. W. 204; Trimble v. State, 16 Tex. App. 115, 120; Prophit v. State, 12 Tex. App. 233; Hunt v. State, 9 Tex. App. 404; Parker v. State, 9 Tex. App. 351; White v. State, 3 Tex. App. 605. **Vt.**—State v. Haven, 59 Vt. 399, 9 Atl. 841. **Eng.**—Rex v. Knight, 1 Salk. 375, 91 Eng. Reprint 327; Reg. v. Collingwood, 6 Mod. 288, 87 Eng. Reprint 1029; Vaux's Case, 4 Co. Rep. 44a, 76 Eng. Reprint 992.

68. Harkness v. State, 95 Miss. 506, 48 So. 294; Fire Ins. Co. v. State, 75 Miss. 24, 39, 22 So. 99.

69. See the following cases: **U. S.** Pettibone v. United States, 148 U. S. 197, 13 Sup. Ct. 542, 37 L. ed. 419; United States v. Hess, 124 U. S. 483, 8 Sup. Ct. 571, 31 L. ed. 516; United States v. Post, 113 Fed. 852; United States v. Burns, 54 Fed. 351. **Ala.** State v. Seay, 3 Stew. 123, 20 Am. Dec. 66. **Ark.**—Quertermous v. State, 95 Ark. 48, 127 S. W. 951; Gage v. State, 67 Ark. 308, 55 S. W. 165. **Ia.** State v. Gallagher, 123 Iowa 378, 98 N. W. 906; State v. Jamison, 110 Iowa 337, 341, 81 N. W. 594; State v. Clark, 80 Iowa 517, 45 N. W. 910; State v. Potter, 28 Iowa 554. **Ky.**—Com. v. Walters, 6 Dana 291. **Me.**—State v. Paul, 69 Me. 215. **Md.**—State v. Hodges, 55 Md. 127, 137. **Mo.**—State v. Phelan, 159 Mo. 122, 130, 60 S. W. 71; State v. Furgerson, 152 Mo. 92, 98, 53 S. W. 427; State v. Rector, 126 Mo. 324, 241, 23 S. W. 1074; State v. Fairbank, 121 Mo. 137, 154, 25 S. W. 895; State v. Meyers, 99 Mo. 107, 12 S. W. 516; State v. McFadden, 151 Mo. App. 479, 132 S. W. 267; State v. Gassard,

103 Mo. App. 143, 77 S. W. 473. **Neb.** Gaweka v. State, 94 Neb. 53, 142 N. W. 287; Moline v. State, 67 Neb. 164, 93 N. W. 228; O'Connor v. State, 46 Neb. 157, 64 N. W. 719; State v. Hughes, 38 Neb. 366, 56 N. W. 982; Smith v. State, 21 Neb. 552, 32 N. W. 594. **Nev.**—People v. Logan, 1 Nev. 89. **N. Y.**—People v. Kane, 161 N. Y. 380, 55 N. E. 946; People v. Albrow, 140 N. Y. 130, 35 N. E. 438; People v. Rouss, 63 Misc. 135, 118 N. Y. Supp. 433. **S. C.**—State v. Henderson, 1 Rich. L. 179; State v. Halder, 2 McCord 377, 13 Am. Dec. 738. **Tenn.**—Kit v. State, 11 Humph. 167. **Tex.**—State v. Powell, 28 Tex. 626; Juaraqui v. State, 28 Tex. 625; Stephanes v. State, 21 Tex. 206; State v. Lee, 15 Tex. 252; McAfee v. State, 38 Tex. Crim. 124, 41 S. W. 627; Neiman v. State, 29 Tex. App. 360, 16 S. W. 253; Mays v. State, 28 Tex. App. 484, 13 S. W. 787; Brown v. State, 26 Tex. App. 540, 10 S. W. 112. **Vt.**—State v. Webber, 78 Vt. 463, 62 Atl. 1018. **Eng.**—Rex v. Somerton, 7 B. & C. 463, 108 Eng. Reprint 796.

"The want of a direct and positive allegation, in the description of the substance, nature or manner of the offense, cannot be supplied by any intendment, argument, or implication." State v. Paul, 69 Me. 215. And see People v. Logan, 1 Nev. 89.

70. Chase v. State (Tex. Crim.), 28 S. W. 952, holding that although the verb "was" was omitted from allegation, still it was still positive and direct.

[a] The "adjective" form of expression is sufficient, if it express in plain and positive terms the necessary charges. Chase v. State (Tex. Crim.), 28 S. W. 952.

71. Chase v. State (Tex. Crim.), 28 S. W. 952.

72. Cal.—People v. Ennis, 137 Cal. 263, 70 Pac. 84; People v. Vasalo, 120 Cal. 168, 52 Pac. 305; People v. Hatch,

ment is plain.⁷³ So also, a material averment may sometimes be introduced with as much clearness and certainty by means of the participle as by a declarative sentence.⁷⁴

13 Cal. App. 521, 109 Pac. 1097; *People v. Hamilton*, 3 Cal. Unrep. 825, 32 Pac. 526. **Ind.**—*Agar v. State*, 176 Ind. 234, 94 N. E. 819 (not the best method of stating a fact); *Hewitt v. State*, 171 Ind. 283, 86 N. E. 63. **Mont.**—*State v. Bloor*, 20 Mont. 574, 581, 52 Pac. 611, participial form is generally to be avoided, as not direct.

[a] **The participial phrases merely state a condition, not a fact.** *Axtell v. State*, 173 Ind. 711, 91 N. E. 354.

73. *State v. Bloor*, 20 Mont. 574, 581, 52 Pac. 611.

[a] **Inducement.**—This form of expression is allowable in setting out matter of inducement in charging a criminal offense. *Hewitt v. State*, 171 Ind. 283, 86 N. E. 63.

74. *State v. Dunning*, 83 Me. 178, 22 Atl. 109.

[a] In *State v. Dunning*, 83 Me. 178, 22 Atl. 109, the court said, "that the desire to introduce greater directness and simplicity, or otherwise promote reforms in legal literature, must always be subordinate to the interests of justice. Courts are not permitted to be finically exacting respecting the construction of sentences or the graces of style. 'The doctrine is general,' says Mr. Bishop, 'that the court will consult sound sense to the disregard of captious objections in looking for the meaning of the allegations in the indictment.' 1 Bishop's Crim. Proc., §356."

[b] **Participle Sufficient.**—In the following cases, the indictment was in the participial form and was held sufficient: **U. S.**—*United States v. Fox*, 1 Low. 199, 25 Fed. Cas. No. 15,150. **Ark.**—*State v. Quentermous*, 95 Ark. 48, 127 S. W. 951; *Fluener v. State*, 58 Ark. 98, 23 S. W. 1. **Cal.**—*People v. Ennis*, 137 Cal. 263, 70 Pac. 84; *People v. Pig-gott*, 126 Cal. 509, 59 Pac. 31; *People v. Hatch*, 13 Cal. App. 521, 109 Pac. 1097; *People v. Hamilton*, 3 Cal. Unrep. 825, 32 Pac. 526. **Ill.**—*Lycan v. People*, 107 Ill. 423; *Bergen v. People*, 17 Ill. 425, 65 Am. Dec. 672. **Ind.**—*Zoborasky v. State*, 180 Ind. 187, 102 N. E. 825; *Agar v. State*, 176 Ind. 234, 94 N. E. 819. **Me.**—*State v. Jackson*, 29 Me. 291; *State v. Hutchinson*, 36 Me. 261,

263; *State v. Palmer*, 35 Me. 9. **Mass.** *Com. v. Creed*, 8 Gray 387. **Minn.** *State v. Munch*, 22 Minn. 67, where it was alleged a defendant "being then and there a person employed," etc., and the court said it was impossible not to understand from the indictment that it was the fact that the defendant was a person employed. **Mo.** *State v. Manley*, 107 Mo. 364, 17 S. W. 800; *State v. Fogerson*, 29 Mo. 416. **N. H.**—*State v. Parker*, 57 N. H. 123; *State v. Roberts*, 52 N. H. 492. **N. M.** *State v. Brooken*, 143 Pac. 479, L. R. A. (N. S.) 19153, 213, holding an indictment for unlawful herding, which, after alleging that defendant held under herd, in a certain pasture, calves unaccompanied by their mother, proceeds, "The said calves being then and there under the age of seven months," was not subject to attack on the ground that the calves were not directly and positively alleged to be under seven months of age. **Vt.**—*State v. Bridgman*, 49 Vt. 202; *State v. Hooker*, 17 Vt. 658. **Wash.**—*State v. Bogardus*, 36 Wash. 297, 78 Pac. 942. **Wis.**—*State v. Brown*, 143 Wis. 405, 127 N. W. 956; *State v. Boneher*, 59 Wis. 477, 18 N. W. 335. **Wyo.**—*Edelhoff v. State*, 5 Wyo. 19, 36 Pac. 627. **Eng.**—*Rex v. Lawley*, 2 Str. 904, 93 Eng. Reprint 930; *Rex v. Moor*, 2 Mod. 128, 86 Eng. Reprint 981.

[a] **Being Officer or Employee.**—It has been held in many cases that the allegation that "A, being an officer, etc.," or "being an employee, etc.," is a sufficient averment that he is an officer or employee. See the following cases: **Ark.**—*State v. Scoggins*, 85 Ark. 43, 106 S. W. 969, "being the agent, etc." **Cal.**—*People v. Hatch*, 13 Cal. App. 521, 529, 109 Pac. 1097; *People v. Hamilton*, 3 Cal. Unrep. 825, 32 Pac. 526. **Ind.**—*Agar v. State*, 176 Ind. 234, 94 N. E. 819, *averring* Axtell v. State, 173 Ind. 711, 91 N. E. 354. **Mo.**—*State v. Manley*, 107 Mo. 364, 17 S. W. 800. **N. H.**—*State v. Roberts*, 52 N. H. 492. **Eng.**—*Rex v. Somerton*, 7 Barn. & C. 403, 14 E. C. L. 210; *Rex v. Bootle*, 2 Barr. 864, 97 Eng. Reprint 655; *Rex v. Royall*, 2 Barr. 832, 97 Eng. Reprint 556.

c. *Use of Scilicet or Videlicet.*⁷⁵—The use of the scilicet or videlicet is not, as a rule, objectionable,⁷⁶ since as to essential matters alleged thereunder, the averments are regarded as positive and direct;⁷⁷ while as to matters not essential, the pleader is neither concluded thereby nor bound to prove the same.⁷⁸ Indeed, its common office is to state time, place, or manner which are not of the essence of the matter in issue, and thereby to relieve the party of the duty of proving the allegation strictly as made,⁷⁹ though it is frequently used, as in other pleadings, for the purpose of particularizing the more general antecedent matter.⁸⁰

If matter laid under a videlicet or scilicet be immaterial, though it be repugnant to what precedes, it will not vitiate the indictment,⁸¹ but the scilicet or videlicet will be rejected as surplusage.⁸² It is otherwise, of course, if the matter so averred is of the gist of the offense, and the same is repugnant to what precedes.⁸³

[a] **Federal Courts.**—Use of participial form of allegation sufficient in the federal courts in misdemeanors. *Pooler v. United States*, 127 Fed. 509, 518, 62 C. C. A. 307.

75. See generally the title “*Scilicet*.”

76. *State v. Grimes*, 50 Minn. 123, 52 N. W. 275. And see the cases cited throughout this section.

77. *State v. Grimes*, 50 Minn. 123, 52 N. W. 275. And see *State v. Murphy*, 55 Vt. 547; *Ryalls v. Reg.*, 3 Cox C. C. 254, 261, 63 E. C. L. 795.

78. *State v. Freeman*, 8 Iowa 428, 74 Am. Dec. 317; *State v. Grimes*, 50 Minn. 123, 52 N. W. 275; *State v. Heck*, 23 Minn. 549.

79. *Sullivan v. State*, 67 Miss. 346, 354, 7 So. 275. And see *State v. Heck*, 23 Minn. 549.

80. *Sullivan v. State*, 67 Miss. 346, 354, 7 So. 275. And see: **Conn.**—*State v. Brown*, 51 Conn. 3. **Ind.**—*Tullis v. Shaw*, 169 Ind. 662, 83 N. E. 376. **Mass.**—*Com. v. Hart*, 10 Gray 465. **Minn.**—*State v. Grimes*, 50 Minn. 123, 52 N. W. 275. **Mo.**—*State v. Arbogast*, 24 Mo. 363. **Vt.**—*State v. Murphy*, 55 Vt. 547.

[a] “The precise and legal use of a videlicet in every species of pleading is to enable the pleader to isolate, to distinguish, and to fix with certainty, that which was before general, and which, without such explanation, might with equal propriety have been applied to different objects. 1 Chit. Crim. Law 226. That is the use which was made of it in this indictment.” **Com. v. Hart**, 10 Gray (Mass.) 465.

[b] “It may work a restriction when the former words are not express and special, but so indifferent as they may receive such restriction without apparent injury, though these former words by construction of law would have had a larger sense if the videlicet had not been.” *Sullivan v. State*, 67 Miss. 346, 354, 7 So. 275.

81. **Conn.**—*State v. Brown*, 51 Conn. 3. **Ia.**—*State v. Freeman*, 8 Iowa 428. **Miss.**—*Sullivan v. State*, 67 Miss. 346, 7 So. 275. **N. C.**—*State v. Haney*, 8 N. C. 460.

82. **Conn.**—*State v. Brown*, 51 Conn. 3. **Ia.**—*State v. Freeman*, 8 Iowa 428, 74 Am. Dec. 317. • **Miss.**—*Sullivan v. State*, 67 Miss. 346, 7 So. 275. **N. C.**—*State v. Haney*, 8 N. C. 460.

As to effect of surplusage generally, see *infra*, IX, J.

83. See the following cases: **Ill.**—*Maloney v. People*, 229 Ill. 593, 82 N. E. 389. **Ia.**—*State v. Freeman*, 8 Iowa 428, 74 Am. Dec. 317. **Mo.**—*State v. Arbogast*, 24 Mo. 363.

[a] “A videlicet will not avoid a variance in an allegation of material matter.” *State v. Arbogast*, 24 Mo. 363.

[b] **Indiana.**—The rule “that when the matter laid under a videlicet is material and impossible or repugnant to what precedes the videlicet it will vitiate the pleading as an entirety, has been somewhat modified in this state by §2063 Burns’ 1908, Acts 1905, pp. 584, 625, §192.” *Tullis v. Shaw*, 169 Ind. 662, 83 N. E. 376.

4. Definiteness, Certainty and Particularity. — a. *In General.*⁸⁴

At common law, the rule was fundamental, that an indictment must be certain and particular in its allegations,⁸⁵ so that it could be seen upon inspection, not merely what nature of crime, but what particular crime is intended to be charged.⁸⁶ While the same degree of certainty and particularity as was required at common law is not always necessary under modern statutory provisions governing criminal pleading,⁸⁷ such statutes do not dispense with the necessity for certainty.⁸⁸

The general rule is that whatever is essential to the gravamen of the offense charged, must be set forth with particularity and certainty, all the authorities concurring that ambiguity and uncertainty is fatal to an indictment or information.⁸⁹

More particularly, the offense must be charged with such degree of certainty and particularity of statement as will identify the charge, lest the grand jury should find a bill for one offense, and the defend-

84. As to certainty in general and the degrees of certainty, see 4 STAND-ARD PROC. 832.

85. See the following: **U. S.**—United States v. Gooding, 12 Wheat. 460, 474, 6 L. ed. 693. **Miss.**—Westbrooks v. State, 76 Miss. 710, 25 So. 491. **N. J.** State v. Allgor, 78 N. J. L. 313, 73 Atl. 76. **N. M.**—State v. Lucero, 146 Pac. 407.

See 1 Chitty Crim. Law 169, wherein it is said that this is "the first general rule respecting indictments."

[a] Especially was this true in capital cases. State v. Lucero (N. M.), 146 Pac. 407.

86. State v. Allgor, 78 N. J. L. 313, 73 Atl. 76.

87. See *supra*, IX, C, 1.

88. **Ark.**—Thompson v. State, 26 Ark. 323. **Ia.**—State v. Clark, 141 Iowa 297, 119 N. W. 719. **Minn.**—State v. Gray, 29 Minn. 142, 12 N. W. 455. **Ohio.** Ellars v. State, 25 Ohio St. 385.

[a] The legislature has no power to dispense with such a degree of certainty as will inform the accused of the nature of the offense for which he is put upon trial, sufficiently to enable him to plead the same in bar upon a subsequent prosecution, after a conviction or acquittal. Murphy v. State, 24 Miss. 590, 1 Mor. St. Cas. 618. As to power of legislature to dispense with averments in indictment or information, see *supra*, IX, A.

89. See the following cases: **U. S.** Blitz v. United States, 153 U. S. 308, 315, 14 Sup. Ct. 924, 38 L. ed. 725;

Peters v. United States, 94 Fed. 127, 36 C. C. A. 105. **Ga.**—Locke v. State, 3 Ga. 534. **Ind.**—McLaughlin v. State, 45 Ind. 338, 346; State v. Locke, 35 Ind. 419; Markle v. State, 3 Ind. 535. **Ia.**—State v. Von Kutzleben, 136 Iowa 89, 113 N. W. 484. **Md.**—State v. Edwards, 124 Md. 592, 92 Atl. 1037. **Minn.**—State v. Gray, 29 Minn. 142, 12 N. W. 455. **Miss.**—Norris v. State, 33 Miss. 373, 2 Mor. St. Cas. 1059; Riggs v. State, 26 Miss. 51, 1 Mor. St. Cas. 674; Murphy v. State, 24 Miss. 590, 1 Mor. St. Cas. 618. **Mo.**—State v. Evans, 128 Mo. 406, 31 S. W. 34. **N. Y.** Dord v. People, 9 Barb. 671, facts constituting the offense should be stated with as much certainty as the nature of the case will admit. **Ohio.**—Ellars v. State, 25 Ohio St. 385; Smith v. State, 8 Ohio 294. **Okla.**—Slover v. Territory, 5 Okla. 506, 49 Pac. 1009. **Tenn.**—Fitts v. State, 102 Tenn. 141, 50 S. W. 756; Hall v. State, 3 Coldw. 125; Pearce v. State, 1 Sneed 63, 60 Am. Dec. 135; Bradford v. State, 3 Humph. 370. **Tex.**—State v. Williams, 14 Tex. 98; Burch v. Republic, 1 Tex. 608; Ranch v. State, 5 Tex. App. 363. **Va.**—Richards v. Com., 81 Va. 110. **Wis.**—Fink v. Milwaukee, 17 Wis. 26. **Wyo.**—McCarthy v. Territory, 1 Wyo. 311.

[a] Every indictment should charge the crime with precision and certainty, and every ingredient thereof should be accurately and clearly stated. Peters v. United States, 94 Fed. 127, 36 C. C. A. 105.

[b] A clear substantive charge, constituting the offense, is as necessary

and be put on trial for another;⁹⁰ and to enable the court to see that, admitting the facts, it has jurisdiction, and that a crime has been committed, of which the defendant is *prima facie* guilty,⁹¹ and so that the defendant may be advised of the particular nature of it,⁹² in

under modern criminal pleading as it ever was. *State v. Reakey*, 62 Mo. 40.

90. *Ga.*—*Wingard v. State*, 13 Ga. 396; *Youmans v. State*, 7 Ga. App. 101, 112, 66 S. E. 383. *Ind.*—*State v. Ennsley*, 177 Ind. 483, 97 N. E. 113, Ann. Cas. 1914D, 1306; *Funk v. State*, 149 Ind. 338, 49 N. E. 266; *Strader v. State*, 92 Ind. 376; *McLaughlin v. State*, 45 Ind. 338. *Miss.*—*Murphy v. State*, 24 Miss. 590, 1 Mor. St. Cas. 618.

[a] The indictment need not be more specific than the law under which it is framed, however. *Posey v. State*, 32 Tex. 476; *Banks v. State*, 28 Tex. 644.

91. See the following cases: *U. S.* *United States v. Reese*, 92 U. S. 214, 233, 23 L. ed. 563; *Miller v. United States*, 133 Fed. 337, 66 C. C. A. 399; *United States v. Swift*, 188 Fed. 92; *United States v. Raley*, 173 Fed. 159; *United States v. Burns*, 54 Fed. 351. *Ark.*—*Barton v. State*, 29 Ark. 68. *Cal.*—*People v. Schmitz*, 153 Cal. xviii, 94 Pac. 419, 15 L. R. A. (N. S.) 717; *People v. Silva*, 8 Cal. App. 349, 97 Pac. 202. *Ind.*—*McLaughlin v. State*, 45 Ind. 338. *Ky.*—*Pike v. Com.*, 2 Duv. 89. *La.*—*State v. John*, 129 La. 208, 55 So. 766. *N. C.*—*State v. Green*, 151 N. C. 729, 66 S. E. 564; *State v. Brown*, 7 N. C. 224. *Ohio.*—*Du Brul v. State*, 80 Ohio St. 52, 87 N. E. 837. *Ore.* *State v. Dougherty*, 4 Ore. 200. *S. C.* *State v. Wimberly*, 3 McCord 190. *Tex.* *Mosely v. State*, 18 Tex. App. 311. *Can.* *Rex v. Cross*, 43 Nova Scotia 320.

92. See the following cases: *U. S.* *Cochran v. United States*, 157 U. S. 286, 15 Sup. Ct. 628, 39 L. ed. 704; *Ball v. United States*, 140 U. S. 118, 136, 11 Sup. Ct. 761, 35 L. ed. 377; *United States v. Cookshank*, 92 U. S. 542, 23 L. ed. 588; *Kovoloff v. United States*, 202 Fed. 475, 120 C. C. A. 605; *Tyomies Pub. Co. v. United States*, 211 Fed. 385, 128 C. C. A. 47; *Horn v. United States*, 182 Fed. 721, 728, 105 C. C. A. 163; *Hauger v. United States*, 173 Fed. 54, 97 C. C. A. 372; *Harper v. United States*, 170 Fed. 385, 95 C. C. A. 555; *Smith v. United States*, 157 Fed. 721, 85 C. C. A. 353; *Miller v. United States*,

133 Fed. 337, 66 C. C. A. 399; *Haynes v. United States*, 101 Fed. 817, 42 C. C. A. 34; *United States v. Rhodes*, 212 Fed. 513; *United States v. Goldman*, 207 Fed. 1002; *United States v. Swift*, 188 Fed. 92; *United States v. Raley*, 173 Fed. 159; *United States v. Barber*, 157 Fed. 889. *Ark.*—*Parker v. State*, 98 Ark. 575, 137 S. W. 253; *Barton v. State*, 29 Ark. 68; *Thompson v. State*, 26 Ark. 323; *Baker v. State*, 4 Ark. 56. *Cal.*—*People v. Silva*, 8 Cal. App. 349, 97 Pac. 202. *Conn.*—*State v. McGee*, 81 Conn. 696, 72 Atl. 141; *Rawson v. State*, 19 Conn. 292, 295. *D. C.*—*Dufour v. United States*, 37 App. Cas. 497; *Geist v. United States*, 26 App. Cas. 594. *Fla.*—*Mills v. State*, 58 Fla. 74, 51 So. 278. *Ga.*—*Wingard v. State*, 13 Ga. 396; *Dean v. State*, 9 Ga. App. 303, 71 S. E. 597; *Burkes v. State*, 7 Ga. App. 39, 65 S. E. 1091. *Ill.*—*People v. Ellis*, 185 Ill. App. 417; *People v. Miller*, 178 Ill. App. 292. *Ind.*—*Agar v. State*, 176 Ind. 234, 94 N. E. 819; *State v. Metsker*, 169 Ind. 555, 83 N. E. 241; *Funk v. State*, 149 Ind. 338, 49 N. E. 266; *McLaughlin v. State*, 45 Ind. 338; *Nichols v. State*, 28 Ind. App. 674, 63 N. E. 783. *Ky.*—*White v. Com.*, 9 Bush 178; *Com. v. Perrigo*, 3 Mete. 5; *Com. v. Magowan*, 1 Mete. 368, 71 Am. Dec. 480; *Com. v. McAtee*, 8 Dana 28; *Sulzer v. Com.*, 4 Ky. L. Rep. 365. *La.*—*State v. John*, 129 La. 208, 55 So. 766. *Md.*—*Harne v. State*, 39 Md. 552; *State v. Nutwell*, 1 Gill 54. *Mass.*—*Com. v. Terry*, 114 Mass. 263; *Com. v. Slack*, 19 Pick. 304; *Com. v. Wade*, 17 Pick. 395. *Mich.* *People v. Quider*, 172 Mich. 280, 137 N. W. 546. *Minn.*—*State v. MacDonald*, 105 Minn. 251, 117 N. W. 482; *State v. Gray*, 29 Minn. 142, 12 N. W. 455. *Miss.*—*Montgomery v. State*, 65 So. 572; *Norris v. State*, 33 Miss. 373, 2 Mor. St. Cas. 1059; *Murphy v. State*, 24 Miss. 590, 1 Mor. St. Cas. 618. *Mo.* *State v. McGinnis*, 126 Mo. 564, 29 S. W. 842; *State v. Rochforde*, 52 Mo. App. 199; *State v. Murphy*, 164 Mo. App. 204, 147 S. W. 520; *State v. Thothos*, 147 Mo. App. 596, 126 S. W. 797; *State v. Rouelle*, 137 Mo. App. 620, 119 S. W. 55. *Mont.*—*State v. Pemberton*, 39

order to defend against it both as to the law and the facts, and to plead in bar a judgment of conviction or acquittal thereof, if subsequently prosecuted,⁹³ and to warrant the court in granting or re-

Mont. 520, 104 Pac. 556. **Neb.**—*Moline v. State*, 67 Neb. 164, 93 N. W. 228. **N. H.**—*State v. Messenger*, 58 N. H. 348; *State v. Gary*, 36 N. H. 359. **N. J.** *State v. Spear*, 63 N. J. L. 179, 42 Atl. 840. **N. M.**—*State v. Lucero*, 146 Pac. 407. **N. Y.**—*Biggs v. People*, 8 Barb. 547; *People v. Knapp*, 147 App. Div. 436, 132 N. Y. Supp. 747; *People v. Rouss*, 63 Misc. 135, 118 N. Y. Supp. 433. **N. C.**—*State v. Moore*, 166 N. C. 284, 81 S. E. 294; *State v. Green*, 151 N. C. 729, 66 S. E. 564. **Ohio**—*DuPaul v. State*, 80 Ohio St. 52, 87 N. E. 837; *Dillingham v. State*, 5 Ohio St. 280. **Okla.**—*Slover v. Territory*, 5 Okla. 506, 49 Pac. 1009; *Brown v. State*, 4 Okla. Crim. xiii, 115 Pac. 603; *Vickers v. United States*, 1 Okla. Crim. 452, 98 Pac. 467. **Ore.**—*State v. Chapin*, 144 Pac. 1187; *State v. Dougherty*, 4 Ore. 200. **R. I.**—*State v. Pirlot*, 19 R. I. 695, 36 Atl. 715. **S. C.**—*State v. Shirer*, 20 S. C. 392; *State v. Washington*, 13 S. C. 453. **Tenn.**—*State v. Witherspoon*, 115 Tenn. 138, 90 S. W. 852; *Givens v. State*, 103 Tenn. 618, 652, 55 S. W. 1167; *Clark v. State*, 86 Tenn. 511, 8 S. W. 145; *Luttrell v. State*, 85 Tenn. 232, 1 S. W. 886, 4 Am. St. Rep. 760; *Blומר v. State*, 3 Sneed 66. **Tex.** *State v. Schwartz*, 25 Tex. 764. **Vt.** *State v. Webber*, 78 Vt. 463, 62 Atl. 1018. **Va.**—*Bishop v. Com.*, 13 Gratt. 785. **Wis.**—*Fink v. Milwaukee*, 17 Wis. 26; *Allen v. State*, 5 Wis. 329. **Can.** *Rex v. Beckwith*, 7 Can. Cr. Cas. 459; *Queen v. Weir*, 3 Can. Cr. Cas. 102; *Rex v. Porte*, 18 Manitoba 222; *Rex v. Ead*, 43 Nova Scotia 53.

[a] This is necessary in order to comply with the constitutional requirement that an accused has the right to demand the nature and cause of the accusation against him. *Norris v. State*, 33 Miss. 373, 2 Mor. St. Cas. 1059; *Murphy v. State*, 24 Miss. 590, 1 Mor. St. Cas. 618. As to such constitutional provisions, see *supra*, IX, A.

[b] An indictment need only charge in ordinarily intelligible terms, such facts as will apprise the accused with reasonable certainty of the particular offense for which he is sought to be punished, under a statute providing

that the indictment must be direct and certain as regards the particular circumstances of the offense charged, if it be necessary to constitute a complete offense. *Goslin v. Com.*, 121 Ky. 698, 90 S. W. 223.

93. U. S.—*Rosen v. United States*, 161 U. S. 29, 16 Sup. Ct. 434, 480, 40 L. ed. 606; *Ball v. United States*, 140 U. S. 118, 126, 11 Sup. Ct. 761, 35 L. ed. 377; *Tyomies Pub. Co. v. United States*, 211 Fed. 385, 128 C. C. A. 47; *Baskin v. United States*, 209 Fed. 740, 126 C. C. A. 464; *Floren v. United States*, 186 Fed. 961, 108 C. C. A. 577; *Horn v. United States*, 182 Fed. 721, 728, 105 C. C. A. 163; *Hauger v. United States*, 173 Fed. 54, 97 C. C. A. 372; *Smith v. United States*, 157 Fed. 721, 85 C. C. A. 353; *Peters v. United States*, 94 Fed. 127, 36 C. C. A. 105; *United States v. Rhodes*, 212 Fed. 513; *United States v. Steinfeld*, 209 Fed. 904; *United States v. Swift*, 188 Fed. 92; *United States v. Raley*, 173 Fed. 159. **Ark.**—*Barton v. State*, 29 Ark. 68; *Baker v. State*, 4 Ark. 56. **Cal.** *People v. Perales*, 141 Cal. 581, 75 Pac. 170; *People v. Silva*, 8 Cal. App. 349, 97 Pac. 202. **Conn.**—*State v. McGee*, 81 Conn. 696, 72 Atl. 141. **D. C.**—*Dufour v. United States*, 37 App. Cas. 497; *Geist v. United States*, 26 App. Cas. 594. **Fla.**—*Douglass v. State*, 53 Fla. 27, 43 So. 424. **Ga.**—*Wingard v. State*, 13 Ga. 396; *Trueheart v. State*, 13 Ga. App. 661, 79 S. E. 755; *Yountans v. State*, 7 Ga. App. 101, 66 S. E. 383. **Ill.**—*McNair v. People*, 89 Ill. 441; *People v. Ellis*, 185 Ill. App. 417. **Ind.**—*State v. Ensley*, 177 Ind. 483, 97 N. E. 113, 1914D, Ann. Cas. 1306; *Strader v. State*, 92 Ind. 376; *McLaughlin v. State*, 45 Ind. 338; *Whitney v. State*, 10 Ind. 404. **Ky.**—*White v. Com.*, 9 Bush 178; *Com. v. Perrigo*, 3 Mete. 5; *Com. v. Magowan*, 1 Mete. 368, 71 Am. Dec. 480; *Com. v. McAtee*, 8 Dana 28; *Sulzer v. Com.*, 4 Ky. L. Rep. 365. **La.**—*State v. John*, 129 La. 208, 55 So. 768. **Md.**—*State v. Edwards*, 124 Md. 592, 92 Atl. 1037; *State v. Nutwell*, 1 Gill 54. **Minn.**—*State v. Gray*, 29 Minn. 142, 12 N. W. 455. **Miss.**—*Keely v. State*, 3 Smed. & M. 518, 525. **Mo.**

fusing any particular right or indulgence which the defendant claims as incident to the nature of the case.⁹⁴

Finally and chiefly this degree of certainty and particularity is also required in order to enable the court to look through the record and decide whether the facts charged are sufficient to support a conviction and to warrant the judgment,⁹⁵ and so as to enable the court,⁹⁶ on

State v. McGinnis, 126 Mo. 564, 29 S. W. 842; *State v. Rouelle*, 137 Mo. App. 620, 119 S. W. 55. **N. J.**—*State v. Spear*, 63 N. J. L. 179, 42 Atl. 810. **N. Y.**—*Biggs v. People*, 8 Barb. 547; *People v. Knapp*, 147 App. Div. 436, 132 N. Y. Supp. 747; *People v. Rouss*, 63 Misc. 135, 118 N. Y. Supp. 433. **N. C.**—*State v. Moore*, 166 N. C. 284, 81 S. E. 294. **Ohio.**—*Du Brul v. State*, 80 Ohio St. 52, 87 N. E. 837. **Okla.** *Slover v. Territory*, 5 Okla. 506, 49 Pac. 1009. **S. C.**—*State v. Shirer*, 20 S. C. 392; *State v. Washington*, 13 S. C. 453. **Tenn.**—*State v. Witherspoon*, 115 Tenn. 138, 90 S. W. 852; *Givens v. State*, 103 Tenn. 648, 652, 55 S. W. 1107; *Clark v. State*, 86 Tenn. 511, 8 S. W. 145; *Luttrell v. State*, 85 Tenn. 232, 1 S. W. 886, 4 Am. St. Rep. 760; *State v. Montgomery*, 7 Baxt. 160; *Bloomer v. State*, 3 Sneed 66. **Tex.** By statutory provision. Penal Code, art. 441; *State v. Dyer*, 41 Tex. 520; *Tucker v. State*, 35 Tex. 113; *State v. Jurgins*, 31 Tex. 588; *State v. Prewitt*, 10 Tex. 310; *Estes v. State*, 10 Tex. 300; *Clepper v. State*, 4 Tex. 242; *Goldstein v. State*, 36 Tex. Crim. 193, 36 S. W. 278; *Runnells v. State*, 34 Tex. Crim. 431, 30 S. W. 1065; *Earl v. State*, 33 Tex. Crim. 570, 28 S. W. 469; *Hammons v. State*, 29 Tex. App. 445, 16 S. W. 99; *Wells v. State*, 4 Tex. App. 20; *Goode v. State*, 2 Tex. App. 520; *Rose v. State*, 1 Tex. App. 400. **Utah.** *State v. Topham*, 41 Utah 39, 123 Pac. 888. **Vt.**—*State v. Webber*, 78 Vt. 463, 62 Atl. 1018. **Wash.**—*State v. Carey*, 4 Wash. 424, 30 Pac. 729. **Wis.**—*Pink v. City of Milwaukee*, 17 Wis. 26; *Allen v. State*, 5 Wis. 329.

[a] "Primarily the purpose of precision in pleading the particulars of a crime is to preclude the possibility of a second prosecution for the same act and at the same time to inform the defendant with reasonable certainty of that which he will be called upon to meet and defend against upon the trial." *People v. Guaragna*, 23 Cal. App. 120, 137 Pac. 279.

[b] It is not required, however, that the indictment be so distinct and minute as to constitute, without oral proof, a bar to a second. *State v. Guernsey*, 9 Mo. App. 312.

94. *McLaughlin v. State*, 45 Ind. 338.

95. **D. C.**—*Geist v. United States*, 26 App. Cas. 594. **Ga.**—*Wingard v. State*, 13 Ga. 396; *Youmans v. State*, 7 Ga. App. 101, 66 S. E. 383. **Ind.** *McLaughlin v. State*, 45 Ind. 338. **Mass.** *Com. v. Slack*, 19 Pick. 304. **Okla.** *Slover v. Territory*, 5 Okla. 506, 49 Pac. 1009.

96. See the following cases: **U. S.** *United States v. Burns*, 54 Fed. 351. **Ala.**—*Clarke v. State*, 117 Ala. 1, 23 So. 671, 67 Am. St. Rep. 157, by statute in Alabama. **Ark.**—*Parker v. State*, 98 Ark. 575, 137 S. W. 253; *De Loney v. State*, 88 Ark. 311, 115 S. W. 138; *Winn v. State*, 55 Ark. 360, 18 S. W. 375. **Cal.**—*People v. O'Brien*, 96 Cal. 171, 31 Pac. 45; *People v. Ah Sing*, 95 Cal. 654, 30 Pac. 796; *People v. Rozelle*, 78 Cal. 84, 20 Pac. 36. **Conn.**—*Rawson v. State*, 19 Conn. 292. **Ga.**—*Wingard v. State*, 13 Ga. 396; *Youmans v. State*, 7 Ga. App. 101, 66 S. E. 383. **Ind.**—*Vogel v. State*, 31 Ind. 64. **Ind. Ter.**—*Tedford v. United States*, 7 Ind. Ter. 254, 104 S. W. 608. **Kan.**—*State v. Garrett*, 78 Kan. 882, 98 Pac. 219. **Ky.**—*Terhune v. Com.*, 144 Ky. 370, 138 S. W. 274, by statute in Kentucky. **Md.**—*State v. Nutwell*, 1 Gill 54. **Mass.**—*Com. v. Wade*, 17 Pick. 395; *Com. v. Maxwell*, 2 Pick. 139. **Minn.**—*State v. Gray*, 29 Minn. 142, 12 N. W. 455. **Mont.**—*State v. Bloor*, 20 Mont. 574, 52 Pac. 611, by statutory provision. **N. H.**—*State v. Gary*, 36 N. H. 359. **N. Y.**—*People v. Rouss*, 63 Misc. 135, 118 N. Y. Supp. 433. **N. C.**—*State v. Green*, 151 N. C. 729, 66 S. E. 564; *State v. Lunsford*, 150 N. C. 862, 64 S. E. 765. **Okla.** *Vickers v. United States*, 1 Okla. Crim. 452, 98 Pac. 467. **S. C.**—*State v.*

conviction, to pronounce the proper judgment, and regulate the appropriate punishment.⁹⁷

These are the tests which will in most cases, determine the sufficiency of the description of the offense in a criminal pleading, so far as particularity and certainty are concerned,⁹⁸ and if the pleading conform thereto, it is sufficient under the modern rules, although it does not

Shirer, 20 S. C. 392; *State v. Washington*, 13 S. C. 453. **Tenn.**—By statutory provision. Shannon's Code, §7080; *State v. Brown*, 3 Heisk. 1.

[a] Though an information, in charging the offense, does not extend to all the details which the utmost certainty might require, if the court can pronounce judgment upon conviction according to the right of the case, that is sufficient. *State v. Garrett*, 78 Kan. 882, 98 Pac. 219.

97. *Wingard v. State*, 13 Ga. 396; *Youmans v. State*, 7 Ga. App. 101, 66 S. E. 383; *McLaughlin v. State*, 45 Ind. 238.

98. *Daniels v. United States*, 196 Fed. 459, 465, 116 C. C. A. 233, 239.

[a] "As we said in *Daniels v. United States*, 196 Fed. 459, 465, 116 C. C. A. 233, 239: 'In such ambiguity as exists, we fail to find any failure to state facts constituting a crime or any tendency to mislead the respondent or any danger that he will be exposed to a second prosecution on account of any of the subject matter; and these are the tests which will, in most cases, determine the sufficiency of the description of the offense as found in an indictment.'" *Ulmer v. United States* (C. C. A.), 219 Fed. 641.

[b] "The cardinal tests of sufficiency of the averments of fact in an indictment are twofold: (a) They must embrace every element of the offense charged and plainly apprise the accused of the proof he must be prepared to meet, and (b) must so state the charge that judgment thereunder can be pleaded in bar of further prosecution for the same offense. These essentials cannot be disregarded, but the rule is settled in the federal jurisdiction that the entire purpose of criminal pleadings, 'to convict the guilty as well as to shield the innocent' (*Evans v. United States*, 153 U. S. 584, 590, 14 Sup. Ct. 934, 38 L. ed. 830), must be observed in considering their sufficiency; and that the test to be applied is not whether the material averments

might have been made more accurate and certain, but whether they plainly embrace in their terms both requirements, of notice of the ultimate facts to be proved against the accused and specification thereof will leave no second prosecution open for the alleged offense; and that, if these requisites are sufficiently stated, the indictment will be upheld, especially after verdict, although lumbered with inaccuracies otherwise, or improper statements not applicable to the issue.'" *Baskin v. United States*, 209 Fed. 740, 126 C. C. A. 464.

[c] The degree of particularity requisite to fairly accomplish these purposes is all that is required in any case. No useless or impracticable standards which may embarrass rather than aid the administration of justice should be required. Averments of the essential elements just suggested which are plain and intelligible to the common understanding are, as against a demurrer, entirely sufficient without regard to their technical accuracy. *Smith v. United States*, 157 Fed. 721, 85 C. C. A. 353.

[d] The true test is not whether the indictment might possibly have been made more certain, but whether it contains every element of the offense intended to be charged and sufficiently apprises the accused of what they must be prepared to meet, and, in case any other proceedings are taken against them for a similar offense, whether the record shows with accuracy to what extent they may plead a former acquittal or conviction. *Horn v. United States*, 182 Fed. 721, 728, 105 C. C. A. 163; *Peters v. United States*, 94 Fed. 127, 36 C. C. A. 105.

[e] "It is true that an indictment should be reasonably certain as to the offense charged in order that the defendant may not be surprised and may be able to prepare to make his defense, and also to enable him to plead a judgment of acquittal or conviction in bar to a subsequent prosecution for the

contain all the phraseology and technical language ordinarily used therein.⁹⁹ Tested by these rules, indictments have been held sufficient in many cases, a few of which are cited in the note.¹

Minor circumstances which are merely incidental to or descriptive of the main fact need only be stated with that degree of particularity that carries knowledge of the offense and bars a future prosecution.²

In framing an indictment, under a statute which denounces a crime based upon the commission of a previous and different crime, the same technical particularity in describing the previous crime is not required as would have been in an indictment charging such original crime.³

b. *Matters of Inducement* are not required to be stated with the same particularity as matters of substance;⁴ but may be in a general

same offense. This is all that a defendant is in reason and justice entitled to. If an indictment is couched in such language as to enable a person of common understanding to know what is intended, it is all that the law requires." *Price v. State*, 9 Okla. Crim. 359, 131 Pac. 1102.

[f] An indictment may contain more than is necessary, or it may be phrased in inapt words, or the sentences may be ungrammatically or awkwardly expressed, or the spelling not conform to approved standards, but if, when considered as a whole, the charge is stated with sufficient clearness and certainty to enable a person of common understanding to know what he is charged with, and to enable the court to pronounce judgment, no error in form of expression will make the indictment bad. *Overstreet v. Com.*, 147 Ky. 471, 144 S. W. 751. See also *Rutland v. Com.*, 160 Ky. 77, 169 S. W. 584.

99. *McHugh v. Territory*, 17 Okla. 1, 86 Pac. 433; *Arnold v. State* (Okla. Crim.), 132 Pac. 1123; *Deen v. State*, 7 Okla. Crim. 150, 122 Pac. 941.

As to use of technical terms and words, see *supra*, IX, C, 2.

1. See the following cases: **U. S.** *New York Central, etc. R. Co. v. United States*, 212 U. S. 481, 497, 29 Sup. Ct. 304, 53 L. ed. 613; *Ulmer v. United States* (C. C. A.), 219 Fed. 641; *Tyomies Pub. Co. v. United States*, 211 Fed. 385, 128 C. C. A. 47. **Ark.**—*Dixon v. State*, 29 Ark. 165. **Fla.**—*Douglass v. State*, 53 Fla. 27, 43 So. 424; *Newton v. State*, 51 Fla. 82, 41 So. 19. **Idaho.**—*State v. Smith*, 25 Idaho 541, 138 Pac. 1107. **Ind.**—*State v. Ensley*,

177 Ind. 483, 97 N. E. 113, Ann. Cas. 1914D, 1306. **Ky.**—*Com. v. Ransdall*, 153 Ky. 334, 155 S. W. 1117. **La.** *State v. Burns*, 130 La. 1018, 58 So. 864; *State v. James*, 120 La. 533, 45 So. 416. **Minn.**—*State v. Sharp*, 121 Minn. 381, 141 N. W. 526. **Miss.** *Sowell v. State*, 102 Miss. 599, 59 So. 848. **Mont.**—*State v. Brown*, 38 Mont. 309, 99 Pac. 954; *State v. Bloor*, 20 Mont. 574, 52 Pac. 611. **Neb.**—*Shevalier v. State*, 85 Neb. 366, 123 N. W. 424. **Okla.**—*Arnold v. State* (Okla. Crim.), 132 Pac. 1123; *Price v. State*, 9 Okla. Crim. 359, 131 Pac. 1102; *Star v. State*, 9 Okla. Crim. 210, 131 Pac. 542; *Hoyle v. State*, 7 Okla. Crim. 342, 123 Pac. 700; *Deen v. State*, 7 Okla. Crim. 150, 122 Pac. 941; *Smythe v. State*, 2 Okla. Crim. 286, 101 Pac. 611. **S. D.**—*State v. Morse*, 150 N. W. 293. **Tex.**—*Zweig v. State* (Tex. Crim.), 171 S. W. 747. **Wis.**—*State v. Brown*, 143 Wis. 405, 127 N. W. 956; *Davis v. State*, 134 Wis. 632, 115 N. W. 150.

2. *State v. Hogreiver*, 152 Ind. 652, 53 N. E. 921, 45 L. R. A. 504; *Pemberton v. State*, 85 Ind. 507; *State v. New*, 36 Ind. App. 521, 76 N. E. 181; *State v. Allen*, 12 Ind. App. 528, 40 N. E. 705; *State v. Smith*, 7 Ind. App. 166, 34 N. E. 127; *Fisher v. State*, 2 Ind. App. 365, 28 N. E. 565.

3. *Newton v. Com.*, 158 Ky. 4, 164 S. W. 108. And see *infra*, IX, D, 8.

4. **Cal.**—*People v. Burns*, 75 Cal. 627, 17 Pac. 646. **Me.**—*State v. Mayberry*, 48 Me. 218. **Mass.**—*Com. v. Reynolds*, 14 Gray 87, 74 Am. Dec. 665. **Minn.**—*State v. Minneapolis Milk Co.*, 124 Minn. 34, 144 N. W. 417; *State v. Barry*, 77 Minn. 128, 79 N. W. 656. **Eng.**—*Rex v. Wade*, 1 B. & Ad. 861,

charge,⁵ or be alleged under a whereas,⁶ or stated participially.⁷

c. *Degree of Certainty.*⁸—Certainty to a certain intent was required at common law.⁹ But this doctrine has been repudiated in some states,¹⁰ no greater particularity being required in an indictment, than in civil pleadings,¹¹ and under the statutes of some of them,¹² cer-

109 Eng. Reprint 861, 20 E. C. L. 721; *Rex v. Soper*, 3 B. & C. 857, 107 Eng. Reprint 951, 10 E. C. L. 386; *Reg. v. Bidwell*, 2 Cox C. C. 298.

5. *Mason v. State*, 55 Ark. 529, 18 S. W. 827 (the court saying that "under the strict rules of the common law as well as under the more liberal rules of the code," such matters "need not be set out in detail or by direct charge, but may be in general terms"); *State v. Barry*, 77 Minn. 128, 136, 79 N. W. 656.

6. *Winn v. State*, 55 Ark. 360, 18 S. W. 375.

[a] *May Be Stated by Way of Recital.*—*Axtell v. State*, 173 Ind. 711, 91 N. E. 354; *Rex v. Crowhurst*, 2 Ld. Raym. 1363, 92 Eng. Reprint 388.

7. *Hewitt v. State*, 171 Ind. 283, 86 N. E. 63.

8. See in general 4 STANDARD PROC. 832.

9. See the following: **U. S.**—*Clement v. United States*, 149 Fed. 305, 313, 79 C. C. A. 243; *United States v. Watkins*, 3 Cranch (C. C.) 441, 28 Fed. Cas. No. 16,649. **Ark.**—*State v. Hand*, 6 Ark. 165. **D. C.**—*Ainsworth v. United States*, 1 App. Cas. 518. **Ind.**—*Lay v. State*, 12 Ind. App. 362, 39 N. E. 768. **Okla.**—*Price v. State*, 9 Okla. Crim. 359, 131 Pac. 1102, common law doctrine not in force in Oklahoma. **Tex.**—*State v. Miller*, 34 Tex. 535.

[a] *Certainty to a certain intent in general* is sufficient. *Rufer v. State*, 25 Ohio St. 464. See also 4 STANDARD PROC. 855.

10. See the following: **U. S.**—*Fitzpatrick v. United States*, 178 U. S. 304, 310, 20 Sup. Ct. 944, 44 L. ed. 1078; *Cannon v. United States*, 116 U. S. 55, 76, 6 Sup. Ct. 278, 29 L. ed. 561. **Okla.**—*Price v. State*, 9 Okla. Crim. 359, 131 Pac. 1102. **Tex.**—*State v. Miller*, 34 Tex. 535. In the latter case, the court said: "The strict rule of the common law requiring 'certainty to a certain intent in every particular,' is not the rule under our law."

[a] Indictment need not be "cer-

tain to a certain intent in every particular." *State v. Sloan*, 67 N. C. 357.

11. *Allen v. State* (Ind.), 107 N. E. 471; *State v. Ensley*, 177 Ind. 483, 97 N. E. 113, Ann. Cas. 1914D, 1306; *Agar v. State*, 176 Ind. 234, 94 N. E. 819; *Brunaugh v. State*, 173 Ind. 483, 90 N. E. 1019; *Lane v. State*, 151 Ind. 511, 51 N. E. 1056; *State v. Sarlls*, 135 Ind. 195, 34 N. E. 1129; *Nichols v. State*, 28 Ind. App. 674, 63 N. E. 783; *Sherban v. Com.*, 8 Watts (Pa.) 212, 34 Am. Dec. 460.

[a] "The certainty in alleging an element in a criminal charge need not be greater than in a civil action. The allegations need only be certain to a common intent." *Allen v. State* (Ind.), 107 N. E. 471.

[b] "Indictments require only the same certainty as declarations, namely, certainty to a common intent in general, and not certainty in every particular as is required in pleading an estoppel." *Sherban v. Com.*, 8 Watts (Pa.) 212, 34 Am. Dec. 460.

12. **Ind.**—*State v. Ensley*, 177 Ind. 483, 97 N. E. 113, Ann. Cas. 1914D, 1306; *Brunaugh v. State*, 173 Ind. 483, 90 N. E. 1019; *Lane v. State*, 151 Ind. 511, 51 N. E. 1056; *O'Brien v. State*, 125 Ind. 38, 25 N. E. 137, 9 L. R. A. 323; *Whitney v. State*, 10 Ind. 404; *Lay v. State*, 12 Ind. App. 362, 39 N. E. 768. **Tenn.**—*Dean v. State*, Mart. & Y. 127. **Wis.**—*State v. Brown*, 143 Wis. 405, 127 N. W. 956; *State v. Downer*, 21 Wis. 274.

[a] In *State v. Brown*, 143 Wis. 405, 127 N. W. 956, the court said: "It has never been held in this state that certainty to a certain intent in particular was required in criminal pleading, although such certainty is, or at least formerly was, required in many jurisdictions. 1 Bouv. Law Dict. (Rawle's Rev.) 300, and cases cited. In *State v. Downer*, 21 Wis. 274, it was held that 'certainty in charging the offense to a common intent is all that is required by the rules of pleading in regard to indictments.' Such certainty is attained 'by a form of state-

tainty to a common intent is all that is required. An indictment must, however, be as certain as a declaration.¹³

As Governed by Offense Charged.—The same degree of certainty and particularity is not required in indictments for misdemeanors, as is required in indictments for felonies.¹⁴

As Governed by Pleading.—The same certainty is required in the allegations of an information or affidavit as in an indictment.¹⁵

5. Disjunctive and Alternative Allegations.—The certainty required in an indictment or information precludes an alternative statement in making affirmative averments and requires the use of the conjunctive "and" and not the disjunctive "or."¹⁶ Thus, if a statute

ment in which words are used in their ordinary meaning, though by argument or inference, they may be made to bear a different one." 1 Bouv. Law Dict. (Rawle's Rev.) 299."

13. *Ark.*—*State v. Hand*, 6 *Ark.* 165. *Ind.*—*State v. McCormack*, 2 *Ind.* 305. *Eng.*—*Rex v. Layley*, 2 *Str.* 904. 93 *Eng. Reprint* 930; *Rex v. Greep*, *Comb.* 459, 90 *Eng. Reprint* 591.

[a] For all rules in civil pleading apply to criminal accusations. *State v. Hand*, 6 *Ark.* 165; *State v. McCormack*, 2 *Ind.* 305. And see *Noble v. State*, 39 *Ala.* 73, wherein it was said that "as high a degree of certainty is required in criminal pleadings as in civil."

14. *U. S.*—*United States v. Schimer*, 5 *Biss.* 185, 27 *Fed. Cas.* No. 16,229. *Ark.*—*State v. Parnell*, 40 *Ark.* 506, 63 *Am. Dec.* 72. *Ky.*—*Ruark v. Com.*, 150 *Ky.* 47, 150 *S. W.* 5. *Mo.*—*State v. Robinson*, 172 *S. W.* 3. *State v. Hogle*, 156 *Mo. App.* 367, 137 *S. W.* 21. *Tenn.*—*State v. Pennington*, 3 *Head* 119; *Taylor v. State*, 6 *Humph.* 285; *Martin v. State*, 6 *Humph.* 204; *Thompson v. State*, 5 *Humph.* 148; *Samuelin v. State*, 2 *Humph.* 315. *Wis.*—*Gallagher v. State*, 26 *Wis.* 423, wherein the court said that the rule is "well settled."

[a] A substantial description of the offense is all that is required in an indictment for a misdemeanor. *Miss.*—*Sowell v. State*, 102 *Miss.* 539, 59 *So.* 548. *Tenn.*—*Gilbro v. State*, 1 *Humph.* 534. *Wis.*—*Gallagher v. State*, 26 *Wis.* 423; *Ford v. State*, 3 *Fin.* 449, 4 *Chand.* 148.

15. *People v. Weinstein*, 255 *Ill.* 530, 99 *N. E.* 589; *Gould v. People*, 89 *Ill.* 216; *Parris v. People*, 76 *Ill.* 274; *People v. Miller*, 178 *Ill. App.* 292; *Strader*

v. State, 92 *Ind.* 376; *Sovine v. State*, 85 *Ind.* 576; *State v. Beebe*, 83 *Ind.* 171.

Certainty required in a preliminary complaint or affidavit, see *supra*, this volume, p. 135.

16. *Ala.*—*Hornsby v. State*, 94 *Ala.* 55, 10 *So.* 522; *Allred v. State*, 89 *Ala.* 112, 8 *So.* 56; *Horton v. State*, 53 *Ala.* 488; *Burgess v. State*, 44 *Ala.* 190. *Ark.*—*Thompson v. State*, 37 *Ark.* 408; *Cooper v. State*, 37 *Ark.* 412; *Cooper v. State*, 37 *Ark.* 421. *Cal.*—*People v. Hood*, 6 *Cal.* 236. *Conn.*—*Smith v. State*, 19 *Conn.* 499. *Ga.*—*Henderson v. State*, 113 *Ga.* 1148, 39 *S. E.* 446; *Eaves v. State*, 113 *Ga.* 749, 39 *S. E.* 318; *Grantam v. State*, 89 *Ga.* 121, 14 *S. E.* 892; *Sanders v. State*, 86 *Ga.* 717, 12 *S. E.* 1058; *Jackson v. State*, 76 *Ga.* 551; *Whitaker v. State*, 11 *Ga. App.* 208, 75 *S. E.* 258; *Lawrence v. State*, 10 *Ga. App.* 786, 74 *S. E.* 300. *Ill.*—*People v. Ellis*, 185 *Ill. App.* 417. *Ind.*—*Regadanz v. State*, 171 *Ind.* 387, 86 *N. E.* 449; *State v. Sarlls*, 135 *Ind.* 195, 34 *N. E.* 1129. *Kan.*—*State v. Seeger*, 65 *Kan.* 711, 70 *Pac.* 599. *Ky.*—*Com. v. Perrigo*, 3 *Metz.* 5. *La.*—*State v. Sullivan*, 125 *La.* 560, 51 *So.* 588. *Me.*—*State v. Singer*, 101 *Me.* 299, 64 *Atl.* 586; *State v. Moran*, 40 *Me.* 129. *Mass.*—*Com. v. Grey*, 2 *Gray* 501, 61 *Am. Dec.* 476. *N. H.*—*State v. Garv.*, 36 *N. H.* 359. *N. J.*—*State v. Hatfield* (*N. J. L.*), 93 *Atl.* 677; *State v. Flynn*, 76 *N. J. L.* 473, 72 *Atl.* 236. *N. Y.*—*People ex rel. Callen v. Schatz*, 50 *App. Div.* 544, 64 *N. Y. Supp.* 127; *People v. Gilkinson*, 4 *Park. Crim.* 26. *N. C.*—*State v. Harper*, 64 *N. C.* 129. *R. I.*—*State v. Carver*, 12 *R. I.* 285. *S. C.*—*State v. O'Bannon*, 1 *Bailey* 144. *Tenn.*—*Robeson v. State*, 3 *Heisk.* 266. *Tex.*—*Potter v. State*, 39 *Tex.* 388; *Hunter*

makes it a crime to do this or that, mentioning several things disjunctively, while all may, in general, be charged in a single count,¹⁷ provided they are not repugnant to each other,¹⁸ the conjunctive "and" must be used where "or" occurs in the statute, else the pleading will be defective as being uncertain.¹⁹ Not every alternative statement, however, will vitiate the indictment. If the disjunctive and

v. State (Tex. Crim.), 166 S. W. 164; *Harris v. State*, 58 Tex. Crim. 523, 126 S. W. 890; *Countryman v. State*, 52 Tex. Crim. 23, 105 S. W. 181; *Taylor v. State*, 50 Tex. Crim. 183, 95 S. W. 119. **Vt.**—*State v. Dyer*, 67 Vt. 690, 32 Atl. 814. **W. Va.**—*State v. Miller*, 68 W. Va. 38, 69 S. E. 365. **Wis.**—*Clifford v. State*, 29 Wis. 327. **Eng.**—*Rex v. Sadler*, 18 E. C. L. 766. **Can.**—*Reg. v. Patterson*, 27 U. C. Q. B. 142.

[a] An indictment is subject to demurrer if the descriptive terms relating to any material allegation are set forth in an alternative form. *Whitaker v. State*, 11 Ga. App. 208, 75 S. E. 258. As to method of taking objection generally, see *infra*, XIV.

[b] Illustrations.—(1) Indictments containing disjunctive allegations as that accused murdered or caused to be murdered, forged or caused to be forged, burned or caused to be burned, conveyed or caused to be conveyed (*People v. Tomlinson*, 35 Cal. 503), (2) sold spirituous or intoxicating liquors (**Ga.**—*Grantham v. State*, 89 Ga. 121, 14 S. E. 892. **Mass.**—*Com. v. Grey*, 2 Gray 501, 61 Am. Dec. 476. **W. Va.**—*Cunningham v. State*, 5 W. Va. 508. *Contra*, *Thomas v. Com.*, 90 Va. 92, 17 S. E. 788), (3) or kept or deposited certain intoxicating liquors intended for unlawful sale in a certain place, or by some other person with his consent (*State v. Moran*, 40 Me. 129), (4) or sold "wines, spirituous liquor or other intoxicating beverage" to a common drunkard (*Smith v. State*, 19 Conn. 499), (5) or did libel by printing and publishing or causing to be printed and published (*State v. Singer*, 101 Me. 299, 64 Atl. 586), (6) or that defendant shot "with a gun or a pistol" (*Whitaker v. State*, 11 Ga. App. 208, 75 S. E. 258), (7) or did burn or cause to be burned, a certain dwelling house (*People v. Hood*, 6 Cal. 236), (8) or "did kill, take and destroy, or attempt to kill, take or destroy," certain fish (*State v. Flynn*, 76 N. J. L. 473, 72

Atl. 296; *Rex v. Sadler*, 18 E. C. L. 766) are bad for uncertainty.

As to certainty generally, see *supra*, IX, C, 4.

17. **U. S.**—*Lehman v. United States*, 127 Fed. 41, 61 C. C. A. 577. **Ala.**—*State v. Whitted*, 3 Ala. 102. **Ark.**—*Thompson v. State*, 37 Ark. 408. **So.**—*Strobhar v. State*, 55 Fla. 167, 47 So. 4; *Bradley v. State*, 20 Fla. 738; *King v. State*, 17 Fla. 183. **Ga.**—*Eaves v. State*, 113 Ga. 749, 39 S. E. 318; *Southern Exp. Co. v. State*, 1 Ga. App. 700, 58 S. E. 67. **Ill.**—*Blemer v. People*, 76 Ill. 265; *People v. Jackson*, 181 Ill. App. 713; *People v. Mackin*, 159 Ill. App. 125. **Ind.**—*State v. Sarlis*, 135 Ind. 195, 34 N. E. 1129; *Marshall v. State*, 123 Ind. 128, 23 N. E. 1141; *Douglass v. State*, 18 Ind. App. 289, 48 N. E. 9. **Ia.**—*State v. Corwin*, 151 Iowa 420, 131 N. W. 659. **Mo.**—*State v. Flynn*, 258 Mo. 211, 167 S. W. 516; *State v. Harroun*, 199 Mo. 258, 97 S. W. 866. **N. Y.**—*People v. Adams*, 17 Wood. 475. **N. C.**—*State v. Van Doran*, 199 N. C. 864, 14 S. E. 32.

[a] An indictment charging defendant with embezzlement as "agent and servant" of another is not bad for uncertainty. *Strobhar v. State*, 55 Fla. 167, 47 So. 4.

18. **U. S.**—*Lehman v. United States*, 127 Fed. 41, 61 C. C. A. 577. **Ia.**—*State v. Corwin*, 151 Iowa 420, 131 N. W. 659. **Mo.**—*State v. Flynn*, 258 Mo. 211, 167 S. W. 516; *State v. Harroun*, 199 Mo. 258, 97 S. W. 866.

19. **Ark.**—*Cooper v. State*, 37 Ark. 412, 418; *Thompson v. State*, 37 Ark. 408. **Cal.**—*People v. Tomlinson*, 35 Cal. 503; *People v. Ah Woo*, 28 Cal. 205; *People v. Frank*, 28 Cal. 507, 513. **Conn.**—*Smith v. State*, 19 Conn. 499. **Ga.**—*Eaves v. State*, 113 Ga. 749, 39 S. E. 318; *Brand v. State*, 112 Ga. 25, 37 S. E. 100; *Sanders v. State*, 86 Ga. 717, 12 S. E. 1058; *Cooper v. State*, 9 Ga. App. 877, 72 S. E. 436; *Lepinsky v. State*, 7 Ga. App. 285, 66 S. E. 965; *Southern Exp. Co. v. State*, 1 Ga. App. 700, 58 S. E. 67. **Ill.**—*Blemer v. Peo-*

all that follows can be rejected as surplusage, the defect does not vitiate the indictment.²⁰ The objection has generally been confined to the statement of the offense,²¹ and rests on the ground that it does not appear what particular offense the defendant is required to answer.²² Accordingly, if the matter charged in the alternative is not in respect to matters descriptive of the offense,²³ as where the matter charged disjunctively is matter of aggravation only,²⁴ or the matter following the disjunctive can be properly construed to be descriptive of that which precedes it, and not an independent allegation,²⁵ to use the disjunctive "or" does not vitiate the indictment.

ple, 76 Ill. 265; *People v. Jackson*, 181 Ill. App. 713. **Ia.**—*State v. Corwin*, 151 Iowa 420, 131 N. W. 659; *State v. Hubbell Son & Co.*, 137 Iowa 570, 115 N. W. 232. **Mo.**—*State v. Flynn*, 258 Mo. 211, 223, 167 S. W. 516; *State v. Nieuhaus*, 217 Mo. 332, 117 S. W. 73; *State v. Harroun*, 199 Mo. 258, 97 S. W. 866. **Tex.**—*Hunter v. State* (Tex. Crim.), 166 S. W. 164; *Walker v. State* (Tex. Crim.), 151 S. W. 318. **Wash.** *State v. Pettit*, 74 Wash. 510, 133 Pac. 1014. **W. Va.**—*State v. Miller*, 68 W. Va. 38, 69 S. E. 365.

[a] **On or About.**—"It was unquestionably the common-law rule that such an allegation—"on or about"—was bad, and an indictment or complaint and information so charging insufficient. . . . The purpose of the said rule at common law, as stated by textbook writers and the decisions of this court, that an accused had the right to know by the indictment with what offense he was charged, and, when the indictment charged in the alternative, he could not and did not know this." *Hunter v. State* (Tex. Crim.), 166 S. W. 164.

20. **Conn.**—*State v. Corrigan*, 24 Conn. 286. **Ga.**—*Henderson v. State*, 113 Ga. 1148, 39 S. E. 446. **Ind.**—*State v. Callahan*, 124 Ind. 364, 24 N. E. 732; *McGregor v. State*, 16 Ind. 9. **N. C.** *State v. Harper*, 64 N. C. 129. **Tex.** *Byrd v. State* (Tex. Crim.), 162 S. W. 360. **W. Va.**—*State v. Newsom*, 13 W. Va. 859.

21. *Barnett v. State*, 54 Ala. 579.

[a] **Only where it renders the statement of the offense uncertain** is the use of the disjunctive form fatal. *Bonneville v. State*, 53 Wis. 680, 11 N. W. 427. See also *State v. Van Doran*, 109 N. C. 864, 14 S. E. 32.

22. *Barnett v. State*, 54 Ala. 579.

23. **Ala.**—*Barnett v. State*, 54 Ala. 579. **Conn.**—*State v. Corrigan*, 24 Conn.

286. **Ga.**—*Henderson v. State*, 113 Ga. 1148, 39 S. E. 446. **Ind.**—*State v. Callahan*, 124 Ind. 364, 24 N. E. 732. **Me.** *State v. Barnes*, 32 Me. 530, distinguished in *State v. Singer*, 101 Me. 299, 64 Atl. 586. **Mo.**—*State v. Flint*, 62 Mo. 393. **Pa.**—*Scott v. Com.*, 6 Serg. & R. 224, that defendant did "bite or cut off" the ear, in an indictment for assault and battery. **S. C.**—*State v. Lark*, 64 S. C. 350, 42 S. E. 175. **Tex.** *Gaines v. State*, 46 Tex. Crim. 212, 78 S. W. 1076.

[a] To charge defendants as members of a corporation or an association does not render the indictment bad. *Barnett v. State*, 54 Ala. 579.

24. *Scott v. Com.*, 6 Serg. & R. (Pa.) 224.

25. *Henderson v. State*, 113 Ga. 1148, 39 S. E. 446.

[a] To charge betting at a game known as "craps," which is a game of "hazard or skill," does not render indictment bad. *State v. Hester*, 48 Ark. 40, 2 S. W. 339.

[b] The rule seems to be that if the disjunctive averment need not be supported by proof, or if the proof which is to be admitted thereunder is the same as that which would be admitted under the immediately preceding averment, or something which would be purely explanatory thereof, the insertion of the disjunctive allegation will not render the pleading defective. *Henderson v. State*, 113 Ga. 1148, 39 S. E. 446.

[c] **Limits of Rule.**—"The reason for discarding the disjunctive and substituting the conjunctive, was that usually the alternative charge left the defendant in such doubt as to the nature of the offence which he was held to answer, that he could not intelligently prepare his defence. . . . But upon the maxim, cessante ratione

This rule that the conjunctive form of averment must be adopted, does not apply to cases where the words used in the alternative are synonymous,²⁶ or where the word "or" in a statute, is used in the sense of "to-wit," that is, in explanation of what precedes²⁷ and mak-

cessat et ipsa lex, the better rule seems now to be that 'or' is only fatal when the use of it renders the statement of the offence uncertain, and not so when one term is used only as explaining or illustrating the other, or where the language of the law makes either an attempt or procurement of an act, or the act itself, in the alternative, indictable. 1 Wharton, C. L., §294; United States v. Potter, 6 McLean 186. Where it is manifest that the defendant cannot be embarrassed by uncertainty in preparing his defence by reason of the use of the disjunctive instead of the conjunctive, if the form ordinarily used in drawing the indictment should be treated as an established precedent essential in all cases, it would be an arbitrary and unreasonable rule." State v. Van Doran, 109 N. C. 864, 866, 14 S. E. 32.

26. Ark.—Blais v. State, 94 Ark. 327, 126 S. W. 1064. Cal.—People v. Tomlinson, 35 Cal. 503. Conn.—Barth v. State, 18 Conn. 432, store and shop. Ga.—Cobb v. State, 45 Ga. 11 ("play or roll billiards"); Whitaker v. State, 11 Ga. App. 208, 75 S. E. 258. Kan.—Wessels v. Territory, 1 Kan. 525, "two steers" or "working cattle." Mo.—State v. Snyder, 182 Mo. 462, 82 S. W. 12; State v. Ellis, 4 Mo. 474. Pa.—Com. v. McDermott, 37 Pa. Super. 1. Tex.—White v. State (Tex. Crim.), 157 S. W. 152. Vt.—State v. Gilbert, 13 Vt. 647, wherein horse stolen was alleged to have been of a "bay or brown" color.

[a] Reason.—(1) In such case, there is but one act described (People v. Tomlinson, 35 Cal. 503), (2) but one offense being laid as committed in different ways. Thompson v. State, 37 Ark. 408.

[b] To charge the forgery of a "writing or paper" in the alternative does not render the indictment bad, as the terms import the same thing, a written instrument. Blais v. State, 94 Ark. 327, 126 S. W. 1064.

[c] Mere Reiteration.—The word "or" is sometimes used to introduce a reiteration of the same idea, and

to express it in a somewhat different way, in which case it is not objectionable. Thus for an indictment to charge that liquor was sold "to a minor or to a person under twenty-one years," is not to charge the crime in the alternative, for the manifest meaning of the language in that case is simply to make the last clause explanatory of the first. Whitaker v. State, 11 Ga. App. 208, 75 S. E. 258.

[d] Examples of Synonymous Terms Disjunctively Charged.—(1) "To a minor or to a person under twenty-one years," in an indictment for selling liquor to minor (Whitaker v. State, 11 Ga. App. 208, 75 S. E. 258), (2) or "store or shop" in indictment for statutory burglary (Barth v. State, 18 Conn. 432), (3) or "violent or tumultuous" in an indictment for unlawful assembly (Bonneville v. State, 53 Wis. 680, 11 N. W. 427), (4) or on the trial of the "cause or issue" in an indictment for perjury (State v. Bishop, 1 D. Chip. [Vt.] 120), (5) or an indictment for practicing medicine without a license and charging that defendant did then and there in the manner herein stated, unlawfully treat a "disease or disorder," to-wit, for tuberculosis and constipation, etc., is not objectionable for uncertainty. White v. State (Tex. Crim.), 157 S. W. 152. (6) So, an allegation that the accused sold A "two shares of stock, or what purported to be two shares of stock" does not subject the indictment to a demurrer based on this ground; the pleader by the use of the additional expression "or what purported to be two shares of stock," merely amplified his previous allegation, and made it more certain. Whitaker v. State, 11 Ga. App. 208, 75 S. E. 253.

27. Ill.—Blemer v. People, 76 Ill. 265; People v. Jackson, 181 Ill. App. 713. Mass.—Brown v. Com., 8 Mass. 59. N. C.—State v. Harper, 64 N. C. 129. Wis.—Clifford v. State, 29 Wis. 327.

[a] If the disjunctive can be properly construed to be synonymous with to-wit, the alternative allegation will

ing it signify the same thing. The use of the word "or" in making negative averments is also proper.²³

Some statutes provide that offenses of the same character and subject to the same punishment may be charged together in the alternative in the same count,²⁹ and are constitutional.³⁰ Under such statutes offenses of the same character, but not subject to the same punishment cannot be charged in the alternative,³¹ and if it is sought to charge two separate offenses in the same count they must be charged in the alternative not in the conjunctive.³² Alternative averments, however, must each present an indictable offense; and if in such an indictment, one or more of the alternatives expressed charges no offense, then the indictment is bad in toto;³³ and unless each separate alternative charged is alleged with certainty, particularity, and definiteness, the indictment is defective.³⁴ Statutes sometimes provide that when an

not render the indictment bad. *Henderson v. State*, 113 Ga. 1148, 39 S. E. 446.

[b] If the gist of the offense is the failure to do something which it is the defendant's duty to do, such as the practice of medicine or dentistry without taking out a license or certificate, the allegation should follow the statute and use the word "or," because the doing of either act would excuse defendant, and he would not be required to do both. *Byrd v. State* (Tex. Crim.), 162 S. W. 360.

28. *People v. Ellis*, 185 Ill. App. 417; *State v. Carver*, 12 R. I. 285.

29. *Sims v. State*, 135 Ala. 61, 33 So. 162; *Lowe v. State*, 134 Ala. 154, 32 So. 273; *McClellan v. State*, 118 Ala. 122, 23 So. 732; *Noble v. State*, 59 Ala. 78; *Horton v. State*, 53 Ala. 488.

[a] The purpose of the statute is to dispense with a multiplicity of counts. *Thomas v. State*, 111 Ala. 51, 20 So. 617; *Horton v. State*, 53 Ala. 488.

30. *Sampson v. State*, 107 Ala. 76, 18 So. 207; *Noble v. State*, 59 Ala. 73; *Horton v. State*, 53 Ala. 488; *Burdine v. State*, 25 Ala. 60.

31. *Barber v. State*, 34 Ala. 213.

32. *Thomas v. State*, 111 Ala. 51, 20 So. 617; *Burgess v. State*, 44 Ala. 190.

[a] If the indictment charges the injury to a "mare and an ox" it must be proved they were injured at one and the same time or the variance will be fatal. *Burgess v. State*, 44 Ala. 190.

[b] A conviction can be claimed on only one specific offense, (1) however, the law leaving it to the jury under all the evidence, of which specific of-

fense charged, the defendant is guilty (*Allison v. State*, 1 Ala. App. 206, 55 So. 453), (2) but the state cannot be put to an election as to which crime it will ask for a conviction. *Carleton v. State*, 100 Ala. 130, 14 So. 472; *Allison v. State*, 1 Ala. App. 206, 55 So. 453.

As to election generally, see *infra*, XVI.

33. *State v. Nix*, 165 Ala. 126, 51 So. 754; *Smith v. State*, 142 Ala. 14, 39 So. 329; *Hornsby v. State*, 94 Ala. 55, 10 So. 522; *Horton v. State*, 53 Ala. 493; *Dix v. State*, 8 Ala. App. 338, 62 So. 1007; *Abercrombie v. State*, 8 Ala. App. 326, 62 So. 966; *Couch v. State*, 6 Ala. App. 43, 60 So. 539.

[a] To charge selling of spirituous, venous or "maltous" liquors instead of malt liquors does not render indictment demurrable within above rule. *Couch v. State*, 6 Ala. App. 43, 60 So. 539.

[b] Under statute making it an offense to override, overload, deprive of necessary sustenance, cruelly beat, mutilate or cruelly kill any animal, an indictment charging that defendant did override, overload, deprive of necessary sustenance, cruelly beat, mutilate or kill a mule is bad in toto as "cruelly" does not qualify the word "kill." *Abercrombie v. State*, 8 Ala. App. 326, 62 So. 966.

34. *Rogers v. State*, 117 Ala. 192, 23 So. 82; *Pickett v. State*, 60 Ala. 77; *Noble v. State*, 59 Ala. 73; *Dix v. State*, 8 Ala. App. 338, 62 So. 1007.

[a] This defect cannot be cured by an election to prosecute only on the alternative averments charging an of-

act is criminal if producing different results, such results may be charged in the alternative;³⁵ or provide that where offenses may be committed by different means it is permissible to charge the same in the alternative,³⁶ but the pleader is not compelled to use the alternative form of expression.³⁷ Nor does the latter statute authorize the charging of different offenses in the same count.³⁸

6. Repugnancy.³⁹—If two material averments in an indictment are repugnant to each other the indictment is fatally defective.⁴⁰ Thus an indictment charging a statutory offense and then containing

fense, as this would amount to an amendment of the indictment. *Dix v. State*, 8 Ala. App. 338, 62 So. 1007.

As to definiteness, certainty, and particularity, see *supra*, IX, C, 4.

35. Ala. Code, 1907, §7150.

36. Ala.—Code, 1907, §7149; *Dudley v. State*, 64 So. 309; *Fitzpatrick v. State*, 169 Ala. 1, 53 So. 1021; *Reynolds v. State*, 92 Ala. 41, 9 So. 398; *Wilson v. State*, 84 Ala. 426, 4 So. 383; *Allison v. State*, 1 Ala. App. 206, 55 So. 453. Ia.—*State v. Watrous*, 13 Iowa 489. Ky.—Com. v. *Lowe*, 116 Ky. 335, 76 S. W. 119. Minn.—*State v. Gray*, 29 Minn. 142, 12 N. W. 455, under Gen. St., 1878, ch. 108, §6. Tenn.—Shannon's Code, §7084; *Handaman v. State*, 3 Heisk. 134, note. Tex.—Penal Code, §461; *Hunter v. State* (Tex. Crim.), 166 S. W. 164. Wash.—*State v. Pettit*, 74 Wash. 510, 133 Pac. 1014, under Rem. & Ball. Ann. Codes & St., §2059.

[a] It is permissible to charge larceny (1) by color and aid of false pretenses, and also as bailee or trustee (*State v. Pettit*, 74 Wash. 510, 519, 133 Pac. 1014), (2) or burglary with intent to steal or to commit rape (*Dismuke v. State*, 83 Ala. 287, 3 So. 671), (3) or killing by striking deceased on the head or by choking him with a piece of fuse or cord (*Wilson v. State*, 84 Ala. 426, 4 So. 383), (4) or killing by stabbing with a knife or by shooting him with a gun. *Dudley v. State* (Ala.), 64 So. 309.

37. *State v. Watrous*, 13 Iowa 489.

38. *Handaman v. State*, 3 Heisk. (Tenn.) 134, note.

39. Repugnancy generally, see the title "Repugnancy."

40. U. S.—*United States v. Grimm*, 45 Fed. 558. Ala.—*State v. Mahan*, 2 Ala. 340. Ark.—*State v. Hand*, 6 Ark. 165, 42 Am. Dec. 689. Fla.—*Burtler v. State*, 25 Fla. 347, 6 So. 67. Ga.—*Werner v. State*, 51 Ga. 426. Ind.—*State*

v. Bracken, 152 Ind. 565, 53 N. E. 838; *Keller v. State*, 51 Ind. 111; *Dias v. State*, 7 Blackf. 20, 39 Am. Dec. 448. Mass.—Com. v. *Lawless*, 101 Mass. 32. Minn.—See *State v. Brin*, 30 Minn. 522, 16 N. W. 406; *State v. Gray*, 29 Minn. 142, 12 N. W. 455. Mo.—*State v. Hayes*, 24 Mo. 358; *Jane v. State*, 3 Mo. 61; *State v. Hardwick*, 2 Mo. 226. N. H.—*State v. Horan*, 64 N. H. 548, 15 Atl. 20. N. Y.—*People v. Kane*, 43 App. Div. 472, 61 N. Y. Supp. 195, 632, 14 N. Y. Crim. 305, *affirmed*, 161 N. Y. 380, 55 N. E. 946; *People v. Wise*, 3 N. Y. Crim. 303. Tex.—*State v. Chinn*, 29 Tex. 498; *Davis v. State*, 60 Tex. Crim. 108, 131 S. W. 315; *Hickman v. State*, 44 Tex. Crim. 533, 72 S. W. 587. Vt.—*State v. Haven*, 59 Vt. 399, 9 Atl. 841; *State v. Temple*, 38 Vt. 37. Wyo.—*McCann v. United States*, 2 Wyo. 274.

[a] Illustrations.—(1) An indictment charging fraudulent issue of a blank certificate of ownership of certain shares of stock of the following "tenor" is fatally repugnant as a blank certificate cannot purport ownership or have a tenor (*State v. Haven*, 59 Vt. 399, 9 Atl. 841); (2) so is one charging that defendant by one and the same act embezzled and stole the same property. *McCann v. United States*, 2 Wyo. 274. (3) An indictment for forging a writing is fatally defective which describes it by saying "purporting to be signed by the president and directors," and setting out the forged writing *verbatim*, upon the face of which it does not appear to have been by order of the president and directors. *State v. Shawley*, 5 Hayw. (Tenn.) 256. (4) To charge that the defendant "willfully" and with "culpable negligence" killed deceased (*State v. Lockwood*, 119 Mo. 163, 24 S. W. 1015) renders the indictment fatally inconsistent.

[b] Repugnancy between the re-

allegations showing an offense not within the statute,⁴¹ or charging an offense against a person by his Christian name and alleging his true Christian name is unknown,⁴² or repugnant as to the time,⁴³ or place of the commission of the offense,⁴⁴ is fatally defective. An indictment is repugnant where it charges defendant with the commission of the act as well as being an accessory before the fact,⁴⁵ except where the statute has abolished the distinction between principals and accessories.⁴⁶ An indictment is not repugnant or ambiguous because showing the commission of the act in an improbable, though not physically impossible manner.⁴⁷ Other illustrations of allegations held not to be repugnant may be found in the note.⁴⁸

citals of a deed of release set forth in an indictment and alleged to have been forged, and the allegations of the indictment in respect thereto does not vitiate it, however. *State v. Sharpless*, 212 Mo. 176, 111 S. W. 69.

41. *State v. Mahan*, 2 Ala. 340.

42. *Jones v. State*, 63 Ala. 27.

[a] To charge that (1) deceased's name was unknown, but reciting that he is "*supposed*" to be a designated person does not render the indictment bad, however. *Reese v. State*, 90 Ala. 624, 8 So. 818. (2) So also, an indictment charging Matt Taylor, whose Christian name is to the grand jury otherwise unknown with a specified offense, is sufficient. The allegation that his Christian name is unknown may be rejected as surplusage. *Taylor v. State*, 100 Ala. 68, 14 So. 875.

43. *State v. Austin*, 113 Mo. 538, 21 S. W. 31; *State v. Hayes*, 24 Mo. 358; *State v. Temple*, 38 Vt. 37.

[a] To charge the commission of a felony a day later than the compounding thereof renders indictment repugnant. *State v. Dandy*, 1 Brev. (S. C.) 395.

44. *United States v. Dow*, Taney 34, 25 Fed. Cas. No. 14,990.

[a] **Store and Shop.**—An indictment alleged that the prisoner "broke and entered the store of one Merrill," and certain goods "in the shop aforesaid, then and there being, then and there in the shop aforesaid, feloniously did steal, take and carry away." The words "store" and "shop" as used in a statute making it larceny to break and enter any shop or store, were not synonymous, that the word "shop" being descriptive of the place where the larceny was committed, could not be rejected as surplusage, and that the

demurrer was well taken. *State v. Canney*, 19 N. H. 135.

45. *State v. Sales*, 30 La. Ann. 916.

46. *State v. Stacy*, 103 Mo. 11, 15 S. W. 147.

47. *Evans v. State*, 58 Ark. 47, 22 S. W. 1026; *Coates v. People*, 72 Ill. 303, wherein three persons were charged to have the same stick in their several right hands inflicting the wound causing death.

[a] To charge an assault with intent to kill with three weapons, a pair of tongs, a hammer and an axe handle does not charge an impossible act. *State v. McDonald*, 67 Mo. 13.

48. **The following have been held not to be repugnant allegations:** (1) An indictment charging defendant who was the assistant financial agent of the state penitentiary, with misappropriation of funds, as an officer of the government and a clerk and employe of the financial agent (*Busby v. State*, 51 Tex. Crim. 289, 103 S. W. 638), (2) or charging the acceptance of a bribe to vote for "a question which was and might be by law brought before" the defendant as state senator (*State v. Smalls*, 11 S. C. 262), (3) or describing a letter sent through mail as "letter and communication" (*Larison v. State*, 49 N. J. L. 256, 9 Atl. 700, 60 Am. Rep. 606), (4) or charging larceny of a specified sum in bank notes usually known as green backs (*State v. Hockenberry*, 30 Iowa 504), (5) to charge that defendant did "remove and destroy a certain fence" (*Phillips v. State*, 29 Tex. 226), (6) or utter a false, forged and counterfeit bank note. *Mackey v. State*, 3 Ohio St. 362; *Stoughton v. State*, 2 Ohio St. 562.

[a] There is no repugnancy between the purport and tenor clauses as to the

Statutes sometimes provide that repugnancy in an indictment shall not vitiate the same if sufficient be alleged to show the offense and person charged,⁴⁹ in which case, unless the indictment or information contains matter which if true, would constitute a legal justification or bar to the prosecution, repugnancy does not vitiate the same.⁵⁰

If the repugnant allegation may be rejected as surplusage, the indictment is, of course, not vitiated thereby,⁵¹ especially under statutes providing that the omission or insertion of words of surplusage or words not necessary to be proved shall not vitiate an indictment.⁵² Thus an indictment is not rendered bad because of repugnancy in regard

official status and functions of the officer administering the oath where the purport clause describes the officer as justice of the peace and ex officio notary public, and the instrument set out in haec verba showed the jurat to be signed by the designated person as justice of the peace of a designated precinct. *Waters v. State*, 30 Tex. App. 284, 17 S. W. 411.

49. *Selby v. State*, 161 Ind. 667, 69 N. E. 463; *Trout v. State*, 111 Ind. 499, 12 N. E. 1005; *Myers v. State*, 101 Ind. 379; *State v. Boss*, 74 Ind. 80.

[a] **The purpose of such a statute** was and is to free the criminal practice from some of the technical rules of the common law which have outlived their usefulness, and which ought to have passed away with the necessities which brought them into being. *Myers v. State*, 101 Ind. 379.

[b] **Repugnancy.** (1) under such statutes, where defendant is truly named in body of indictment, but another person named in title (*State v. Boss*, 74 Ind. 80), (2) or where forgery of an instrument set out in haec verba signed by Dr. W. is charged and the indictment charges forgery of an order purporting to be signed by V. T. W. (*Myers v. State*, 101 Ind. 379), is not fatal.

[c] **Using of names** "B." and "B. Sr." interchangeably in an affidavit does not render the affidavit void for repugnancy, as the addition of "Sr." is a matter of description only. *State v. Simpson*, 166 Ind. 211, 76 N. E. 511, 1005.

50. *Trout v. State*, 111 Ind. 499, 12 N. E. 1005.

51. *Ala.*—*Taylor v. State*, 100 Ala. 68, 14 So. 875. *Ind.*—*Watson v. State*, 111 Ind. 599, 12 N. E. 1008; *Myers v. State*, 101 Ind. 379; *Kennedy v. State*, 62 Ind. 136. *Ia.*—*State v. Freeman*, 8

Iowa 428, 74 Am. Dec. 317. *Ky.*—*Richey v. Com.*, 81 Ky. 524. *Mass.*—*Com. v. Pray*, 13 Pick. 359. *Mo.*—*State v. Furgerson*, 162 Mo. 668, 63 S. W. 101; *State v. Flint*, 62 Mo. 393. *Pa.*—*Com. v. Bell*, Add. 156, 1 Am. Dec. 298. *Va.*—*Robertson v. Com.*, 20 S. E. 362. *Eng.*—*Rex v. Gill*, Russ. & Ry. 431.

[a] Where a written instrument is set out in haec verba, a clause setting out its purport may be rejected as surplusage. *Myers v. State*, 101 Ind. 379.

[b] Where the indictment charges a certain offense by name and the facts alleged show another offense the repugnancy is harmless. *State v. Snyder*, 113 Minn. 244, 129 N. W. 375.

[c] **An inconsistent or repugnant clause or averment** concluding an indictment, such as a misnomer of the defendant, should be treated as surplusage, when the other averments clearly charge the defendant with the commission of the crime. *Kennedy v. State*, 62 Ind. 136.

[d] **Location of Wound.**—Where deceased is alleged to have been shot by defendant, and it is charged that the shot gave a mortal wound of which he died, an allegation describing the wound in one place as just above the nipple of the left breast and subsequently as below the nipple of the left breast, does not render the indictment defective, as the allegation as to the place of the wound may be rejected as surplusage. *Robertson v. Com.* (Va.), 20 S. E. 362.

[e] **Repugnancy in Middle Name.** To charge the defendant in one part in the name of R. D. Eddison, and later clause referring to him as the said R. H. Eddison does not render the indictment void. *Eddison v. State* (Tex. Crim.), 73 S. W. 397.

52. *State v. Taylor*, 126 Mo. 531, 29 S. W. 598; *State v. Anderson*, 98 Mo.

to non-traversable matter laid after a scilicet,⁵³ or because a misdemeanor is alleged to have been done "feloniously."⁵⁴ If an allegation be sensible and consistent in the place where it occurs and be not repugnant to antecedent matter, it cannot be rejected as surplusage, though it be repugnant to a subsequent allegation.⁵⁵

D. WHAT MUST BE CHARGED.—1. Facts Constituting Offense. It is a rule of almost universal application,⁵⁶ and is sometimes a requirement of statute,⁵⁷ that all the facts and circumstances constituting the offense sought to be charged must be pleaded.⁵⁸ Especially must

461, 11 S. W. 981 (wherein it was alleged defendant gave deceased one mortal wound on the "head and body"); *Robertson v. Com.* (Va.), 20 S. E. 362.

53. *State v. Haney*, 8 N. C. 460, wherein time of offense was alleged as of one date, and then, after scilicet, on another date, and statute provided time need not be alleged.

54. *Com. v. Philbot*, 130 Mass. 59; *Com. v. Squire*, 1 Metc. (Mass.) 258; *State v. Crummev*, 17 Minn. 72.

55. *Dias v. State*, 7 Blackf. (Ind.) 20, 39 Am. Dec. 448.

56. See the following cases: **U. S.** *United States v. Louisville & N. R. Co.*, 165 Fed. 936; *United States v. Post*, 113 Fed. 852; *United States v. Burns*, 54 Fed. 351. **Fla.**—*Thomas v. State*, 58 Fla. 120, 50 So. 954. **Me.** *State v. Philbrick*, 31 Me. 401. **N. Y.** *People v. Gates*, 13 Wend. 311. **Ohio.** *State v. Owen*, 3 Ohio N. P. 181. **S. C.**—*State v. Wilson*, 2 Mill 135. **Tex.** *Beasley v. State*, 39 Tex. Crim. 688, 47 S. W. 991.

[a] "Every fact," as Mr. Bishop says in 1 Cr. Proc. Par. 519, "which is an element in a prima facie case of guilt must be stated; otherwise there will be at least one thing which the accused is entitled to know, whereof he is not informed. And that he may be certain what each thing is, each must be charged expressly, and nothing left to intendment. All that is to be proved must be alleged." *Thomas v. State*, 58 Fla. 120, 50 So. 954.

"The obvious reason for this rule is that the accused is entitled to have stated in the indictment fully and precisely all the elements of the offense charged against him, in order that he may know what he is to meet by testimony, and whether the facts charged constitute a crime, and if so, that the judgment in the case may afford a bar to any further prosecution for the

same offense." *United States v. Louisville & N. R. Co.*, 165 Fed. 936. See also *People v. Gregg*, 59 Hun 107, 111, 13 N. Y. Supp. 114.

57. See the following: *Beasley v. State*, 39 Tex. Crim. 688, 47 S. W. 991; *Kerry v. State*, 17 Tex. App. 178, 185, 50 Am. Rep. 122; *Berry v. State*, 10 Tex. App. 315.

58. See the following cases: **U. S.** *Tapack v. United States* (C. C. A.), 220 Fed. 445; *Foster v. United States*, 178 Fed. 165, 101 C. C. A. 485; *Smith v. United States*, 157 Fed. 721, 85 C. C. A. 353. **Cal.**—*People v. Bradbury*, 155 Cal. 808, 103 Pac. 215; *People v. Murphy*, 39 Cal. 52; *People v. Wallace*, 9 Cal. 30; *People v. Hood*, 6 Cal. 236; *People v. Aro*, 6 Cal. 207, 65 Am. Dec. 503. **Colo.**—*Fehringer v. State*, 147 Pac. 361. **Ga.**—*Youmans v. State*, 7 Ga. App. 101, 114, 66 S. E. 383. **Ia.**—*State v. Rankin*, 150 Iowa 701, 130 N. W. 732; *State v. Clark*, 141 Iowa 297, 119 N. W. 719. **Kan.**—*State v. Briggs*, 94 Kan. 92, 145 Pac. 866. **Ky.**—*Rhodus v. Com.*, 2 Duv. 159. **Md.**—*State v. Edwards*, 124 Md. 592, 92 Atl. 1037; *State v. Hodges*, 55 Md. 127, 137. **Mass.**—*Com. v. Terry*, 114 Mass. 263; *Com. v. Slack*, 19 Pick. 304. **Mo.**—*State v. Timeus*, 232 Mo. 177, 184, 135 S. W. 26. **N. Y.** *People v. Rouss*, 63 Misc. 135, 118 N. Y. Supp. 433. **Ohio.**—*Lamberton v. State*, 11 Ohio 282. **Okla.**—*Greenwood v. State*, 3 Okla. Crim. 247, 105 Pac. 371. **Tex.**—*State v. Hall*, 27 Tex. 333; *Williams v. State*, 37 Tex. Crim. 238, 39 S. W. 664; *Caldwell v. State*, 28 Tex. App. 566, 574, 14 S. W. 122; *McLaurine v. State*, 28 Tex. App. 530, 13 S. W. 992; *Kerry v. State*, 17 Tex. App. 178, 185, 50 Am. Rep. 122; *Vaughn v. State*, 9 Tex. App. 563; *Gaddy v. State*, 8 Tex. App. 127; *White v. State*, 3 Tex. App. 605. **W. Va.**—*State v. Welch*, 69 W. Va. 547, 72 S. E. 649. **Wis.** *State v. Gaffney*, 4 Chand. 163, 3 Pin.

all the facts be averred which in law may influence the punishment.⁵⁹ By express provision of statute in some states, that which is not necessary to be proved need not be alleged.⁶⁰

If it be intended to charge a crime by the commission of an act criminal only from the color given to it by extrinsic facts, which explain its criminal aspects, such facts should be set out by way of inducement, colloquium or innuendo in the indictment, or their absence will invalidate it.⁶¹

369. Can.—The Queen v. Weir, 3 Can. Cr. Cas. 102.

See also *infra*, IX, C, 3, a; IX, D, 5.

[a] **Other Statements of the Rule.** "That where necessary to show a complete offense, the particular circumstances must be pleaded, is, of course, well settled." *People v. Bradbury*, 155 Cal. 808, 103 Pac. 215. And see *Ex parte Goldman*, 7 Cal. Unrep. 254, 88 Pac. 819; *Twelve Mile Tpk. Co. v. Com.*, 4 Ky. L. Rep. 369.

[b] "Matters of substance must be alleged, to the end that the court may see that an indictable offense is charged." *State v. Cline*, 150 N. C. 854, 64 S. E. 591.

[c] "The rule is fundamental that no essential element of the crime intended to be charged can be omitted without destroying the whole pleading." *Foster v. United States*, 178 Fed. 165, 101 C. C. A. 485. And see *People v. Rouss*, 63 Misc. 135, 118 N. Y. Supp. 433.

[d] **The rule of the common law** (1) in this respect is not changed by statutory provisions upon the subject of what the indictment must contain. *People v. Dolan*, 9 Cal. 576; *People v. Lloyd*, 9 Cal. 54; *People v. Wallace*, 9 Cal. 30. (2) But it is not necessary that they be stated with the particularity which was required at common law. *People v. Dolan*, 9 Cal. 576. And see *supra*, IX, C, 1.

That facts and not mere conclusions should be averred, see *infra*, IX, D, 5.

That matters of evidence need not be averred, see *infra*, IX, D, 3.

59. U. S.—*United States v. Reese*, 92 U. S. 214, 232, 23 L. ed. 563. Ark. *Knightlinger v. State*, 105 Ark. 172, 150 S. W. 690. Md.—*Maguire v. State*, 47 Md. 485. Mo.—*State v. Thierauf*, 167 Mo. 429, 441, 67 S. W. 292. Ohio. *Larney v. Cleveland*, 34 Ohio St. 599. Tex.—*State v. Heath*, 41 Tex. 426; *Long v. State*, 36 Tex. 6; *Meyer v. State*, 4

Tex. App. 121. Va.—*Shiflett v. Com.*, 114 Va. 876, 77 S. E. 606.

[a] **Rule Stated.**—"In 1 Bish., Crim. Proc., sec. 81, the rule is stated in the following language: 'The doctrine of the courts is identical with that of reason, namely, that the indictment must contain an allegation of every fact which is legally essential to the punishment to be inflicted. This doctrine pervades the entire adjudged law of criminal procedure.'" *State v. Timeus*, 232 Mo. 177, 184, 135 S. W. 26. See also *United States v. Reese*, 92 U. S. 214, 232, 23 L. ed. 563.

[b] **Another statement of the rule** is: "It is a cardinal principle in criminal pleading that the indictment or information must contain an allegation of every fact which is essential to the punishment to be inflicted." *State v. Thierauf*, 167 Mo. 429, 441, 67 S. W. 292.

As to necessity for alleging prior conviction, see *infra*, IX, D, 8, b, (I).

60. Tex.—Penal Code, art. 440; *Blair v. State*, 32 Tex. 474; *Evans v. State*, 25 Tex. Supp. 303; *Bosshard v. State*, 25 Tex. Supp. 207; *Kerry v. State*, 17 Tex. App. 178, 185, 50 Am. Rep. 122; *Berry v. State*, 10 Tex. App. 315; *Mayo v. State*, 7 Tex. App. 342; *Wilkinson v. State*, 2 Tex. App. 255, 268; *Johnson v. State*, 1 Tex. App. 146. Va. Code, 1906, §3998; *Lazier v. Com.*, 10 Gratt. 708, 715. W. Va.—Penal Code, 1913, §5558.

[a] Under such a statutory provision, the length, breadth and depth of the wound need not be set out in an indictment for murder. *Lazier v. Com.*, 10 Gratt. (Va.) 708, 715.

61. Md.—*Cearfoss v. State*, 42 Md. 403. N. J.—*State v. Allgor*, 78 N. J. L. 313, 73 Atl. 76. Pa.—*Com. v. Clark*, 2 Ashm. 105. Tenn.—*Pearce v. State*, 1 Sneed 63, 60 Am. Dec. 135. Tex. *Bolton v. State* (Tex. Crim.), 154 S. W. 1197.

The omission of essential matter in the description of the offense intended to be charged cannot be supplied by a charge that the act was committed "unlawfully,"⁶² or "contrary to law,"⁶³ or "against the peace,"⁶⁴ nor can the omission of essential matter be supplied by intentment.⁶⁵

Charging Offense by Name. — To simply charge a person with the commission of a designated offense by name,⁶⁶ or with the offense of felony,⁶⁷ or misdemeanor,⁶⁸ is not sufficient, being a mere legal conclusion.⁶⁹

2. Name and Character of Offense.⁷⁰ — It is not necessary to give

See generally the title "Inducement."

[a] Thus, as a general rule, an indictment which charges a defendant with neglecting to perform a public duty, should show how that duty arises. *State v. Haddonfield & C. Tpk. Co.*, 65 N. J. L. 97, 46 Atl. 700.

62. *Roberts v. Com.*, 10 Leigh (Va.) 686; *State v. Welch*, 69 W. Va. 547, 72 S. E. 649.

63. *Bishop v. Com.*, 13 Gratt. (Va.) 785; *State v. Welch*, 69 W. Va. 547, 72 S. E. 649.

64. *State v. Hodges*, 55 Md. 127, 133 (averment "contra pacem" does not aid the omission of an averment of intent in an indictment, except the omission of an averment of an intent to commit a breach of law); *State v. Welch*, 69 W. Va. 547, 72 S. E. 649.

65. See *infra*, IX, C, 3, a.

66. *Idaho*.—*State v. Smith*, 25 Idaho 541, 138 Pac. 1107. **N. Y.**—*People v. Quartararo*, 76 Misc. 55, 133 N. Y. Supp. 985. **Okla.**—*Greenwood v. State*, 3 Okla. Crim. 247, 105 Pac. 371.

[a] Under the New York Code of Criminal Procedure (§§275, 276) the indictment must set forth the crime charged, and also a plain and concise statement of the acts constituting the crime, without unnecessary repetition. An indictment which alleges a crime, but does not state the acts constituting that crime, would be bad. Likewise an indictment which stated the acts, without alleging the crime charged against the defendant, would also be bad. *People v. Quartararo*, 76 Misc. 55, 133 N. Y. Supp. 985.

[b] To simply charge that a person committed murder or larceny is not sufficient. *State v. Smith*, 25 Idaho 541, 138 Pac. 1107.

[c] "It is necessary in some way to inform the party accused as to how

it is claimed he committed murder, whether by shooting, by striking a blow, by drowning, poisoning or in some other manner perpetrating the offense; or, if he committed larceny, what property he took." *State v. Smith*, 25 Idaho 541, 138 Pac. 1107.

Following language of the statute, see *infra*, IX, E, 5, f.

67. **Ark.**—*Johnson v. State*, 36 Ark. 242; *Lacefield v. State*, 34 Ark. 275, 36 Am. Rep. 8. **Cal.**—*Ex parte Goldman*, 7 Cal. Unrep. 254, 88 Pac. 819, general accusation that defendant had committed a felony "by being an accessory to the commission of a felony" would be wholly insufficient and void. **Idaho**.—*People v. Page*, 1 Idaho 102.

68. *Simmons v. State*, 106 Ga. 355, 32 S. E. 339; *Hall v. State*, 3 Ga. 18; *Com. v. Castleman*, 8 Ky. L. Rep. 608.

69. "To charge a person with murder, robbery, grand larceny, or being accessory to the commission of either crime would obviously be the statement of a legal conclusion. And an averment that a party concealed the commission of an offense is as obviously the statement of a mere abstract legal proposition. The indictment must show on its face the acts or facts from which the conclusion flows. The concealment of a crime 'necessarily includes the element of some affirmative act,' and the particular affirmative act constituting the offense must be stated in the indictment, to the end that the court and defendant may know, independently of the conclusion stated, that such act constitutes an offense against the law." *Ex parte Goldman*, 7 Cal. Unrep. 254, 88 Pac. 819.

Legal conclusions generally, see *infra*, IX, D, 5.

70. As to necessity for stating name of offense in caption, see *supra*, VIII, A, 3, c, (VII); for indorsement on in-

any specific name to the offense charged, so long as the indictment or information sets forth facts constituting an offense,⁷¹ the same being characterized, not by its specific designation, in the indictment, but by the criminal acts alleged to have been committed.⁷² Neither will a discrepancy or mistake in the name of the offense charged vitiate the pleading where the particular facts necessary to constitute the offense charged are specifically and accurately set forth.⁷³

Statutes sometimes provide that the indictment or information shall name the crime with which the defendant is charged.⁷⁴ But even

dictment or information, see *supra*, VIII, A, 8, b.

71. U. S.—United States *v.* Wood, 44 Fed. 753; United States *v.* Lehman, 39 Fed. 768. **Ark.**—Guest *v.* State, 19 Ark. 405. **Cal.**—People *v.* Phipps, 39 Cal. 326. **Fla.**—McCaskill *v.* State, 55 Fla. 117, 45 So. 843. **Ga.**—Lipham *v.* State, 125 Ga. 52, 53 S. E. 817, 114 Am. St. Rep. 181; Alexander *v.* State, 122 Ga. 174, 50 S. E. 56; O'Halloran *v.* State, 31 Ga. 206. **Ind.**—Cronkhite *v.* State, 11 Ind. 307. **Ia.**—State *v.* Baldy, 17 Iowa 39; State *v.* Hessekamp, 17 Iowa 25. **Minn.**—State *v.* Howard, 66 Minn. 309, 68 N. W. 1096, 61 Am. St. Rep. 403, 34 L. R. A. 178. **Nev.**—State *v.* Rigg, 10 Nev. 284; State *v.* Johnson, 9 Nev. 175. **Tex.**—Massie *v.* State, 5 Tex. App. 81.

[a] To allege the name of the offense is to allege a conclusion of law only. McCaskill *v.* State, 55 Fla. 117, 45 So. 843. See *supra*, IX, D, 1.

[b] **It Was Not Required at Common Law.**—State *v.* Anderson, 3 Nev. 254.

72. Cal.—People *v.* Cuddihy, 54 Cal. 53. **Ga.**—Lipham *v.* State, 125 Ga. 52, 53 S. E. 817, 114 Am. St. Rep. 181; Alexander *v.* State, 122 Ga. 174, 50 S. E. 56; Sneed *v.* State (Ga. App.), 85 S. E. 354; McKissick *v.* State, 11 Ga. App. 721, 76 S. E. 71. **Minn.**—State *v.* Howard, 66 Minn. 309, 68 N. W. 1096, 61 Am. St. Rep. 403, 34 L. R. A. 178.

[a] An indictment stating defendant was accused of crime of "assault with intent to commit murder" and then stating facts showing administering of poison with intent to kill does not charge two offenses, as the appellation given must be disregarded. People *v.* Cuddihy, 54 Cal. 53.

[b] If an indictment charges the commission of a "felony," instead of naming the particular offense, it is not

fatally defective where the particular offense is identified by the acts charged. Johnson *v.* State, 36 Ark. 212; Lipham *v.* State, 125 Ga. 52, 53 S. E. 817, 114 Am. St. Rep. 181. See also People *v.* Beatty, 14 Cal. 566.

73. U. S.—United States *v.* Lehman, 39 Fed. 768. **Ariz.**—Brady *v.* Territory, 7 Ariz. 12, 60 Pac. 698, statute gave no specific name to offense. **Ark.**—Kelley *v.* State, 102 Ark. 651, 145 S. W. 556; Harrington *v.* State, 77 Ark. 480, 91 S. W. 747 ("Sabbath breaking" instead of "selling intoxicating liquor without license" charged); State *v.* Culbreath, 71 Ark. 80, 71 S. W. 254. **Cal.**—People *v.* Eppinger, 105 Cal. 36, 38 Pac. 538; People *v.* Cuddihy, 54 Cal. 53; People *v.* Phipps, 39 Cal. 326; People *v.* Izlar, 8 Cal. App. 600, 97 Pac. 685; People *v.* O'Brian, 8 Cal. App. 641, 97 Pac. 679; People *v.* Morley, 8 Cal. App. 372, 97 Pac. 84. **Ga.**—Aiken *v.* State, 90 Ga. 452, 16 S. E. 206; Camp *v.* State, 25 Ga. 689. **Ia.**—State *v.* Gillett, 92 Iowa 527, 61 N. W. 169; State *v.* Davis, 41 Iowa 311; State *v.* Chartrand, 36 Iowa 691; State *v.* Shaw, 35 Iowa 575; State *v.* Ansaleme, 15 Iowa 44. **Minn.**—State *v.* Howard, 66 Minn. 309, 68 N. W. 1096, 61 Am. St. Rep. 403, 34 L. R. A. 178; State *v.* Munch, 22 Minn. 67; State *v.* Coon, 18 Minn. 518; State *v.* Garvey, 11 Minn. 154; State *v.* Hinckley, 4 Minn. 345. **Nev.**—State *v.* Anderson, 3 Nev. 254. **Ore.**—State *v.* Jarvis, 18 Ore. 360, 23 Pac. 251. **Wash.**—State *v.* Robey, 74 Wash. 562, 134 Pac. 174, wrong designation of crime in information, otherwise sufficient, does not render it obnoxious to a demurrer.

[a] That adultery and fornication with defendant's daughter is charged does not affect the sufficiency of the charge of incest. McCaskill *v.* State, 55 Fla. 117, 45 So. 843.

74. Com. *v.* Tobin, 140 Ky. 261, 130

under such a statute a mistake in naming the crime shown by the particular facts set forth, is not fatal.⁷⁵

Degree or Character of Offense.—If a statute makes a particular act or acts a crime of a particular grade, and such acts are set forth in the indictment, there is no necessity for charging the legal conclusion that the particular acts amount to the crime of the grade declared.⁷⁶ The indictment need not state in terms that the offense is a felony or misdemeanor.⁷⁷

3. Matters of Evidence.⁷⁸—It is not only unnecessary⁷⁹ to plead the evidence by which the indictment or information is to be sup-

S. W. 1116; *Com. v. Slaughter*, 12 Ky. L. Rep. 893; *N. Y. Code Crim. Proc.*, §276; *People v. Dumar*, 106 N. Y. 502, 13 N. E. 325; *People v. Valentine*, 147 App. Div. 31, 131 N. Y. Supp. 733; *People v. Schlessel*, 127 App. Div. 510, 112 N. Y. Supp. 45; *People v. Maxon*, 57 Hun 367, 10 N. Y. Supp. 593; *People v. Quartararo*, 76 Misc. 55, 133 N. Y. Supp. 985.

[a] Where a statute creating an offense does not give the offense a name, but merely describes it, an indictment under the statute should, in naming the offense, follow the statute. *Knoxville Nursery Co. v. Com.*, 108 Ky. 6, 55 S. W. 691; *Daviess Gravel Road Co. v. Com.*, 14 Ky. L. Rep. 812; *Com. v. Slaughter*, 12 Ky. L. Rep. 893.

75. *Drury v. Com.*, 162 Ky. 123, 172 S. W. 94; *Overstreet v. Com.*, 147 Ky. 471, 144 S. W. 751 (both holding that any difference between the accusative part of the indictment as to the name of the offense, and the body or descriptive part thereof, that is not so substantial as to be misleading, will not be fatal to the indictment); *People v. Valentine*, 147 App. Div. 31, 131 N. Y. Supp. 733; *People v. Miller*, 143 App. Div. 251, 128 N. Y. Supp. 549, both citing *People v. Sullivan*, 4 N. Y. Crim. 193.

[a] "The name of the crime is mere matter of form, which may or may not be stated, and if it is stated incorrectly, it does not vitiate or control the character of the crime as against the allegations constituting it. *Code Crim. Proc.*, §284, subds. 6, 7, §285." *People v. Sullivan*, 4 N. Y. Crim. 193.

[b] **Waiver.**—"In *People v. Valentine*, 147 App. Div. 31, 131 N. Y. Supp. 733, it was said that 'if the indictment were defective so far as the name in the charging clause is concerned, if the

facts stated therein constituted a crime under the latter section, this defect was waived by a failure to demur,' " citing *Code Crim. Proc.*, §§323, 331; *People v. Carr*, 3 N. Y. Crim. 578.

76. **Ala.**—*State v. Absence*, 4 Port. 397. **Ark.**—*Guest v. State*, 19 Ark. 405. **Cal.**—*People v. Russell*, 81 Cal. 616, 23 Pac. 418. **Kan.**—*Millar v. State*, 2 Kan. 169, 174. **Minn.**—*State v. Eno*, 8 Minn. 220; *State v. Dumphrey*, 4 Minn. 438. **S. D.**—*State v. La Croix*, 8 S. D. 369, 66 N. W. 944.

[a] An indictment charging the crime of maiming in the words of the statute is sufficient, though it is not alleged that the party was maimed. *Guest v. State*, 19 Ark. 405.

77. *People v. War*, 20 Cal. 117; *O'Halloran v. State*, 31 Ga. 206.

78. In civil pleadings, see 4 STANDARD PROC. 128, 846; 6 STANDARD PROC. 695.

79. **U. S.**—*Stokes v. United States*, 157 U. S. 187, 15 Sup. Ct. 617, 39 L. ed. 667; *Bannon v. United States*, 156 U. S. 464, 15 Sup. Ct. 467, 39 L. ed. 494; *Potter v. United States*, 155 U. S. 438, 15 Sup. Ct. 144, 39 L. ed. 214; *Evans v. United States*, 153 U. S. 584, 594, 14 Sup. Ct. 934, 939, 38 L. ed. 830; *United States v. Simmons*, 96 United States, 360, 24 L. ed. 819; *Brown v. United States*, 143 Fed. 60, 74 C. C. A. 214. **Ala.**—*Sterne v. State*, 20 Ala. 43. **Cal.**—*People v. Savereool*, 81 Cal. 650, 22 Pac. 856. **Colo.**—*Walt v. People*, 46 Colo. 136, 104 Pac. 89. **Ga.**—*Dowd v. State*, 74 Ga. 12; *Hoyt v. State*, 50 Ga. 313; *Snell v. State*, 13 Ga. App. 158, 79 S. E. 71; *Barron v. State*, 12 Ga. App. 342, 77 S. E. 214; *Central Georgia P. Co. v. State*, 10 Ga. App. 448, 73 S. E. 688. **Ind.**—*Brunaugh v. State*, 173 Ind. 483, 90 N. E. 1019; *State v. McCormack*, 2 Ind. 305.

ported, but it is improper to do so,⁸⁰ though such impropriety does not render the indictment or information fatally defective.⁸¹

4. **Presumptions and Matters of Judicial Knowledge.**—Neither presumptions which the law makes from the facts stated⁸² nor matters of which judicial notice is taken by the courts,⁸³ need be stated in an indictment or information.

Ky.—*Miller v. Com.*, 13 Bush 731. **La.**—*State v. Patterson*, 14 La. Ann. 46. **Mass.**—*Com. v. Johnson*, 175 Mass. 152, 55 N. E. 804; *Com. v. Harris*, 95 Mass. 534, 539. **Minn.**—*State v. Whitman*, 103 Minn. 92, 114 N. W. 363; *State v. Braun*, 96 Minn. 521, 105 N. W. 975; *State v. Holton*, 88 Minn. 171, 92 N. W. 541; *State v. Moore*, 86 Minn. 418, 90 N. W. 786; *State v. Ring*, 29 Minn. 78, 11 N. W. 233. **Miss.**—*State v. Peek*, 95 Miss. 240, 48 So. 819. **Mo.**—*State v. Becker*, 248 Mo. 555, 154 S. W. 769. **N. J.**—*Mead v. State*, 53 N. J. L. 601, 23 Atl. 264. **N. Y.**—*People v. Willis*, 158 N. Y. 392, 53 N. E. 29, *affirming* 34 App. Div. 203, 54 N. Y. Supp. 642; *Tully v. People*, 67 N. Y. 15; *Tuttle v. People*, 36 N. Y. 431; *People v. Rouss*, 63 Misc. 135, 118 N. Y. Supp. 433. **N. C.**—*State v. Wynne*, 151 N. C. 644, 65 S. E. 459. **Okla.**—*State v. Feedback*, 3 Okla. Crim. 508, 107 Pac. 442. **Eng.**—*Rex v. Baxter*, 5 T. R. 83, 101 Eng. Reprint 48; *Rex v. Turner*, 1 Str. 139, 93 Eng. Reprint 435.

As to necessity for charging facts constituting crime, see *supra*, IX, D, 1.

80. *People v. Rouss*, 63 Misc. 135, 118 N. Y. Supp. 433.

81. **Miss.**—*State v. Broughton*, 71 Miss. 90, 13 So. 885. **N. C.**—*State v. Wynne*, 151 N. C. 644, 65 S. E. 459. **Tex.**—*State v. Killough*, 32 Tex. 74.

[a] Evidential matters contained in a bill of indictment can furnish no ground for the trial judge to consider quashing the bill, when otherwise it is sufficient, as such would be an invasion of the province of the jury. *State v. Wynne*, 151 N. C. 644, 65 S. E. 459.

82. See the following: **Ala.**—Code, 1907, §7145; *Henry v. State*, 33 Ala. 389, 399. **Ark.**—*Kirby's Dig.*, 1904, §2240. **Cal.**—Penal Code, §961. **Idaho.**—Rev. Codes, 1907, §7688. **Ind.**—*Burns' Ann. St.*, 1914, §2047; *State v. Paris*, 179 Ind. 446, 101 N. E. 497; *Brunaugh v. State*, 173 Ind. 483, 90 N. E. 1019. **Ia.**—Code, 1897, §5291. **Kan.**—*Gen. St.*, 1905, §5999; *Smith v. City of Emporia*, 27 Kan. 528. **Mass.**—Rev. Laws, 1902,

ch. 218, §33. **Mont.**—Rev. Codes, 1907, §9158. **Nev.**—Rev. Laws, 1912, §7061. **N. Y.**—Code Crim. Proc., §286. **N. D.**—Rev. Codes, 1905, §9858. **Okla.**—Comp. Laws, 1909, §6706; *Rasberry v. State*, 4 Okla. Crim. 613, 103 Pac. 865. **Ore.**—Lord's Laws, §1450. **S. D.**—Code Crim. Proc., §231. **Tenn.**—*Shannon's Code*, §7081. **Tex.**—Code Crim. Proc., art. 463. **Utah.**—Comp. Laws, 1907, §4743. **Wash.**—Rem. & Ball. Ann. Codes & St., §2067. Compare 6 STANDARD PROC. 680; 9 ENCY. OF EV. 878.

[a] Such statutes do not refer to those disputable presumptions which may be overcome by opposing proof, but to those conclusive presumptions of law which forbid all further inquiry, and allow of no proof that the fact is otherwise. *Henry v. State*, 33 Ala. 389, 399.

As to necessity for pleading mere conclusions of law, see *infra*, IX, D, 5.

83. See the following: **U. S.**—*United State v. Moody*, 164 Fed. 269; *United States v. Howard*, 132 Fed. 325; *United States v. Slater*, 123 Fed. 115; *United State v. Wright*, 28 Fed. Cas. No. 16,774; *United States v. Rhodes*, 27 Fed. Cas. No. 16,151. **Ala.**—Code, 1907, §7145; *Gady v. State*, 83 Ala. 51, 3 So. 429; *Sands v. State*, 80 Ala. 201; *Duvall v. State*, 63 Ala. 12; *Grant v. State*, 55 Ala. 201; *Davis v. State* (Ala. App.), 67 So. 770, value of money a matter of judicial knowledge, of which no averment or proof required. **Ark.**—*Kirby's Dig.*, 1904, §2240. **Cal.**—Penal Code, §961. **Ga.**—See *Maxwell v. State*, 9 Ga. App. 875, 72 S. E. 445; *McDonald v. State*, 2 Ga. App. 633, 58 S. E. 1067. **Idaho.**—Rev. Codes, 1907, §7688. **Ind.**—*Burns' Ann. St.*, 1914, §2047; *State v. Paris*, 179 Ind. 446, 101 N. E. 497; *State v. Cameron*, 176 Ind. 385, 96 N. E. 150; *Brunaugh v. State*, 173 Ind. 483, 90 N. E. 1019. **Ia.**—Code, 1897, §5291. **Kan.**—*Gen. St.*, 1905, §5999; *Smith v. Emporia*, 27 Kan. 528, 529. **Ky.**—*Anderson v. Com.*, 117 S. W. 364. **Md.**—See *Acton v. State*, 80 Md. 547, 31 Atl. 419. **Mass.**—Rev. Laws,

5. **Conclusions.**—Facts, rather than the pleader's mere conclusions, must be alleged.⁸⁴ For this reason, it is not necessary to allege

1902, ch. 218, §33; *Com. v. Inhab. of Springfield*, 7 Mass. 9. **Minn.**—*State v. Gill*, 89 Minn. 502, 95 N. W. 449. **Miss.** *State v. Borroum*, 23 Miss. 477, 481. **Mo.**—*State v. Warren*, 57 Mo. App. 502. **Mont.**—*Rev. Codes*, 1907, §9158. **Nev.** *Rev. Laws*, 1912, §7061. **N. Y.**—*Code Crim. Proc.*, §286; *People v. Willis*, 158 N. Y. 392, 53 N. E. 29; *People v. Breesee*, 7 Cow. 429; *Vanderwerker v. People*, 5 Wend. 530. **N. C.**—*State v. Swink*, 151 N. C. 726, 66 S. E. 448; *State v. Piner*, 141 N. C. 760, 53 S. E. 305. **N. D.**—*Rev. Codes*, 1905, §9858. **Okla.**—*Comp. Laws*, 1909, §6706; *Rasberry v. State*, 4 Okla. Crim. 613, 103 Pac. 865. **Ore.**—*Lord's Laws*, §1450. **S. D.**—*Code Crim. Proc.*, §231. **Tenn.** *Shannon's Code*, §7081; *Owen v. State*, 5 Sneed 493. **Tex.**—*Code Crim. Proc.*, art. 463 ("among which are included the authority and duties of all officers elected or appointed under the general laws of this state"); *Mischer v. State*, 41 Tex. Crim. 212, 53 S. W. 627, 96 Am. St. Rep. 780; *Damron v. State* (Tex. Crim.), 27 S. W. 7 (not necessary to allege that horse was "corporal personal property"); *Boston v. State*, 5 Tex. App. 383, 32 Am. Rep. 575. **Utah.** *Comp. Laws*, 1907, §4743. **Wash.** *Rem. & Ball. Ann. Codes & St.*, §2067; *Schilling v. Territory*, 2 Wash. Ter. 283, 5 Pac. 926.

See generally the title "**Judicial Notice**," 6 STANDARD PROC. 680; 7 ENCY. OF EV. 1033.

[a] **Complaints.**—Statutory provisions that presumptions of law and matters of which judicial knowledge are taken need not be set forth in an indictment or information are applicable to complaints. *Smith v. Emporia*, 27 Kan. 528.

[b] **The court takes judicial notice** of the requirements of a public statute, (1) and they need not be averred in the indictment. *Anderson v. Com.* (Ky.), 117 S. W. 364. And see *United States v. Rhodes*, 27 Fed. Cas. No. 16,151; *State v. Piner*, 141 N. C. 760, 53 S. E. 305. (2) Likewise, it takes judicial notice of rules and regulations by the president and heads of departments under authority granted by congress. See the following cases: *Caha v. United States*, 152 U. S. 211, 221, 14

Sup. Ct. 513, 38 L. ed. 415; *Wilkins v. United States*, 96 Fed. 837, 37 C. C. A. 538; *United States v. Moody*, 164 Fed. 269. (3) It has also been held that it will take judicial notice that a public road and highway is a public place. *State v. Warren*, 57 Mo. App. 502.

84. See the following cases: **U. S.** *Martin v. United States*, 168 Fed. 198, 93 C. C. A. 484; *United States v. Pat-ten*, 187 Fed. 664, reversed on other grounds, 226 U. S. 525, 33 Sup. Ct. 141, 57 L. ed. 333; *United States v. El Paso*, etc. R. Co., 178 Fed. 846. **Ark.**—*State v. Graham*, 38 Ark. 519. **Cal.**—*People v. Turner*, 122 Cal. 679, 55 Pac. 685; *People v. Ward*, 110 Cal. 369, 42 Pac. 894; *Ex parte Goldman*, 7 Cal. Unrep. 254, 88 Pac. 819. **D. C.** *Ainsworth v. United States*, 1 App. Cas. 518. **Ga.**—*Taylor v. State*, 123 Ga. 133, 51 S. E. 326. **Ill.**—*People v. Ellis*, 185 Ill. App. 417, 418; *Rank v. People*, 80 Ill. App. 40. **Ind.**—*State v. Rodgers*, 175 Ind. 25, 93 N. E. 223 (that saw was not "properly" guarded is conclusion); *State v. Romaine*, 171 Ind. 725, 86 N. E. 73; *State v. Bridgewater*, 171 Ind. 1, 85 N. E. 715; *State v. Metsker*, 169 Ind. 555, 83 N. E. 241; *Johns v. State*, 159 Ind. 413, 65 N. E. 287, 59 L. R. A. 789; *Henning v. State*, 106 Ind. 386, 6 N. E. 803, 7 N. E. 4, 55 Am. Rep. 756; *State v. McDonald*, 106 Ind. 233, 6 N. E. 607; *State v. Record*, 56 Ind. 107. **Ia.**—*State v. Manhattan Oil Co.*, 155 Iowa 453, 136 N. W. 197. **Ky.**—*Louisville*, etc. R. Co. v. *Com.*, 130 Ky. 432, 113 S. W. 517; *Com. v. White*, 33 Ky. L. Rep. 70, 109 S. W. 324; *Com. v. Clark*, 4 Ky. L. Rep. 622. **La.**—*State v. Stiles*, 5 La. Ann. 324. **Mass.**—*Sturtevant v. Com.*, 158 Mass. 598, 33 N. E. 648. **Minn.** *State v. Greenwood*, 76 Minn. 211, 78 N. W. 1042, 1117, 77 Am. St. Rep. 632; *State v. O'Neil*, 71 Minn. 399, 73 N. W. 1091. **Miss.**—*State v. Jones*, 102 Miss. 89, 58 So. 782. **N. H.**—*State v. Piper*, 73 N. H. 226, 60 Atl. 742; *State v. Pitts*, 44 N. H. 621. **N. M.**—*State v. Roberts*, 138 Pac. 205. **N. Y.**—*People v. Wacke*, 77 Misc. 196, 137 N. Y. Supp. 652; *People v. Cooper*, 3 N. Y. Crim. 117. **Okla.**—*Ex parte Hunnicutt*, 7 Okla. Crim. 213, 123 Pac. 179; *Cheeves v. State*, 5 Okla. Crim. 361, 114 Pac.

1125. **Ore.**—*State v. Miller*, 54 Ore. 381, 103 Pac. 519. **Tex.**—*Strickland v. State*, 19 Tex. App. 518; *Lasindo v. State*, 2 Tex. App. 59. **Wash.**—*State v. Heath*, 57 Wash. 246, 106 Pac. 756.

See 1 Chitty Crim. Law 228.

As to propriety of pleading conclusions generally, see 5 STANDARD PROC. 204.

[a] All facts necessary to support the conclusion should be specifically averred. *State v. Piper*, 73 N. H. 226, 60 Atl. 742.

[b] "All courts agree that an offense is charged by the statement of the material facts which constitute it, and not by the statement of a mere conclusion of law." *State v. Heath*, 57 Wash. 246, 106 Pac. 756.

Charging offense by name only, see *supra*, IX, D, 1.

[c] **Illustrations.**—(1) Such allegations, as "such allowance being illegal and unwarranted" in reference to an allowance by an auditor (*State v. Trueblood*, 25 Ind. App. 437, 57 N. E. 975), (2) that claim was too high for work done, in indictment for presenting false claim against a county (*State v. Metsker*, 169 Ind. 555, 83 N. E. 241), (3) that such funds are "due and owing to the state of Indiana," in a prosecution against a clerk of court for failing to pay over moneys collected by him for fines, etc. (*State v. Record*, 56 Ind. 107), (4) or that a person assaulted was engaged in the execution of "a lawful process or mandate" (*People v. Cooper*, 3 N. Y. Crim. 117), (5) that the defendant "practiced medicine" on a certain day, in a prosecution for practicing without a license (*State v. Carey*, 4 Wash. 424, 30 Pac. 729) are mere conclusions and insufficient, (6) as is a charge that accused was guilty of the offense of keeping a disorderly house, instead of a charge that the accused "did keep" such a house. *Lasindo v. State*, 2 Tex. App. 59.

[d] In *United States v. John Reardon & Sons Co.*, 191 Fed. 454, it is held that "it is never sufficient to allege that an act is illegal, but you must allege something more which the court can see on the face of the indictment is illegal if the facts are proven."

[e] An indictment for unlawfully rescuing a prisoner, which charges that the prisoner rescued was "lawfully"

in custody, without a presentation of the facts, is defective, as it states merely a conclusion of law. *Com. v. Clark*, 4 Ky. L. Rep. 622.

[f] The phrase "did assault" is a conclusion of the pleader, and not an averment of a material fact. *State v. Heath*, 57 Wash. 246, 106 Pac. 756, citing *State v. Smith*, 71 Ind. 557.

[g] That defendant "killed and murdered" a designated person is not a conclusion, however. *Lane v. State*, 151 Ind. 511, 51 N. E. 1056.

[h] Nor is an allegation that the bank of which accused was president was insolvent when he received the deposit in question objectionable as a conclusion; it is an allegation of a fact. *Parrish v. Com.*, 136 Ky. 77, 123 S. W. 339.

[i] An averment, in an indictment for sending obscene matter through the mail, that a pamphlet was obscene, lewd, and lascivious, is a statement of fact, and not a legal conclusion. *Konda v. United States*, 166 Fed. 91, 92 C. C. A. 75, 22 L. R. A. (N. S.) 304; *Rinker v. United States*, 151 Fed. 755, 81 C. C. A. 379, "no more a legal conclusion than was the one that the article deposited in the post office was a letter, or than would be an allegation of ownership or sale."

[j] Where an information, after charging larceny in the usual form, alleges in substance that the defendant did feloniously and purposely aid, abet and procure the thief to commit the crime, is not demurrable on the ground that it states a mere legal conclusion. *Lamb v. State*, 69 Neb. 212, 95 N. W. 1050.

[k] If, under a statute defining an accessory after the fact, it is unimportant how the knowledge of the commission of the crime is received by the alleged accessory, a statement in an indictment simply that he had full knowledge that the accused person had committed the crime was a statement of fact, and not of a mere conclusion. *State v. Jones*, 91 Ark. 5, 120 S. W. 154.

[l] An allegation as to want of license as follows: "Who was then and there not licensed under the laws of the state of Indiana to sell, barter, or give away, etc.," was held a declaration of fact, and not a recital of a conclusion in *Gaussin v. State*, 174 Ind. 583, 92 N. E. 651.

mere conclusions of law,⁸⁵ or matters which are a necessary conclusion or inference from facts stated.⁸⁶

It is true the pleader may charge a conclusion of law in addition to the facts from which it is derived, and is the proper and necessary sequence.⁸⁷

6. Negating Defenses.—The rule is well settled that an indictment or information need not negative matters of defense,⁸⁸ such as

85. See the following cases: **Ala.**—*State v. Absence*, 4 Port. 397. **Ark.**—*Ball v. State*, 48 Ark. 94, 2 S. W. 462. **Cal.**—*Ex parte Goldman*, 7 Cal. Unrep. 254, 88 Pac. 819. **Ind.**—*State v. Trueblood*, 25 Ind. App. 437, 57 N. E. 975. **Mass.**—*Com. v. Goulding*, 135 Mass. 552; *Com. v. Lavonsair*, 132 Mass. 1; *Wells v. Com.*, 12 Gray 326. **N. M.**—*Territory v. O'Donnell*, 4 N. M. 196, 12 Pac. 743. **N. Y.**—*Hall v. People*, 90 N. Y. 498. **Ohio.**—*Whiting v. State*, 48 Ohio St. 220, 27 N. E. 96. **Okla.**—*Rasberry v. State*, 4 Okla. Crim. 613, 103 Pac. 865. **Ore.**—*State v. Miller*, 54 Ore. 381, 103 Pac. 519. **Tex.**—*Horton v. State*, 32 Tex. 80. **Va.**—*Leftwich v. Com.*, 20 Gratt. 716. **Wash.**—*State ex rel. Whitney v. Friars*, 10 Wash. 348, 39 Pac. 104. **Eng.**—*Rex v. Michael*, 2 Leach C. C. 938; 1 Chit. Crim. Law 231a.

That presumptions of law need not be averred, see *supra*, IX, D, 4.

86. See the following cases: **Ala.**—*Anthony v. State*, 29 Ala. 27. **Ark.**—*Mason v. State*, 55 Ark. 529, 18 S. W. 827; *Anderson v. State*, 5 Ark. 444. **Cal.**—*People v. McNulty*, 93 Cal. 427, 26 Pac. 597, 29 Pac. 61. **Fla.**—*Smith v. State*, 29 Fla. 408, 10 So. 894. **Ga.**—*Kitchens v. State*, 80 Ga. 810, 7 S. E. 209. **Ill.**—*Palmer v. People*, 138 Ill. 356, 28 N. E. 130, 32 Am. St. Rep. 146. **Ind.**—*Henning v. State*, 106 Ind. 386, 6 N. E. 803, 7 N. E. 4, 55 Am. Rep. 756; *Christ v. State*, 33 Ind. App. 488, 69 N. E. 269. **Mass.**—*Com. v. Follansbee*, 155 Mass. 274, 29 N. E. 471; *Com. v. McCarty*, 152 Mass. 577, 26 N. E. 140; *Com. v. Caldwell*, 14 Mass. 330. **Mich.**—*People v. Webb*, 127 Mich. 29, 86 N. W. 406; *Evans v. People*, 12 Mich. 27. **Minn.**—*State v. Butler*, 47 Minn. 483, 50 N. W. 532. **Miss.**—*Norton v. State*, 72 Miss. 128, 16 So. 264, 18 So. 916, 48 Am. St. Rep. 538. **Mont.**—*State v. Keerl*, 29 Mont. 508, 75 Pac. 362, 101 Am. St. Rep. 579. **Nev.**—*State v. Dorst*, 10 Nev. 413. **N. M.**—*State v. Roberts*, 138 Pac. 208. **N. Y.**—*People v. Bennett*, 37 N. Y. 117, 93 Am. Dec. 551; *People v. Yarter*, 152 App. Div. 506, 137 N. Y. Supp. 462. **N. C.**—*State v. Ballard*, 6 N. C. 186. **Pa.**—*Gorman v. Com.*, 124 Pa. 536, 17 Atl. 26. **S. C.**—*State v. Maberry*, 3 Strobb. 144. **Tex.**—*Caldwell v. State*, 28 Tex. App. 566, 14 S. W. 122. **Vt.**—*State v. Labounty*, 63 Vt. 374, 21 Atl. 730.

[a] In *Henning v. State*, 106 Ind. 386, 6 N. E. 803, 55 Am. Rep. 756, the court states the rule: "The general rule is that if the facts well pleaded supply grounds for the necessary legal conclusion, it will be made by the court, and the failure of the pleader to state it will not, under our criminal code, however it may have been at common law, vitiate the indictment."

87. *Tomkins v. State*, 33 Tex. 228.

88. **U. S.**—*Stokes v. United States*, 157 U. S. 187, 15 Sup. Ct. 617, 39 L. ed. 667; *Evans v. United States*, 153 U. S. 584, 590, 14 Sup. Ct. 934, 939, 38 L. ed. 830; *Horn v. United States*, 182 Fed. 721, 727, 105 C. C. A. 163; *United States v. Shevlin*, 212 Fed. 343; *United States v. Patterson*, 59 Fed. 280. **Ark.**—*State v. Bailey*, 43 Ark. 150; *Dean v. State*, 37 Ark. 57; *Perry v. State*, 37 Ark. 54; *Bass v. State*, 29 Ark. 142. **Cal.**—*People v. Collins*, 105 Cal. 504, 39 Pac. 16; *People v. Wessel*, 98 Cal. 352, 33 Pac. 216. **Fla.**—*Butler v. Perry*, 67 Fla. 405, 66 So. 150; *Goff v. State*, 60 Fla. 13, 53 So. 327. **Ga.**—*Jordan v. State*, 22 Ga. 545. **Ind.**—*State v. Bridgewater*, 171 Ind. 1, 85 N. E. 715; *Brow v. State*, 103 Ind. 133, 2 N. E. 296; *Dorrell v. State*, 80 Ind. 566; *Payne v. State*, 74 Ind. 203; *Merrick v. State*, 63 Ind. 327; *State v. Shoemaker*, 4 Ind. 100. **Ia.**—*State v. Niers*, 87 Iowa 723, 54 N. W. 1076; *State v. Conable*, 81 Iowa 60, 46 N. W. 759; *State v. Williams*, 70 Iowa 52, 29 N. W. 801. **Kan.**—*State v. Waterman*, 75 Kan. 253, 88 Pac. 1054; *State v. Pitzer*, 23 Kan. 250; *State v. Pittman*, 10 Kan. 593. **Me.**—*State v. Brewer*, 102 Me.

matters of excuse and justification,⁸⁹ which it is held must be set up by defendant.⁹⁰

But where the exclusion of any matter constitutes an essential and an affirmative element of the offense charged, such matter should be negated in the indictment or information.⁹¹

293, 66 Atl. 642. **Mass.**—*Com. v. Peretz*, 212 Mass. 253, 98 N. E. 1054, Ann. Cas. 1913D, 484; *Com. v. Hart*, 11 Cush. 130. **Minn.**—*State v. Ward*, 35 Minn. 182, 28 N. W. 192. **Mo.**—*State v. Ford*, 47 Mo. App. 601. **N. H.**—*State v. Fuller*, 33 N. H. 259. **N. Y.**—*People v. West*, 106 N. Y. 293, 12 N. E. 610, 60 Am. Rep. 452. **N. C.**—*State v. Kerby*, 110 N. C. 558, 14 S. E. 856; *State v. Murphy*, 101 N. C. 697, 8 S. E. 112; *State v. Emery*, 98 N. C. 768, 3 S. E. 810. **Tex.**—*McFain v. State*, 41 Tex. 385; *State v. Rupe*, 41 Tex. 33; *State v. Collins*, 38 Tex. 189; *Jenkins v. State*, 33 Tex. 638; *State v. West*, 10 Tex. 553. **Wash.**—*State v. Seifert*, 65 Wash. 596, 118 Pac. 746; *State v. Nakashima*, 62 Wash. 686, 114 Pac. 894, Ann. Cas. 1912D, 220.

[a] **Other Statements of Rule.**—(1) "The rules of criminal pleading do not require the indictment to negative every possible theory of defense. *Stokes v. United States*, 157 U. S. 187." *State v. Seifert*, 65 Wash. 596, 118 Pac. 746. (2) "It is not necessary that the indictment should negative every conceivable fact which might change the character of the offense." *State v. Shoemaker*, 4 Ind. 100; *State v. Gooch*, 7 Blackf. (Ind.) 468.

[b] **Jurisdiction of the federal courts** need not be negated in an indictment in a state court. *People v. Collins*, 105 Cal. 504, 39 Pac. 16.

89. *Payne v. State*, 74 Ind. 203.

90. **Ind.**—*Payne v. State*, 74 Ind. 203. **Tex.**—*McFain v. State*, 41 Tex. 385; *State v. Rupe*, 41 Tex. 33; *State v. Collins*, 38 Tex. 189; *Jenkins v. State*, 36 Tex. 638; *State v. West*, 10 Tex. 553. **Wash.**—*State v. Seifert*, 63 Wash. 596, 118 Pac. 746; *State v. Nakashima*, 62 Wash. 686, 114 Pac. 894, Ann. Cas. 1912D, 220.

[a] "The state is not bound to anticipate defenses and aver facts rendering them unavailing. Excuses and justifications must come in by way of defense; there is no such a presumption of their existence as requires the

state to allege that they do not exist." *Payne v. State*, 74 Ind. 203.

[b] **In an indictment for manslaughter**, that the crime is committed "in the heat of passion" is a mitigating, not a differentiating, circumstance, so that a failure to allege that fact does not prejudice defendant. *State v. Matakovich*, 59 Minn. 514, 61 N. W. 677.

[c] **If murder be charged**, and the killing was justifiable or excusable under the law, such fact must be brought in by way of defense. See the following: **Ga.**—*Jordan v. State*, 22 Ga. 545, 555. **Mass.**—*Com. v. Hersey*, 2 Allen 173, 181. **Wash.**—*State v. Seifert*, 65 Wash. 596, 118 Pac. 746.

[d] **In an indictment for incest**, the fact of a lawful marriage between the parties, if a defense, is to be affirmatively pleaded, and need not be negated in the information. *State v. Nakashima*, 62 Wash. 686, 114 Pac. 894, Ann. Cas. 1912D, 220. See *supra*, this volume, p. 8.

[e] **An indictment for fornication** need not aver that the woman was unmarried; if she was married, defendant can avail himself thereof. *State v. Gooch*, 7 Blackf. (Ind.) 468. And see the title "Lewdness."

[f] **In an indictment for rape**, an averment that defendant was capable of committing the offense need not be made. *People v. Wessel*, 98 Cal. 352, 33 Pac. 216; *Com. v. Scannel*, 11 Cush. (Mass.) 547. And see the title "Rape."

For other specific applications of this rule, see the specific titles throughout this work.

91. *Goff v. State*, 60 Fla. 13, 53 So. 327.

[a] Courts infer that what is not charged in an indictment does not exist, and it should therefore exclude, by proper averments, the conclusions to which the accused is thus entitled. *Mears v. Com.*, 2 Grant Cas. (Pa.) 385.

As to necessity for negating statutory provisos or exceptions, see *infra*, IX, E, 5, f.

7. Matter in Avoidance of Statute of Limitations.⁹²—According to some authorities, though the right to prosecute the offense charged is, on the face of the pleading, apparently barred, it is not necessary to allege facts removing the apparent bar of the statute.⁹³ Other authorities, however, hold that under such circumstances it is necessary to aver any facts relied upon as taking the case out of the statute.⁹⁴

92. See generally the title "**Limitation of Actions.**"

93. See the following cases: **U. S.** *United States v. Cook*, 17 Wall. 168, 21 L. ed. 538 (leading case upon subject); *United States v. White*, 5 Cranch C. C. 116, 28 Fed. Cas. No. 16,677. **Ark.** *State v. Gill*, 33 Ark. 129. **Colo.** *Packer v. People*, 26 Colo. 306, 57 Pac. 1087, following *United States v. Cook*, 17 Wall. (U. S.) 168, 21 L. ed. 538. **Miss.**—*Thompson v. State*, 54 Miss. 740. **N. Y.**—*People v. Durrin*, 2 N. Y. Crim. 328; *People v. Van Santvoord*, 9 Cow. 654.

[a] In *Thompson v. State*, 54 Miss. 740, the rule is thus expressed: "A statute of limitations is never part of an offense, but always a matter of defense; nor is any allusion to time contained in our statutes relative to grand larceny. It will be time enough, therefore, for the district attorney to plead the exceptions to the statute when the statute itself has been pleaded by the accused. No sound rule of pleading can require him, in preferring the indictment, to anticipate the defense, and negative it by setting forth the facts which render it unavailing. If the accused pleads the statute specially, the representative of the state, by replication, will plead the exceptional facts which deprive the defendant of its protection; or if the defendant, under the plea of not guilty, invokes the protection of the statute by proof and by instructions asked, the district attorney will in the same manner claim the benefit of the exception. Such a mode of procedure is simple, free from all difficulties, and can work no harm to the accused."

Right to demur where pleading shows on its face that statutory period has run before the commencement of the prosecution, see *infra*, XIV, B, 1, b.

94. See the following cases: **Cal.** *People v. Miller*, 12 Cal. 291. **Ga.** *Hansford v. State*, 54 Ga. 55; *McLane v. State*, 4 Ga. 335; *Hollingsworth v.*

State, 7 Ga. App. 16, 65 S. E. 1077, ground for motion in arrest of judgment where it appears from the indictment that the alleged offense is barred by the statute of limitations, and no exception to remove the bar is stated therein. **Ill.**—*People v. Hallberg*, 259 Ill. 502, 102 N. E. 1005; *Lamkin v. People*, 94 Ill. 501; *Garrison v. People*, 87 Ill. 96; *Church v. People*, 10 Ill. App. 222. **Ind.**—*Hatwood v. State*, 18 Ind. 492; *Jones v. State*, 14 Ind. 120; *Ulmer v. State*, 14 Ind. 52. **Ky.**—*Com. v. T. J. Megibben Co.*, 101 Ky. 195, 40 S. W. 694; *Com. v. G. W. Taylor Co.*, 19 Ky. L. Rep. 1334, 43 S. W. 399; *N. N. & M. V. Co. v. Com.*, 14 Ky. L. Rep. 196. **La.**—*State v. Hinton*, 49 La. Ann. 1354, 22 So. 617; *State v. Davis*, 44 La. Ann. 972, 11 So. 580; *State v. Joseph*, 40 La. Ann. 5, 3 So. 405; *State v. Victor*, 36 La. Ann. 978. **Mo.**—*State v. Snyder*, 182 Mo. 462, 498, 82 S. W. 12; *State v. Meyers*, 68 Mo. 266. **Tex.** *Hickman v. State*, 44 Tex. Crim. 533, 72 S. W. 587; *Fulcher v. State*, 32 Tex. Crim. 621, 25 S. W. 625.

[a] "Ordinarily the offense must be laid in the indictment within the time fixed by the statute of limitation. Where, however, the statute does not impose an absolute bar, the prosecution may lay the offense outside the statute and prove without averment that the defendant was within the exception. But wherever a statute exists limiting prosecutions within fixed periods the more exact course is to state the time correctly in the indictment, and then aver the exceptions, and this mode of pleading is now generally required." *N. N. & M. V. Co. v. Com.*, 14 Ky. L. Rep. 196, citing *Whart. Crim. Pl.*, §318; 1 *Bishop Crim. Proc.*, §105.

[b] **The indictment must allege absence of the defendant from the state, if this is relied upon to toll the statute of limitations.** *People v. Miller*, 12 Cal. 291.

[c] **A new indictment found upon re-submission to the grand jury (1)**

How Averred.—It is not absolutely necessary to use the words of the statute in framing an averment to relieve the particular prosecution from the statute,⁹⁵ though it is sufficient to do so.⁹⁶ Nor need the particular facts which constitute the exception to the bar of the statute be minutely alleged.⁹⁷

cannot be regarded as a continuation of the former prosecution, so as to avoid the statute of limitations, unless it alleges the facts as to the former indictment, its dismissal, re-reference to the grand jury, etc., and thus clearly shows upon its face that the prosecution was intended to be a continuous one. *Com. v. T. J. Megibben Co.*, 101 Ky. 195, 198, 40 S. W. 694, *cited and quoted from in Combs v. Com.*, 27 Ky. L. Rep. 273, 84 S. W. 753; *Com. v. G. W. Taylor Co.*, 19 Ky. L. Rep. 1334, 43 S. W. 399; *N. N. & M. V. Co. v. Com.*, 14 Ky. L. Rep. 196, *following Tulley v. Com.*, 13 Bush (Ky.) 153. (2) No such averment is necessary, however, where the new indictment is found before the statutory period has expired. *Com. v. C. B. Cook Co.*, 102 Ky. 288, 43 S. W. 400.

[d] In Pennsylvania, "in a case where the statute may be interposed, and the commonwealth alleges the defendant comes within the exception to the statute, the better practice is to aver in the indictment the facts relied upon to toll the statute," but this is not regarded as essential, however. *Blackman v. Com.*, 124 Pa. 578, 17 Atl. 578, *affirming* 3 Pa. Co. Ct. 464.

[e] Where a criminal prosecution is deemed commenced when a warrant is duly issued and placed in the hands of a proper officer for execution, it is only where no warrant has been issued within the period of limitations after the commission of the offense that facts relied upon to avoid the statute must be stated. *State v. Waterman*, 75 Kan. 253, 88 Pac. 1074.

95. *State v. Hinton*, 49 La. Ann. 1354, 22 So. 617.

[a] Hence, an allegation that the offense has "just" come to the knowledge of an officer with authority to prosecute was held sufficient. *State v. Hinton*, 49 La. Ann. 1354, 22 So. 617.

96. *Cohen v. State*, 2 Ga. App. 689, 59 S. E. 4, sufficient if any of the exceptions stated in the statute be stated in the language therein employed.

97. *Cohen v. State*, 2 Ga. App. 689, 59 S. E. 4.

[a] As to such exceptions, the state is only required to show a *prima facie* case, as this is not matter essential to actual guilt or innocence of the accused. *Cohen v. State*, 2 Ga. App. 689, 59 S. E. 4.

[b] The allegations were sufficient to take the cases without the statutes in the following cases: **La.**—*State v. Drummond*, 132 La. 749, 61 So. 778 (allegation that the accused "fled from justice" is sufficient; not necessary for pleader to set out further particulars); *State v. Hinton*, 49 La. Ann. 1354, 22 So. 617; *State v. Wren*, 48 La. Ann. 803, 19 So. 745; *State v. Strong*, 39 La. Ann. 1081, 3 So. 266; *State v. Vines*, 34 La. Ann. 1073. **Mo.**—*State v. Snyder*, 182 Mo. 462, 82 S. W. 12, holding allegation that defendant "has not been an inhabitant of or usually resident within the state of Missouri," sufficiently alleged facts which, if true, would remove the bar of the statute of limitations otherwise apparent on the face of the indictment, and it was not necessary to allege only one of the two, nor both conjunctively, since taken together as averred, they are one and the same. **Pa.**—*Rosenberger v. Com.*, 118 Pa. 77, 83, 11 Atl. 782.

[c] But see *Randolph v. State*, 14 Ind. 232, where the indictment alleged generally that defendant had concealed the fact of the crime charged. The court held this insufficient, saying: "The particular acts done by him, whereby he produced such concealment should have been alleged." To the same effect is *Jones v. State*, 14 Ind. 120.

[d] Though a statute provides for the tolling of the statute "if, when the offense is committed, defendant be out of the state," this includes a defendant leaving the state after the commission of the offense, and an indictment so alleging the exception is sufficient. *People v. Montejo*, 18 Cal. 38.

[e] **Time of Absence or Concealment.**—(1) An allegation that "ever

8. Matters of Aggravation. — a. *In General.* — Though a statute in defining an offense describes several degrees thereof, it is not necessary in charging the minor offense to negative the aggravating circumstances which would constitute the higher offense.⁹⁸ On the other hand, an indictment either on a statute or at the common law, fully setting out an offense, is not rendered bad by the addition of matter in aggravation, beyond what the law requires for the purpose of charging that offense;⁹⁹ and though it is sought to charge an aggravated offense, which is insufficiently done, the indictment, being sufficient as to the minor offense, will be allowed to stand, and a conviction therefor be sustained.¹

In charging an aggravated offense, it is necessary to charge, in appropriate terms the minor offense,² and then allege the particular offense which the accused intended to commit.³

b. *Prior Convictions.* — (I.) *Necessity for Pleading.* — Under some statutes, if defendant has been previously convicted of another offense, he may be punished more severely; and if it is sought to inflict the severer penalty in the prosecution for the subsequent offense, the prior conviction must be alleged in the indictment or information,⁴ though

since the offense herein charged the defendant has continuously so concealed himself that process could not be served upon him" is sufficient under the Kansas statute providing that the term of absence or concealment shall not be included in computing the period of limitations. *State v. Rook*, 61 Kan. 382, 59 Pac. 653, 49 L. R. A. 186. (2) Under a similar Indiana statute, however, it has been held that to allege merely that accused fled from the state on a specified day is not sufficient, and that the length of time defendant was absent must be alleged. *Colvin v. State*, 127 Ind. 403, 26 N. E. 888.

[f] In a new indictment found upon a re-submission to the grand jury, the certainty required in charging the offense is not required in stating the proceedings under the first indictment. *State v. Duclos*, 35 Mo. 237, *overruling State v. English*, 2 Mo. 147.

98. *Lacy v. State*, 15 Wis. 13.

99. *People v. Boer*, 262 Ill. 152, 104 N. E. 162; *Johnson v. State*, 26 Tex. 117.

[a] Where an indictment sets forth, in aggravation of the offense charged, a former conviction of a similar offense, a nolle prosequi as to the matter in aggravation may be entered after a conviction on the whole indictment *Com. v. Briggs*, 7 Pick. (Mass.) 177.

1. See the following cases: *Mass.*

Com. v. Kennedy, 131 Mass. 584; *Com. v. Hathaway*, 14 Gray 392; *Com. v. Kirby*, 2 Cush. 577. **S. C.**—*State v. Hailey*, 2 Strobb. 73. **Tex.**—*Johnson v. State*, 26 Tex. 117.

See more fully *infra*, XIII, A.

2. *Adell v. State*, 34 Ind. 543.

[a] If the minor offense is not properly charged, there is no foundation for an allegation of an intent to commit the higher crime. *Adell v. State*, 34 Ind. 543.

3. *Adell v. State*, 34 Ind. 543.

4. **U. S.**—*McDonald v. Massachusetts*, 180 U. S. 311, 21 Sup. Ct. 389, 45 L. ed. 542. **Ala.**—*Ingram v. State*, 39 Ala. 247, 84 Am. Dec. 782. **Cal.** *People v. King*, 64 Cal. 338, 30 Pac. 1028. **Conn.**—*Kilbourn v. State*, 9 Conn. 562. **Ga.**—*McWhorter v. State*, 118 Ga. 55, 44 S. E. 873; *Hines v. State*, 26 Ga. 614. **Ill.**—*People v. Tierney*, 250 Ill. 515, 95 N. E. 447; *Watson v. People*, 134 Ill. 374, 25 N. E. 567, each count should aver such prior conviction. **Ind.** *Evans v. State*, 150 Ind. 651, 50 N. E. 820. **Ia.**—*State v. Smith*, 129 Iowa 709, 106 N. W. 187, 4 L. R. A. (N. S.) 539, 6 Am. & Eng. Ann. Cas. 1023. See *State v. Zimmerman*, 83 Iowa 118, 49 N. W. 71. **Kan.**—*State v. Briggs*, 145 Pac. 866, each count of an information should aver such fact, since it should be complete within itself. **Ky.** *Stewart v. Com.*, 2 Ky. L. Rep. 386.

La.—State *v.* Compagno, 125 La. 669, 51 So. 681. **Md.**—Hall *v.* State, 121 Md. 577, 89 Atl. 111; Goeller *v.* State, 119 Md. 61, 85 Atl. 954, Ann. Cas. 1914C, 562; Maguire *v.* State, 47 Md. 485. See Kenny *v.* State, 121 Md. 120, 87 Atl. 1109. **Mass.**—Com. *v.* Walker, 163 Mass. 226, 39 N. E. 1014; Com. *v.* Harrington, 130 Mass. 35; Garvey *v.* Com., 8 Gray 382; Tuttle *v.* Com., 2 Gray 505; Wilde *v.* Com., 2 Mete. 408. **Mich.**—People *v.* Campbell, 173 Mich. 381, 139 N. W. 24; People *v.* Buck, 109 Mich. 687, 67 N. W. 982. **Minn.**—State *v.* Findling, 123 Minn. 413, 144 N. W. 142, 49 L. R. A. (N. S.) 449. **Miss.**—Robinson *v.* State, 68 So. 249; Gaston *v.* State, 65 So. 563; Britton *v.* State, 101 Miss. 584, 58 So. 530; Hoggett *v.* State, 101 Miss. 272, 57 So. 812. **Mo.**—State *v.* Manicke, 139 Mo. 545, 41 S. W. 223; State *v.* Austin, 113 Mo. 538, 21 S. W. 31. **N. H.**—State *v.* Small, 64 N. H. 491, 14 Atl. 727; State *v.* Adams, 64 N. H. 440, 13 Atl. 785. **N. Y.**—People *v.* Rosen, 208 N. Y. 169, 101 N. E. 855; People *ex rel.* Cosgriff *v.* Craig, 195 N. Y. 190, 88 N. E. 38; People *v.* Sickles, 156 N. Y. 541, 51 N. E. 288; Phelps *v.* People, 72 N. Y. 334, 355; Johnson *v.* People, 55 N. Y. 512; Wood *v.* People, 53 N. Y. 511; People *v.* Powers, 6 N. Y. 50; People *v.* Bosworth, 64 Hun 72, 19 N. Y. Supp. 114; People *ex rel.* Bretton *v.* Schleth, 68 Misc. 307, 123 N. Y. Supp. 686; People *v.* Price, 6 N. Y. Crim. 141, 2 N. Y. Supp. 414, *affirmed*, 119 N. Y. 650, 23 N. E. 1149. **N. C.**—State *v.* Davidson, 124 N. C. 839, 32 S. E. 957. **N. D.**—State *v.* Markuson, 7 N. D. 155, 73 N. W. 82. **Ohio.**—Blackburn *v.* State, 50 Ohio St. 428, 36 N. E. 18; Larney *v.* Cleveland, 34 Ohio St. 599. **Pa.**—Com. *v.* Payne, 242 Pa. 394, 89 Atl. 559; Kane *v.* Com., 109 Pa. 541; Rauch *v.* Com., 78 Pa. 490; Halderman's Case, 53 Pa. Super. 554; Smith *v.* Com., 14 Serg. & R. 69; Com. *v.* Aul, 18 Pa. Dist. 1040. **Compare**, Com. *v.* Burwell, 21 Pa. Dist. 197. **Tex.**—Long *v.* State, 36 Tex. 6; Neece *v.* State, 62 Tex. Crim. 378, 137 S. W. 919; Kinney *v.* State, 45 Tex. Crim. 500, 73 S. W. 226, 79 S. W. 570, 47 Tex. Crim. 496, 84 S. W. 590. **Vt.**—State *v.* Davis, 52 Vt. 376; State *v.* Freeman, 27 Vt. 523. **Va.**—Shiflett *v.* Com., 114 Va. 880, 77 S. E. 608; *s. c.*, 114 Va. 876, 77 S. E. 606; Rand *v.* Com., 9 Gratt. 738. See Satterfield *v.* Com., 105 Va. 867,

52 S. E. 979. **W. Va.**—State *v.* Davis, 68 W. Va. 142, 151, 69 S. E. 939, Ann. Cas. 1912A, 996, 32 L. R. A. (N. S.) 501. **Wis.**—Paetz *v.* State, 129 Wis. 174, 107 N. W. 1090, 9 Am. & Eng. Ann. Cas. 767; Fossdahl *v.* State, 89 Wis. 482, 62 N. W. 185. See Davis *v.* State, 134 Wis. 632, 115 N. W. 150. **Wyo.**—Bandy *v.* Hehn, 10 Wyo. 167, 67 Pac. 979. **Eng.**—Reg. *v.* Willis, 12 Cox C. C. 192; Reg. *v.* Stennell, 1 Cox C. C. 142. **Can.**—Rex *v.* Edwards, 17 Manitoba 288; L'Association Pharmaceutique, 9 Quebec Q. B. 243.

See *supra*, IX, D, 1.

[a] A statute providing that the record of a former conviction need not be "set forth particularly," in an indictment for a second offense, and that "it shall be sufficient to allege briefly that such person has been convicted of a" prior offense, implies that there must be a statement of the record if it is relied on with a view of charging the defendant with the higher penalty. Tuttle *v.* Com., 2 Gray (Mass.) 505; State *v.* Small, 64 N. H. 491, 14 Atl. 727.

[b] Such allegations are necessary (1) so as to give the accused notice that a greater penalty is sought to be inflicted than for a first offense (Neece *v.* State, 62 Tex. Crim. 378, 137 S. W. 919. See also State *v.* Paisley, 36 Mont. 237, 248, 92 Pac. 566), (2) it being an established rule of criminal pleading that "the indictment must contain an averment of every fact essential to the punishment to be inflicted." Shiflett *v.* Com., 114 Va. 876, 77 S. E. 606.

[c] The legislature cannot dispense with necessity of such averment, a statute attempting to do so being unconstitutional. Com. *v.* Harrington, 130 Mass. 35. *Compare* State *v.* Freeman, 27 Vt. 523.

[d] Judicial knowledge of a former conviction cannot be taken, though in the same court. State *v.* Davis, 68 W. Va. 142, 150, 69 S. E. 939, Ann. Cas. 1912A, 996, 32 L. R. A. (N. S.) 501. See generally 7 ENCY. OF EV. 1003.

[e] The court will presume in absence of averment of prior conviction, that offense is a first offense, and inflict punishment accordingly. State *v.* Dawson, 38 Ind. App. 483, 78 N. E. 352; Britton *v.* State, 101 Miss. 584, 58 So. 530.

upon this proposition, there are authorities to the contrary.⁵ Unless a statute inflicts a severer punishment for a subsequent offense, an indictment alleging a prior conviction is bad, however,⁶ since such an allegation, where unnecessary cannot be considered merely as surplusage.⁷ Such an allegation, where required, is not a charge of a distinct offense,⁸ and though an essential part of the indictment,⁹ it is not as a rule considered an element of the offense.¹⁰

Such statutes do not make it necessary to allege that the offense charged is the first offense, where such is the case.¹¹

More than one prior conviction can be alleged, though but one is sufficient to bring the accused within the habitual criminal statute.¹²

5. *State v. Hudson*, 32 La. Ann. 1052; *State v. Kelly*, 89 S. C. 303, 71 S. E. 987 (not necessary that indictment should contain such an allegation where record of the former conviction before the court, the defendant having been convicted for both offenses before the same judge); *State v. Parris*, 89 S. C. 140, 71 S. E. 808; *State v. Smith*, 8 Rich. L. (S. C.) 460.

6. *McWhorter v. State*, 118 Ga. 55, 44 S. E. 873; *Seick v. State*, 94 Md. 71, 50 Atl. 436, on demurrer.

7. *Seick v. State*, 94 Md. 71, 50 Atl. 436. But see *People v. Boyle*, 64 Cal. 153, 28 Pac. 232 (holding that though it was unnecessary to allege a prior conviction, such an averment is surplusage, which should be stricken out or disregarded); and *Wright v. Com.*, 109 Va. 847, 857, 65 S. E. 19, to the same effect.

[a] It is prejudicial to the defendant. *McWhorter v. State*, 118 Ga. 55, 44 S. E. 873; *Seick v. State*, 94 Md. 71, 50 Atl. 436.

8. **U. S.**—*McDonald v. Massachusetts*, 180 U. S. 311, 21 Sup. Ct. 389, 45 L. ed. 542. **Cal.**—*People v. Boyle*, 64 Cal. 153, 28 Pac. 232. **Md.**—*Hall v. State*, 121 Md. 577, 89 Atl. 111; *Maguire v. State*, 47 Md. 485. **Mont.** *State v. Paisley*, 36 Mont. 237, 246, 92 Pac. 566; *State v. Gordon*, 35 Mont. 458, 90 Pac. 173.

[a] "As said by Lord Campbell, in the case of *Reg. v. Clark*, *supra* (Dears 198, 20 E. L. & Eq. R. 582) 'it is only the averment of a fact which may affect the punishment.'" *Maguire v. State*, 47 Md. 485, 497.

[b] Two offenses are not therefore charged in the indictment. *People v. Boyle*, 64 Cal. 153, 28 Pac. 232.

9. *State v. Davis*, 68 W. Va. 142,

150, 69 S. E. 639, Ann. Cas. 1912A, 996, 32 L. R. A. (N. S.) 501. See *supra*, this section.

10. **N. Y.**—*People v. McCormack*, 68 Misc. 430, 125 N. Y. Supp. 68. **N. D.** *State v. Bloomdale*, 21 N. D. 77, 128 N. W. 682. **Tex.**—*Neece v. State*, 62 Tex. Crim. 378, 137 S. W. 919.

[a] Compare *McWhorter v. State*, 118 Ga. 55, 44 S. E. 873, wherein the court said that "where the second conviction changes the grade of the offense, or authorizes a higher penalty than could otherwise have been imposed, the former conviction enters as an element into the new offense, and must be alleged as a necessary part of the description and character of the crime intended to be punished."

[b] "The allegations in the indictment relating to alleged past offenses do not relate to the crime charged, but to an alleged event in the life of the defendant compelling, if found upon the trial to have occurred, the infliction of a heavier penalty." *People v. McCormack*, 68 Misc. 430, 125 N. Y. Supp. 68.

11. **Ala.**—*Rosenberg v. State*, 5 Ala. App. 196, 59 So. 366. **Ark.**—*State v. Burgett*, 22 Ark. 323. **Conn.**—*Kilbourn v. State*, 9 Conn. 562. **Ind.**—*State v. Dawson*, 38 Ind. App. 483, 78 N. E. 352.

12. See *People v. Fegelli*, 163 App. Div. 576, 148 N. Y. Supp. 979; *Com. v. Payne*, 242 Pa. 394, 89 Atl. 559.

[a] **Necessity for Election.**—Though the indictment charges more than one prior conviction, and but one is sufficient to bring the accused within the habitual criminal statute, the prosecutor is not required to elect upon which prior conviction he will stand. *People v. Fegelli*, 163 App. Div. 576,

(II.) **How Averred.**—The early rule was that in averring a prior conviction, it was not enough to state that the defendant was convicted on the former indictment, and that the court gave judgment; it should appear what judgment was given on the former indictment.¹³ But the rule requiring the former conviction and judgment to be pleaded at length is entirely abrogated by statutes in some states, it being sufficient thereunder briefly to allege such conviction,¹⁴ technical accuracy in this respect not being required.¹⁵ Nor is the same particularity required as if the party was charged originally with the commission of the offense.¹⁶ It is only necessary to set forth so much of the former proceedings as will intelligently show that the party was indicted, tried, and convicted of an offense or offenses, if there be more than one,¹⁷ provided, in some jurisdictions, that it is also shown

148 N. Y. Supp. 979. Compare, however, *Com. v. Payne*, 242 Pa. 394, 89 Atl. 559, holding that, though more than one prior conviction can be averred, so that if it appear that the prisoner was not convicted of one of them, the other may be proved, only one conviction can be proved.

13. *Smith v. Com.*, 14 Serg. & R. (Pa.) 69. See also *United States v. Thompson*, 4 Cranch C. C. 335, 28 Fed. Cas. No. 16,485.

14. See the following: **Cal.**—Penal Code, §969. **Me.**—*State v. Wentworth*, 65 Me. 234, 247, 20 Am. Rep. 688 (under Rev. St., ch. 27, §55, providing that it "shall not be requisite to set forth particularly the record of a former conviction, but it shall be sufficient to allege briefly," etc.); *State v. Robinson*, 39 Me. 150. **Mass.**—*Com. v. Holley*, 3 Gray 458, under St., 1852, ch. 322, §18. **N. H.**—*State v. Small*, 64 N. H. 491, 14 Atl. 727, under Gen. Laws, ch. 109, §23. **N. D.**—*State v. Bloomdale*, 21 N. D. 77, 128 N. W. 682; *State v. Markuson*, 7 N. D. 155, 73 N. W. 82. **Vt.**—*State v. Davis*, 52 Vt. 376.

[a] It is only necessary to use apt words. *People v. Tierney*, 250 Ill. 515, 95 N. E. 447; *Watson v. People*, 134 Ill. 374, 25 N. E. 567.

15. *State v. Wentworth*, 65 Me. 234, 247, 20 Am. Rep. 688.

16. *State v. Bloomdale*, 21 N. D. 77, 128 N. W. 682; *Neece v. State*, 62 Tex. Crim. 378, 137 S. W. 919.

17. *Conner v. Com.*, 13 Ky. L. Rep. 403, 16 S. W. 454.

[a] It is not necessary that the indictment should state the particular offense upon which the first conviction

was based; it is sufficient to allege that it was a felony. *Whorton v. Com.*, 7 Ky. L. Rep. 826.

[b] Where the statute provides (1) that one having been "convicted" of a prior offense shall be punished by a severer punishment upon a subsequent conviction therefor, it is enough to state that the defendant was "convicted," without averring in terms a judgment or sentence. *Stevens v. People*, 1 Hill (N. Y.) 261. (2) It is otherwise, however, where the statute requires not only a conviction, but a sentence. *People v. Ellsworth*, 68 Mich. 496, 36 N. W. 236.

[c] **The former judgment need not be set forth literally;** (1) but the defendant is entitled to a description that will enable him to find the record, to apply for a conviction or reversal, and to make preparation for a trial of the question whether he is a convict. A construction less favorable to him would not be consistent with his constitutional right. *State v. Small*, 64 N. H. 491, 14 Atl. 727, holding an averment giving the defendant no information of the time, court, or county in which the judgment was rendered, is insufficient. (2) And see *Wilde v. Com.*, 2 Mete. (Mass.) 408, wherein it is said it is "not necessary to set forth the full and entire record of such previous conviction in *ex tenso*; it is sufficient to set it forth with such particularity as to identify it, and indicate the nature and character of the offense charged, and to set forth the sentence or judgment with so much exactness, as to show that it was such a conviction as brings the convict within the law providing for the addi-

that such previous convictions were for offenses committed before the commission of that for which the defendant is on trial.¹⁸

It is not sufficient to allege, in the language of the statute, that accused had been previously convicted of "the same offense,"¹⁹ but it must be averred that he had been previously convicted of an offense of like character to that for which he is being tried.²⁰ If the time and place of the former conviction and the court wherein it was had are definitely stated, this will ordinarily be held a good allegation of prior conviction,²¹ provided, in some jurisdictions, that facts are alleged

tional punishment sought for by the information."

[d] The law presumes that the former indictment was sufficient, and the conviction and judgment were proper, which presumption lasts until the conviction is set aside by direct proceeding. *Conner v. Com.*, 13 Ky. L. Rep. 403, 16 S. W. 454.

18. *Long v. State*, 36 Tex. 6; *Rand v. Com.*, 9 Gratt. (Va.) 738.

[a] Where the offense in the last indictment is charged to have been committed on a given day, and the dates of the former indictments are also given, this is sufficient to show that the offense was committed after the former indictments. *Brown v. Com.*, 22 Ky. L. Rep. 1582, 61 S. W. 4.

19. *Collins v. State* (Tex. Crim.), 171 S. W. 729; *Neece v. State*, 62 Tex. Crim. 378, 137 S. W. 919; *Kinney v. State*, 45 Tex. Crim. 500, 78 S. W. 226, 79 S. W. 570, 47 Tex. Crim. 496, 84 S. W. 590.

20. *Neece v. State*, 62 Tex. Crim. 378, 137 S. W. 919; *Kinney v. State*, 45 Tex. Crim. 500, 78 S. W. 226, 79 S. W. 570, 47 Tex. Crim. 496, 84 S. W. 590.

[a] Under a statute providing for an increased penalty upon a second conviction of felony, it is not necessary that the indictment should state the particular offense upon which the first conviction was based; it is sufficient to allege that it was a felony. *Whorton v. Com.*, 7 Ky. L. Rep. 826.

21. *State v. Bloomdale*, 21 N. D. 77, 128 N. W. 682.

[a] All that the pleader is required to do is to allege the fact that the defendant had theretofore been convicted of an offense, naming it, and giving the date and court which rendered the judgment. *State v. Paisley*, 36 Mont. 237, 247, 92 Pac. 566.

[b] Properly, the date and oc-

casion of such conviction, at least, should be stated. *People v. Buck*, 109 Mich. 687, 67 N. W. 982. That they must be stated, see *Rand v. Com.*, 9 Gratt. (Va.) 738, and also Cal. Penal Code, §969, providing that if more than one previous conviction is charged, the date of the judgment upon each conviction must be stated.

[c] Sufficient allegations of prior conviction were made in the following: Ill.—*People v. Tierney*, 250 Ill. 515, 95 N. E. 447. Ia.—*State v. Zimmerman*, 83 Iowa 118, 49 N. W. 71. Me.—*State v. Wyman*, 80 Me. 117, 13 Atl. 47; *State v. Robinson*, 39 Me. 150. Md. *Hall v. State*, 121 Md. 577, 89 Atl. 111. Mo.—*State v. Loehr*, 93 Mo. 103, 5 S. W. 696. Mont.—*State v. Paisley*, 36 Mont. 237, 92 Pac. 566, *distinguishing Com. v. Finn*, 120 Ky. 364, 86 S. W. 693 (see note following) on the ground that the charge of a former conviction is held to be a charge of a separate offense in Kentucky, and also because in *Com. v. Finn*, *supra*, the indictment failed to state in what courts the defendant had been previously convicted. N. D.—*State v. Bloomdale*, 21 N. D. 77, 128 N. W. 682. Ohio.—*Blackburn v. State*, 50 Ohio St. 428, 36 N. E. 18.

[d] Conviction in Foreign State.—In *Com. v. Finn*, 120 Ky. 364, 86 S. W. 693, it was sought to charge the accused with being an habitual criminal, under a statute providing that every person convicted a third time of a felony, the punishment of which is confinement in the penitentiary, shall be confined in the penitentiary during his life. The charge was based upon prior convictions in other states. It was held insufficient because it did not show either that the acts for which such prior convictions were had were felonies in those states, or the courts in which the convictions took place. The court said: "Good pleading, where

sufficient to show that such court had jurisdiction to try the offense.²² The prison to which the defendant was committed need not be charged.²³ It need not be averred in terms that the accused was an habitual criminal.²⁴ Nor need it be alleged that such former convictions have never been vacated.²⁵ But, where the statute describes the former conviction as one from which the accused has been discharged either by pardon or by serving out the sentence, the indictment must allege a discharge.²⁶

The insufficiency of the allegation of a prior conviction does not vitiate the indictment or information as to the main offense charged,²⁷ for

a judgment of a court of another state is relied upon, requires that the laws of the state under which the judgment was rendered be pleaded, so as to show the jurisdiction of the court to render the judgment relied upon. It was likewise essential to plead the laws of the states in which the judgments are claimed to have been rendered, so that the trial court in this state may know whether, in point of fact, the convictions, even if had as claimed, were felonies, the punishment of which was by confinement in the penitentiary. Courts of this state do not take cognizance of the statutes and jurisdictions of courts of other states unless pleaded, and they must be pleaded as other facts. Furthermore, appellee was entitled to be notified explicitly what court in each instance it was that it is claimed had convicted him of the offense alleged, that he might meet the charge by proof."

[e] **Conclusion.**—It is not necessary that each specification of a former conviction of felony should be concluded with the formal *contra pacem* conclusion, which is required to the entire indictment. *Boggs v. Com.*, 9 Ky. L. Rep. 342, 5 S. W. 307. As to conclusion to an indictment, see *supra*, VIII, A, 6.

22. *People v. Powers*, 6 N. Y. 50, *affirming* 7 Barb. 462; *People v. Cook*, 2 Park. Crim. (N. Y.) 12. See generally the title "**Jurisdiction.**"

[a] It has been held, however, that a statement generally that the court had jurisdiction, without stating the particular facts showing such jurisdiction, is a defect in a matter of form only, cured by a statutory provision for the cure of defects. *People v. Powers*, 6 N. Y. 50; *People v. Golden*, 3 Park. Crim. (N. Y.) 330.

23. *State v. Dowden*, 137 Iowa 573, 115 N. W. 211.

[a] It is sufficient to charge that defendant was convicted without showing what punishment he actually suffered. *Brown v. Com.*, 22 Ky. L. Rep. 1582, 61 S. W. 4.

24. *Sturtevant v. Com.*, 158 Mass. 598, 33 N. E. 648, such being mere conclusion of law.

25. *Gragg v. Com.*, 31 Ky. L. Rep. 873, 104 S. W. 285.

[a] It devolves upon defendant to prove these facts if they exist. *Gragg v. Com.*, 31 Ky. L. Rep. 873, 104 S. W. 285.

26. *State v. Austin*, 113 Mo. 538, 21 S. W. 31; *Wood v. People*, 53 N. Y. 511 (since defendant might have escaped or been discharged on habeas corpus or the judgment arrested or reversed); *Stevens v. People*, 1 Hill (N. Y.) 261; *Gibson v. People*, 5 Hun (N. Y.) 542.

[a] Under a statute which imposes additional punishment on convicts, who have been discharged from former sentences, "in due course of law," it is sufficient to aver that the convict had been discharged from a former sentence, "in consequence of a pardon." *Evans v. Com.*, 3 Mete. (Mass.) 453.

27. **Me.**—*State v. Dorr*, 82 Me. 341, 19 Atl. 861. **N. H.**—*State v. Small*, 64 N. H. 491, 14 Atl. 727; *State v. Thornton*, 63 N. H. 114. **Va.**—*Satterfield v. Com.*, 105 Va. 867, 52 S. E. 979.

[a] The only effect is to exclude evidence of the same upon a trial. *People v. McCormack*, 68 Misc. 430, 125 N. Y. Supp. 68.

[b] If under the statute a former conviction of petit larceny can only be used to enhance the punishment in a case where he is again charged with petit larceny, an indictment for grand larceny alleging prior conviction of

which the accused may nevertheless be tried and convicted.²⁸ Statutes in some states authorize an amendment of a defective averment of prior conviction.²⁹

9. Matters to the Grand Jury Unknown.—Facts not vital to the accusation, but constituting merely matter of fuller description, may be stated in an indictment or information as unknown to the grand jury, if such is the case.³⁰ This was the rule at the common law, as

petit larceny is not vitiated thereby, though such allegation is neither necessary nor proper. *Myers v. State*, 92 Ind. 390; *Good v. State*, 61 Ind. 69.

[c] If the conviction alleged is impossible, the whole allegation should be disregarded. *State v. Dorr*, 82 Me. 341, 19 Atl. 861.

28. *Palmer v. People*, 5 Hill (N. Y.) 427.

29. *Com. v. Holley*, 3 Gray (Mass.) 458, statute constitutional. And see *State v. Davis*, 52 Vt. 376.

As to amendments of indictments or informations generally, see *infra*, XII.

30. See the following cases: **U. S.** *Frisbie v. United States*, 157 U. S. 160, 167, 15 Sup. Ct. 586, 39 L. ed. 657; *United States v. La Coste*, 2 Mason 129, 26 Fed. Cas. No. 15,548. **Ala.**—Code, 1907, §7143. **Cal.**—*People v. Bogart*, 36 Cal. 245; *People v. Cronin*, 34 Cal. 191. **Fla.**—*Lang v. State*, 42 Fla. 595, 28 So. 856. **Ind.**—*McQueen v. State*, 82 Ind. 72. **Kan.**—*State v. McAnulty*, 26 Kan. 533. **Mass.**—*Com. v. Sinclair*, 195 Mass. 100, 80 N. E. 799; *Com. v. Noble*, 165 Mass. 13, 15, 42 N. E. 328. **Mich.** *Merwin v. People*, 26 Mich. 298, 12 Am. Rep. 314. **Minn.**—*State v. Bly*, 99 Minn. 74, 108 N. W. 833; *State v. Ames*, 91 Minn. 365, 98 N. W. 190; *State v. Briggs*, 84 Minn. 357, 87 N. W. 935; *State v. Taunt*, 16 Minn. 109, *explaining* *State v. Hinekey*, 4 Minn. 345. **Mont.** *Territory v. Bell*, 5 Mont. 562, 6 Pac. 60; *Territory v. Shipley*, 4 Mont. 468, 474, 2 Pac. 313. **N. Y.**—*People v. Stark*, 136 N. Y. 538, 32 N. E. 1046; *Haskins v. People*, 16 N. Y. 344; *People v. Nussbaum*, 87 Misc. 269, 150 N. Y. Supp. 605; *People v. Taylor*, 3 Denio 91. **Tenn.**—*State v. Ferriss*, 3 Lea 701, 703. **Tex.**—*Hughes v. State* (Tex. Crim.), 60 S. W. 562.

[a] If this rule were not adopted, there would frequently be a failure of justice. *People v. Nussbaum*, 87 Misc. 269, 150 N. Y. Supp. 605.

[b] The rule is stated in *Lang v. State*, 42 Fla. 595, 28 So. 856, as fol-

lows: "It is well settled in criminal pleading that the omission to state some matters of description not essential constituents of an offense, but which are required to be stated, if known, may be excused by an allegation that they were unknown to the indicting grand jury. . . ."

[c] This rule has been applied to the description of property (1) in cases of larceny. *Lang v. State*, 42 Fla. 595, 28 So. 856. And see the title "**Larceny**." (2) Thus the following descriptions have been held sufficient: "Two promissory notes for the payment of money, commonly called bank notes, of the Stonington Bank, current money of the state of New York, each of the value of fifty dollars; bank bills of banks to the jurors unknown, and of a number and denomination to the jurors unknown, of the value of six hundred dollars; silver coin, current money of the state of New York, of a denomination to the jurors unknown, of the value of fifty dollars" (*Haskins v. People*, 16 N. Y. 344); (3) "bank bills, of banks to the jurors unknown, and of a number and denomination to the jurors unknown, of the value of forty-nine dollars" (*Quinlan v. People*, 6 Park. Crim. [N. Y.] 9; also *People v. Dimick*, 107 N. Y. 13, 31, 14 N. E. 178, 184); (4) "sundry gold coins, current as money in this commonwealth, of the aggregate value of twenty-nine dollars, but a more particular description of which the jurors cannot give, as they have no means of knowledge" (*Com. v. Sawtelle*, 11 Cush. [Mass.] 142. And see *Fla.*—*Porter v. State*, 26 Fla. 56, 7 So. 145. **Kan.** *State v. McAnulty*, 26 Kan. 533. **Minn.** *State v. Taunt*, 16 Minn. 109. **S. C.** *State v. Shirer*, 20 S. C. 392); (5) "sundry bank bills of some banks respectively to said jurors unknown, of the amount and value in all of thirty-eight dollars" (*Com. v. Grimes*, 10 Gray [Mass.] 470, 71 Am. Dec. 666); (6) "a quantity of suit cases of a

to a fact which could not be learned by the exercise of reasonable diligence and which was not an ingredient of the offense sought to be prosecuted.³¹ The basis of the rule being necessity,³² it has no application to facts known to the grand jury,³³ or which could have been learned by the employment of reasonable diligence.³⁴ According to some authorities this averment must be proved.³⁵ But by other authorities it is held that such an averment is sufficient unless it be shown that the fact was known to the grand jury.³⁶

E. NECESSITY AND MANNER OF CHARGING PARTICULAR MATTERS.

1. Averments as to Defendant.—*a. Necessity for.*—The indictment must directly and positively charge the commission by the defendant, of the offense which is the subject of the prosecution.³⁷ The

number and description to the grand jury aforesaid unknown." *People v. Nussbaum*, 87 Misc. 269, 150 N. Y. Supp. 605.

[d] **Homicide.**—(1) Mode and means by which the homicide was committed, unknown. *People v. Cronin*, 34 Cal. 191. And see 11 STANDARD PROC. 590. (2) Name of victim unknown. See 11 STANDARD PROC. 607.

[e] **Intoxicating Liquors.**—Place from which unlawful conveyance of liquor was made, unknown. *Schave v. State*, 4 Okla. Crim. 285, 111 Pac. 962. And see the title "Intoxicating Liquors."

As to designation or description of accused where name unknown, see *infra*, IX, E, 1, b, (II).

As to designation or description of third persons where name unknown, see *infra*, IX, E, 2, b, (II).

31. *Duval v. Pelham*, 63 Ala. 12, 17; 1 Chitty Crim. Law 212, 213.

32. *Duval v. State*, 63 Ala. 12, 17.

[a] **A Rule of Necessity.**—"While the allegation that further particulars of a transaction are unknown is permissible in indictments under certain conditions and serves a useful purpose in preventing variances, it must not be overlooked that its use proceeds purely upon grounds of necessity. With the ceasing of the necessity ceases the rule. It should not be so used as to withhold unnecessarily from defendants information which in their proper defense they should have." *United States v. Aurandt*, 15 N. M. 292, 107 Pac. 1064, 27 L. R. A. (N. S.) 1181.

33. *Duval v. State*, 63 Ala. 12, 17.

[a] Such allegations are permissible only from necessity when the grand jury does not have and cannot obtain

a knowledge of the facts. *Naftzger v. United States*, 200 Fed. 494, 501, 118 C. C. A. 598; *United States v. Rhodes*, 212 Fed. 513; *State v. Stone*, 132 Mo. 199, 33 S. W. 799.

[b] "When it appears on the trial that a fact alleged in the indictment to have been unknown to the grand jury, was known to them, a conviction thereon should not be allowed." *Ware v. State* (Ala. App.), 67 So. 763.

34. *Duval v. State*, 63 Ala. 12, 17.

35. See the following cases: **U. S.** *Naftzger v. United States*, 200 Fed. 494, 501, 118 C. C. A. 598; *United States v. Rhodes*, 212 Fed. 513. **Ark.** *Reed v. State*, 16 Ark. 499; *Cameron v. State*, 13 Ark. 712. **Ill.**—*People v. Gray*, 251 Ill. 431, 96 N. E. 268. **Ind.** *Brooster v. State*, 15 Ind. 190; *Blodget v. State*, 3 Ind. 403. **Mass.**—*Com. v. Hendrie*, 2 Gray 503. **Mo.**—*State v. Stowe*, 132 Mo. 199, 33 S. W. 799.

36. *Coffin v. United States*, 156 U. S. 432, 451, 15 Sup. Ct. 394, 39 L. ed. 481; *Duval v. State*, 63 Ala. 12; *Ware v. State* (Ala. App.), 67 So. 763.

[a] In *Coffin v. United States*, 156 U. S. 432, 15 Sup. Ct. 394, 39 L. ed. 481, the court says that "the true rule is that where nothing appears to the contrary, the verity of the averment of want of knowledge in the grand jury is presumed."

37. **Ark.**—*State v. Hand*, 6 Ark. 165. **Ind.**—*Lane v. State*, 151 Ind. 511, 51 N. E. 1056. **Ky.**—*Com. v. Briggance*, 3 Ky. L. Rep. 623. **Mo.**—*State v. Whitaker*, 160 Mo. 59, 60 S. W. 1068. **N. C.**—*State v. Phelps*, 65 N. C. 450. **Tex.**—*Zinn v. State* (Tex. Crim.), 151 S. W. 825.

[a] "It is necessary in an indictment to name the person charged with

omission, however, of the defendant's name in the accusatory part of the indictment or information, does not render the same fatally defective, where the name appears in the charging part.³⁸ But if it neither names nor refers to the defendant, the indictment or information is bad.³⁹

Where Several Defendants.—If it is sought to indict two persons jointly the indictment should state their names and connect them by the conjunction "and,"⁴⁰ though the omission of the conjunction does not vitiate the indictment where a comma appears between the names wherever the names appear in the indictment.⁴¹

b. How Name Alleged.—(I.) **In General.**—The rule is well settled that if the true name of the defendant is known, he must be charged by such name.⁴² A person may be properly indicted under a name by which he is generally known and called,⁴³ whether or not

crime." *People v. Seidenshner*, 210 N. Y. 341, 104 N. E. 420.

[b] "It is not sufficient to present that there was an affidavit filed to the effect that appellant committed the offense, but the county attorney must directly present the fact that he charges and presents in the court that appellant did the act of which complaint is made." *Zinn v. State* (Tex. Crim.), 151 S. W. 825.

As to necessity for direct and positive statement of facts constituting offense, see *supra*, IX, C, 3.

38. *Curtley v. State*, 42 Tex. Crim. 227, 59 S. W. 44; *State v. Maldonado*, 21 Wash. 653, 59 Pac. 489. But see *State v. Hand*, 6 Ark. 165.

Necessity of repeating name, see *infra*, IX, E, 1, h.

39. **Ala.**—*Washington v. State*, 68 Ala. 85; *Diggs v. State*, 49 Ala. 311, 318. **Ind.**—*Enright v. State*, 58 Ind. 567; *Campbell v. State*, 10 Ind. 420. **Mo.**—*State v. Stern*, 4 Mo. App. 385, wherein blank space appeared where name should be. **Tex.**—*Minchen v. State* (Tex. Crim.), 20 S. W. 712. **Va.** *Com. v. Snider*, 2 Leigh 744. **Eng.** *Rex v. Shakespeare*, 10 East 83, 103 Eng. Reprint 707.

40. *State v. Toney*, 13 Tex. 74.

41. *Hash v. Com.*, 88 Va. 172, 13 S. E. 398.

42. **U. S.**—*United States v. Doe*, 127 Fed. 982. **Ala.**—*Hinktom v. State*, 9 Ala. App. 27, 64 So. 193; *White v. State*, 7 Ala. App. 59, 61 So. 463. **Tex.** *Mistrot v. State*, 72 Tex. Crim. 408, 162 S. W. 833.

[a] "The object of the requirement of the law in this particular is to safeguard what with us has risen to the

dignity of a constitutional right—"that no person shall for the same offense be twice put in jeopardy of life or limb." . . . A compliance in the indictment with the requirement mentioned provides definite record evidence of the identity of the person charged, and thereby affords him protection against future prosecutions for the same offense, or, if, perchance, he should be so prosecuted again, affords him easy, definite and ample proof to support a plea of *autrefois acquit* or *autrefois convict* in assertion of the constitutional right." *Axelrod v. State*, 7 Ala. App. 61, 60 So. 959.

43. **U. S.**—*United States v. Winter*, 13 Blatchf. 276, 28 Fed. Cas. No. 16,743. **Ala.**—*Stallworth v. State*, 146 Ala. 8, 41 So. 184; *Rufus v. State*, 117 Ala. 131, 23 So. 144; *Washington v. State*, 68 Ala. 85; *Diggs v. State*, 49 Ala. 311, 318. **Cal.**—*People v. Woods*, 65 Cal. 121, 3 Pac. 466; *People v. Leong Quong*, 60 Cal. 107; *People v. Kelly*, 6 Cal. 210. **Ga.**—*Roland v. State*, 127 Ga. 401, 56 S. E. 412; *Eaves v. State*, 113 Ga. 749, 39 S. E. 318; *Hainey v. State*, 107 Ga. 711, 33 S. E. 418; *Henderson v. State*, 95 Ga. 326, 22 S. E. 537; *Wiggins v. State*, 80 Ga. 468, 5 S. E. 503; *Wilson v. State*, 69 Ga. 224, wherein defendant was indicted under name of "Doe" *Wilson*. **Ill.**—*People v. Reilly*, 175 Ill. App. 45. **La.**—*State v. Risso*, 131 La. 946, 60 So. 625; *State v. Pierre*, 39 La. Ann. 915, 3 So. 60. **Pa.**—*Alexander v. Com.*, 105 Pa. 1. **Tenn.** *Lewis v. State*, 1 Head 329.

[a] **Reason.**—"Formerly it was held that the surname need not be stated, and the Christian name was required to be stated, out of regard for the

this be his true name. If defendant is known by two or more names, he may be indicted by either name.⁴⁴

(II.) **Where Unknown.**—If no name for the defendant is known, then he must be otherwise so described that it shall appear what particular person is charged with the commission of the offense.⁴⁵ Accordingly, under such circumstances he may be described in the indictment as a person whose name is to the jurors unknown,⁴⁶ but such allegation must be accompanied by some averment of fact identifying him,⁴⁷ unless a statute provides that his name may be alleged as unknown without further identification.⁴⁸ Notwithstanding this rule, an indictment of the defendant by his surname, with an allegation that his Christian name is unknown to the grand jurors is sufficient.⁴⁹ But

religious ceremony of baptism. A person having received a name at his baptism, was not at liberty to change it; and, although he might assume another at his confirmation, still this did not dispense with the first; hence it was held that the Christian name must, in all cases when known, be stated.⁵⁰ *People v. Kelly*, 6 Cal. 210.

[b] Where a defendant's Christian name has come to be regarded as his surname and he is so known, it is not material that his real surname is different. *Rufus v. State*, 117 Ala. 131, 23 So. 144, wherein defendant was indicted under name of John Rufus and his real name was John Rufus George.

44. *Eaves v. State*, 113 Ga. 749, 39 S. E. 318.

As to use of alias, see *infra*, IX, E, 1, c.

45. *United States v. Doe*, 127 Fed. 982.

46. Ala.—Code, 1907, §7142; *Diggs v. State*, 49 Ala. 311, 318. Cal.—*People v. Kelly*, 6 Cal. 210. Ind.—*Jones v. State*, 11 Ind. 357; *Levy v. State*, 6 Ind. 281. Tex.—*Morgan v. State* (Tex. Crim.), 73 S. W. 968. See *Sugarman v. State* (Tex. Crim.), 166 S. W. 732.

[a] To name the accused (1) as Mrs. Beaumont (*Beaumont v. Dallas*, 34 Tex. Crim. 68, 29 S. W. 157), (2) or ——— Mistrot, without alleging his name is unknown (*Mistrot v. State*, 72 Tex. Crim. 408, 162 S. W. 833) is insufficient, however.

[b] That defendant's true name might have been ascertained by due diligence is not material. *Smoke v. State*, 87 Ala. 143, 6 So. 143. But see *Lyon v. State*, 61 Ala. 221. *Contra*, *Geiger v. State*, 5 Iowa 484. And see *supra*, IX, D, 9.

47. U. S.—*United States v. Doe*, 127 Fed. 982. Ala.—*Washington v. State*, 68 Ala. 85. Ind.—*Levy v. State*, 6 Ind. 281. Ia.—*State v. Geiger*, 5 Iowa 484. Tex.—*Mistrot v. State*, 72 Tex. Crim. 408, 162 S. W. 833 (Code Crim. Proc., 1895, art. 257, subd. 1); *Bradford v. State*, 72 Tex. Crim. 76, 160 S. W. 1185; *Wilcox v. State*, 35 Tex. Crim. 630, 34 S. W. 958.

[a] A person may be arrested under a warrant that merely describes his person, the color of his eyes and hair, his complexion, height, weight, etc., where his name is unknown; and he may be indicted and convicted under such a description. *Wiggins v. State*, 80 Ga. 463, 5 S. E. 503.

[b] To indict the defendant as "John Doe, a Chinese person, whose true name is to the grand jurors aforesaid unknown" with a certain offense is too indefinite. To describe the defendant as above is just as indefinite as if he had been described as "a Chinese person, whose true name is to the grand jurors unknown." *United States v. Doe*, 127 Fed. 982.

48. Ala. Code, 1907, §7142; *Axelrod v. State*, 7 Ala. App. 61, 60 So. 959; *People v. Oliveria*, 127 Cal. 376, 59 Pac. 772.

49. *Wilcox v. State*, 35 Tex. Crim. 631, 34 S. W. 958, overruling earlier cases to contrary.

[a] Thus to charge the defendant by the name (1) of ——— Skinner, late of a certain county whose Christian name is unknown to the grand jury aforesaid (*Skinner v. State*, 30 Ala. 524), (2) or to charge defendant by the name of "Levy" and allege his Christian name is unknown (*Levy v. State*, 16 Ind. 281), (3) or to charge

it cannot charge the defendant's name as both known and unknown;⁵⁰ and if his name be alleged to be unknown, when in fact it is known, the variance is fatal.⁵¹

c. *Christian Name, Initials and Middle Names.*—Upon the principle that every one is presumed to have a Christian name, until the contrary is shown,⁵² the indictment or information must allege the Christian name of the accused,⁵³ unless some reason is shown for not so stating it,⁵⁴ such as that his Christian name is unknown,⁵⁵ and otherwise identify the accused.⁵⁶

Initials.⁵⁷—The certainty required at common law made it necessary to allege the full Christian name of defendant and not merely his initials,⁵⁸ unless it is alleged that his Christian name is unknown to the grand jury otherwise than as laid in the indictment.⁵⁹ or the defendant was commonly known by the initials of his Christian name only,⁶⁰ and this is still the rule in some states,⁶¹ and is the better prac-

tice given under name L. J. Jones, whose given name is to the grand jurors unknown (Jones v. State, 11 Ind. 357), is sufficient.

50. Jones v. State, 63 Ala. 27, wherein defendant was indicted under name of Douglas Jones alias Dug Jones, whose true Christian name is to this grand jury unknown.

51. Wells v. State, 88 Ala. 239, 7 So. 272; Winter v. State, 90 Ala. 637, 8 So. 556; James v. State, 115 Ala. 83, 22 So. 565; Duvall v. State, 63 Ala. 12; Hinktom v. State, 9 Ala. App. 27, 64 So. 193. See *supra*, IX, D, 9.

52. Burton v. State, 75 Ind. 477; Gardner v. State, 4 Ind. 632.

53. **Ala.**—Lyon v. State, 61 Ala. 224; Roseberry v. State, 50 Ala. 160. **Ind.**—Burton v. State, 75 Ind. 477; State v. Kutter, 59 Ind. 572; Gardner v. State, 4 Ind. 632. **Kan.**—Prell v. McDonald, 7 Kan. 426, 12 Am. Rep. 423.

[a] **Christian Name by Which Accused Is Commonly Known.**—United States v. Winter, 13 Blatchf. 276, 28 Fed. Cas. No. 16,743. See *supra*, IX, E, 1, b, (I).

54. Burton v. State, 75 Ind. 477.

55. Roseberry v. State, 50 Ala. 160; Bryant v. State, 36 Ala. 270; Skinner v. State, 30 Ala. 524; Jones v. State, 11 Ind. 357; Levy v. State, 6 Ind. 281. See Sugarman v. State (Tex. Crim.), 166 S. W. 732; and *supra*, IX, E, 1, b, (II).

[a] If the indictment alleges that the Christian name is unknown, and it be shown that it was in fact known to the grand jury, the variance is fatal.

Winter v. State, 90 Ala. 637, 8 So. 556; Wells v. State, 88 Ala. 239, 7 So. 272; Hinktom v. State, 9 Ala. App. 27, 64 So. 193; Axelrod v. State, 7 Ala. App. 61, 60 So. 959.

56. Levy v. State, 6 Ind. 281. See *supra*, IX, E, 1, b, (II).

57. **Initials of other persons**, see *infra*, IX, E, 2, c.

58. Levy v. State, 6 Ind. 281; Gardner v. State, 4 Ind. 632.

As to certainty required in an indictment, see *supra*, IX, C, 4.

59. Jones v. State, 181 Ala. 63, 61 So. 434; Strange v. State, 5 Ala. App. 164, 59 So. 691; Sugarman v. State (Tex. Crim.), 166 S. W. 732.

[a] An indictment against "W. P. O'Brien" is not self contradictory because the Christian name is alleged to be otherwise unknown. O'Brien v. State, 91 Ala. 25, 8 So. 560. See also Wells v. State, 88 Ala. 239, 7 So. 272.

[b] An indictment which sets forth the defendant's Christian name by initials only is subject to plea in abatement, unless it is alleged that the Christian name was unknown to the grand jury otherwise than as laid in the indictment. Jones v. State, 181 Ala. 63, 61 So. 434; Wellborn v. State, 154 Ala. 79, 45 So. 646; O'Brien v. State, 91 Ala. 25, 8 So. 560; Jones v. State, 63 Ala. 27; Lyon v. State, 61 Ala. 224, 229.

60. **Ill.**—People v. Reilly, 175 Ill. App. 45. **S. C.**—Charleston v. King, 4 McCord 487. **Eng.**—Reg. v. Dale, 17 Q. B. 64, 117 Eng. Reprint 1206, 15 Jur. 657, 79 E. C. L. 64.

61. Jones v. State, 181 Ala. 63, 61 So. 434; Hewlett v. State, 135 Ala. 59,

tice.⁶² But in other states,⁶³ especially under statutes providing for correction of misnomer,⁶⁴ it is permissible to allege defendant's Christian name by initials without alleging that his full name is unknown. The defendant is sufficiently designated, however, by his initials, where it is further stated that his Christian name is unknown to the grand jury, there being no evidence to show it was known.⁶⁵

An abbreviation of the Christian name of defendant may be used where its use for the full name has been so general and constant that the meaning of the abbreviation is universally understood and is a matter of general knowledge.⁶⁶

Middle Name.—The law knows only one Christian name, and the middle letter forms no part of it, so that its insertion or omission,⁶⁷ or error therein, makes no difference.⁶⁸

d. Additions and Descriptions.—Though in a few states, the English statute of additions, requiring the estate, degree, mystery and place of residence of the defendant to be stated,⁶⁹ has been construed to be a part of the common law of this country,⁷⁰ as a rule, such statute

33 So. 662; *O'Brien v. State*, 91 Ala. 25, 8 So. 560; *Winter v. State*, 90 Ala. 637, 8 So. 556; *Gerrish v. State*, 53 Ala. 476; *Axelrod v. State*, 7 Ala. App. 61, 60 So. 959; *Burton v. State*, 75 Ind. 477; *Gardner v. State*, 4 Ind. 632.

62. *Eaves v. State*, 113 Ga. 749, 39 S. E. 318.

63. *Eaves v. State*, 113 Ga. 749, 39 S. E. 318; *Wiggins v. State*, 80 Ga. 468, 5 S. E. 503; *State v. Appleton*, 70 Kan. 217, 78 Pac. 445. See *People v. Reilly*, 257 Ill. 538, 101 N. E. 54, Ann. Cas. 1914A, 1112, and *infra*, IX, E, 2, c.

[a] The court cannot assume that an initial is not the full Christian name of the defendant. *Wiggins v. State*, 80 Ga. 468, 5 S. E. 503.

[b] The transposition of two inter-medial initials, such as J. S. C. Timberlake for J. C. S. Timberlake, is immaterial. *Timberlake v. State*, 100 Ga. 66, 27 S. E. 158.

64. *State v. Webster*, 30 Ark. 166; *State v. Johnson*, 93 Mo. 317, 6 S. W. 77.

65. *Rogers v. State*, 154 Ala. 75, 45 So. 221 (W. J. whose Christian name is unknown); *O'Brien v. State*, 91 Ala. 25, 8 So. 560; *Winter v. State*, 90 Ala. 637, 8 So. 556; *Axelrod v. State*, 7 Ala. App. 61, 60 So. 959.

66. *McDonald v. State*, 55 Fla. 134, 46 So. 176 ("Jno." for "John"); *State v. Granger*, 203 Mo. 586, -102 S. W. 498, "Jno." for "John."

As to use of abbreviations generally, see *supra*, IX, C, 2, d.

[a] **Reason.**—The courts take judicial notice of the usual abbreviations of Christian names in common use. *McDonald v. State*, 55 Fla. 134, 46 So. 176. See the title "Judicial Notice;" and 7 ENCY. OF EV. 926.

[b] Where defendant is described as "Ben," this will be presumed to be his full Christian name. *Burton v. State*, 75 Ind. 477.

67. **U. S.**—*United States v. Winter*, 13 Blatchf. 276, 28 Fed. Cas. No. 16,743. **Ala.**—*Woods v. State*, 133 Ala. 162, 31 So. 984; *Taylor v. State*, 100 Ala. 68, 14 So. 875; *Diggs v. State*, 49 Ala. 311, 318; *Edmundson v. State*, 17 Ala. 179, 52 Am. Dec. 169 (insertion of middle initial "L." immaterial and not misnomer); *Robinson v. State*, 8 Ala. App. 435, 62 So. 372, omission of middle initial "M." not material. **Ark.** *State v. Smith*, 12 Ark. 622, 56 Am. Dec. 287. **Ind.**—*O'Connor v. State*, 97 Ind. 104; *Choen v. State*, 52 Ind. 347, 21 Am. Rep. 179; *West v. State*, 48 Ind. 483. **Eng.**—*Rex v. Majorem Rippon*, 1 Ld. Raym. 563, 91 Eng. Reprint 1276.

[a] The omission of the middle initial is not material. *Robinson v. State*, 8 Ala. App. 435, 62 So. 372.

68. **Ala.**—*Pace v. State*, 69 Ala. 231, 44 Am. Rep. 513. **Cal.**—*People v. Boggs*, 20 Cal. 432. **Ill.**—*Miller v. People*, 39 Ill. 457.

69. 1 Hen. 5, ch. 5.

70. *State v. Bishop*, 15 Me. 122;

is held to be inapplicable to prosecutions in this country,⁷¹ and where the accused is named, it is not necessary to otherwise describe him,⁷² unless the matter of description constitutes an essential element of the offense.⁷³ Neither is there any necessity to allege the residence of the defendant,⁷⁴ as it is wholly immaterial in fixing the venue of criminal offenses.⁷⁵

If a description be attempted, however, the accused is entitled to be correctly described;⁷⁶ a false statement in this respect, cannot be treated as surplusage, and will be fatal upon proper objection thereto being made,⁷⁷ unless a statute provides, as is sometimes the case, that an indictment shall not be quashed for any omission or misstatement of the title, occupation, or description of the defendant, where the same does not tend to his prejudice.⁷⁸

Junior and Senior. — The additions "Junior" or Jr.,⁷⁹ and "Senior" are no part of the name proper,⁸⁰ so that neither their omission,⁸¹ nor insertion, contrary to what would be deemed proper, will create a variance or be fatal.⁸²

e. Alias. — If the offender is known by more than one name,⁸³ or if the grand jury is uncertain which of several names is the real name of the person, he may be indicted under an alias;⁸⁴ and if he is known

Com. v. France, 2 Brewst. (Pa.) 568.

[a] "According to the old authorities, these additions should be added after the first name, and not after the alias dictus. 2 Inst. 699; 3 Salk. 20. Though, if an addition be given to the name after the alias dictus, it may be rejected as surplusage. Hawk. b. 2, c. 25, §71." State v. Bishop, 15 Me. 122.

71. Lanekton v. United States, 18 App. Cas. 348; State v. Newmans, 4 N. C. 171.

[a] No longer applicable in Rhode Island, though at one time expressly re-enacted there. State v. Daly, 14 R. I. 510.

72. Com. v. Scott, 10 Gratt. (Va.) 749, 756.

Where name of accused is unknown, as to necessity of describing him, see *supra*, IX, E, 1, b, (II).

73. Com. v. Scott, 10 Gratt. (Va.) 749.

[a] An indictment charging E. C. Morrison with an offense is not objectionable upon the ground that it does not aver that defendant is an individual, a partnership, or a corporation. Morrison v. State, 151 Ala. 118, 44 So. 13.

[b] It is not necessary to aver the color of the accused, except in cases, as of intermarriage in violation of law, when the fact enters into the in-

gredients of the offense. Taylor v. State, 44 Ga. 263.

74. Ala.—Morgan v. State, 19 Ala. 556. Ga.—Studstill v. State, 7 Ga. 2.

La.—State v. Daniels, 49 La. Ann. 954, 22 So. 415. Mass.—Com. v. Taylor, 113 Mass. 1.

75. Studstill v. State, 7 Ga. 2.

76. State v. Daly, 14 R. I. 510.

77. State v. Daly, 14 R. I. 510, fatal on plea in abatement.

78. State v. Nelson, 29 Me. 329. See also State v. Guest, 100 N. C. 410, 6 S. E. 253.

79. Cal.—People v. Oliveria, 127 Cal. 376, 59 Pac. 772. Ill.—Davids v. People, 192 Ill. 176, 61 N. E. 537. N. Y. People v. Collins, 7 Johns. 549.

[a] "It is a mere description of the person, and intended only to designate between different persons of the same name. It is a casual and temporary designation. It may exist one day and cease the next." People v. Collins, 7 Johns. (N. Y.) 549.

80. People v. Oliveria, 127 Cal. 376, 59 Pac. 772.

81. People v. Oliveria, 127 Cal. 376, 59 Pac. 772.

82. People v. Oliveria, 127 Cal. 376, 59 Pac. 772.

83. Stinchcomb v. State, 119 Ga. 442, 46 S. E. 639.

84. Ala.—Haley v. State, 63 Ala. 89; Lee v. State, 55 Ala. 259. Cal.

by one or more names it is not only proper⁸⁵ but desirable and necessary as a matter of description to give the several names by which he was known.⁸⁶ If the true name of the defendant be alleged, the alias becomes immaterial and an error as to it does not vitiate the indictment.⁸⁷ Nor does the use of several aliases render the indictment defective or uncertain.⁸⁸

If defendant is indicted by a fictitious name, and it is further alleged that his true name is unknown, upon the discovery of the true name the record must be amended so as to set forth the true name.⁸⁹

f. *Partnerships and Corporations.*—A partnership, as such, may not be indicted,⁹⁰ but the indictment may charge the defendants as individuals and describe them as members of a certain partnership.⁹¹

Public and Private Corporations.—Corporations whether merely an ordinary private corporation,⁹² or a municipal corporation⁹³ must be indicted in its own name. An allegation that the defendant is a

People v. Maroney, 109 Cal. 277, 41 Pac. 1097. *Ga.*—*Stinchcomb v. State*, 119 Ga. 442, 46 S. E. 639. *Tex.*—*Leslie v. State* (Tex. Crim.), 47 S. W. 367.

85. *People v. Seidenshner*, 210 N. Y. 341, 104 N. E. 420; *People v. Everhardt*, 104 N. Y. 591, 11 N. E. 62. See *supra*, IX, E, 1, b, (1).

[a] The use of "nicknames" more or less opprobrious is not error where there was evidence justifying their use. *People v. Seidenshner*, 210 N. Y. 341, 104 N. E. 420.

86. *People v. Seidenshner*, 210 N. Y. 341, 104 N. E. 420. But see *People v. Maroney*, 109 Cal. 277, 41 Pac. 1097, holding that under modern statutes if an indictment be read to the jury charging defendant with the commission of a crime under several aliases, the defendant is prejudiced and if such an indictment were so framed without reason, its reading would prevent the defendant from obtaining a fair and impartial trial, but where the indictment charges prior convictions of crime under different names, for the purpose of identifying him as the person who had suffered those convictions the use of the alias is not only permissible but proper and is not prejudicial where read to the jury.

87. *Barnesciotta v. People*, 10 Hun (N. Y.) 137.

[a] An indictment charging a certain designated person with the commission of an offense is not rendered vague and uncertain by the fact that the given name of an alias is alleged to be unknown, nor is it subject to the objection of inconsistency or re-

pugnancy. *Brown v. State*, 157 Ala. 15, 47 So. 1024.

88. *State v. Howard*, 30 Mont. 518, 77 Pac. 50.

[a] The better practice is to charge the defendant under some alias and state his true name is unknown. *State v. Howard*, 30 Mont. 518, 77 Pac. 50.

89. *Territory v. Do*, 1 Ariz. 507, 25 Pac. 472, wherein verdict was against defendant under true name.

90. *McCowen v. Bowring Bros.*, Newf. L. Rep. (1884-1896) 872.

91. *Barnett v. State*, 54 Ala. 579. See *McCowen v. Bowring Bros.*, Newf. L. Rep. (1884-1896) 872.

[a] An indictment against "Ernest Schraubstadter and Emile A. Groezinger, doing business in the city and county of San Francisco under the firm name and style of A. Finke's Widow, hereinafter called the defendants," shows an intentment to indict the defendants personally, and not the firm as a firm. The recitation "doing business" in San Francisco, etc., is but descriptive of the persons composing the firm and it would be exceedingly technical to hold that such an indictment was an indictment of the firm, and not of the persons composing it. An indictment so drawn will be treated as an indictment of the individual members of the firm, and not of the firm under its firm name. *Schraubstadter v. United States*, 199 Fed. 568; *State v. Powell*, 3 Lea (Tenn.) 164.

92. *Reg. v. Birmingham, etc. R. Co.*, 3 Q. B. 223, 114 Eng. Reprint 492, 43 E. C. L. 708, 38 E. C. L. 278.

93. *Com. v. Dedham*, 16 Mass. 141,

corporation existing under the laws of a specified state is all that is necessary to describe the corporation.⁹⁴ There is no necessity for alleging the time and place when and where its existence commenced.⁹⁵

g. *Misnomer and Errors in Spelling of Names.*⁹⁶—While if there is a material variance between the name of the defendant as alleged and the proof, the variance is fatal,⁹⁷ slight departures from the true name of defendant are immaterial, so long as they are idem sonans.⁹⁸ The question whether one name is idem sonans with another is not always a question of spelling, but of pronunciation, depending less upon rule than upon usage,⁹⁹ in which case it may be a question of fact for the jury.¹ Frequently, however, the similarity or dissimilarity is so pronounced that the question is one for the court,²

wherein town of Dedham instead of the inhabitants of town of Dedham was indicted.

[a] That the name of the town was changed by the legislature after indictment is not ground for quashing the indictment. *Com. v. Phillipsburg*, 10 Mass. 78.

[b] But an indictment against certain persons as burgess and members of the city council is an indictment of them in their corporate, and not their individual capacity. *Com. v. Bredin*, 165 Pa. 224, 30 Atl. 921.

94. *State v. Vermont Cent. R. Co.*, 28 Vt. 583.

95. *State v. Vermont Cent. R. Co.*, 28 Vt. 583.

96. As to names of third parties, see *infra*, IX, E, 2, g.

97. *People v. Roth*, 185 Ill. App. 162.

98. Ala.—*Edmundson v. State*, 17 Ala. 179, 52 Am. Dec. 169, *Edmundson for Edmindson*. Ga.—*Roland v. State*, 127 Ga. 401, 56 S. E. 412; *Biggers v. State*, 109 Ga. 105, 34 S. E. 210. Kan.—*State v. Haist*, 52 Kan. 35, 34 Pac. 453. Mo.—*State v. Hutson*, 15 Mo. 512. Tex.—*Boren v. State*, 32 Tex. Crim. 637, 25 S. W. 775.

[a] The following have been held to be idem sonans: (1) "Surrena" and "Serena" (*Tuells v. Torras*, 113 Ga. 691, 39 S. E. 455), (2) Rawlin and Roland (*Roland v. State*, 127 Ga. 401, 56 S. E. 412), (3) Witt and Wid (*Veal v. State*, 116 Ga. 589, 42 S. E. 705), (4) Barbra and Barbara (*State v. Haist*, 52 Kan. 35, 34 Pac. 453), (5) Owens D. Havelly and Owen D. Haverly (*State v. Blankenship*, 21 Mo. 504), (6) Hutson and Hudson (*State v. Hutson*, 15 Mo. 512), (7) Israel and Isreal

(*Boren v. State*, 32 Tex. Crim. 637, 25 S. W. 775), (8) Darius and Trius, *Queen v. Davis*, 5 Cox C. C. [Eng.] 237, 2 Den. C. C. 231, 233.

[b] There is a material variance between the following, however: (1) "Tarpley" and "Tapley" (*Tarpley v. State*, 79 Ala. 271), (2) "Munkers" and "Muncus" (*Munkers v. State*, 87 Ala. 94, 6 So. 357), (3) "Mulette" and "Merlette" (*Merlette v. State*, 100 Ala. 42, 14 So. 562), (4) "Rooks" and "Rux" (*Rooks v. State*, 83 Ala. 79, 3 So. 720), (5) "Donnelly" and "Donly." *Donnelly v. State*, 78 Ala. 453.

As to mistakes in spelling name, see *supra*, IX, C, 2, e.

99. *Roland v. State*, 127 Ga. 401, 56 S. E. 412; *Com. v. Donovan*, 13 Allen (Mass.) 571. See generally the title "Names."

[a] The term idem sonans does not necessarily mean that the two names are precisely alike, but only that their pronunciations are so nearly alike that when one of them is uttered, it may be readily taken for the other. *Roland v. State*, 127 Ga. 401, 56 S. E. 412.

1. *Munkers v. State*, 87 Ala. 94, 6 So. 357; *Com. v. Donovan*, 13 Allen (Mass.) 571, presenting question whether Mealy was idem sonans with Malay or Maley.

2. See the following: Ala.—*Munkers v. State*, 87 Ala. 94, 6 So. 357. Ga.—*Veal v. State*, 116 Ga. 589, 42 S. E. 705. Mass.—*Com. v. Warren*, 143 Mass. 568, 10 N. E. 178. Mo.—*State v. Blankenship*, 21 Mo. 504; *State v. Havelly*, 21 Mo. 498. Eng.—*Reg. v. Davis*, 5 Cox C. C. 237.

[a] In *Com. v. Warren*, 143 Mass. 568, 10 N. E. 178, it was said: "The province of the court and jury in cases

especially when the question is raised by demurrer,² or motion to strike.⁴

Statutes in some states expressly provide that error in the name of defendant shall not vitiate the indictment if it can be understood therefrom that the defendant is named,⁵ and upon the discovery of the error, the proceedings thereafter are taken in the true name of the defendant.⁶

h. Necessity of Repeating Name and Errors in Repetition.—It is not essential that the name of the defendant be constantly repeated throughout the indictment,⁷ though it must be stated wherever necessary for certainty.⁸ When once mentioned in full, it may be abbreviated when it occurs again in the same count or sentence,⁹ or even in subsequent counts,¹⁰ with a reference to the first statement of it, by the words, "said" or "aforesaid."¹¹

The insertion of a wrong name in the formal part of an indictment does not vitiate the same, if properly written in the charging part thereof.¹²

An incorrect designation of the surname of the accused in a single place in an indictment or information does not vitiate it, where it is correctly designated in several other places therein;¹³ especially is this true, when the sentence containing the incorrect name can be treated as surplusage, and sufficient still remains to charge the offense.¹⁴

2. Averments as to Third Parties.—*a. Necessity for.*—While the names of third persons actually injured by the wrongful acts of the

like the present is governed by the following rule: If two names, spelled differently, necessarily sound alike, the court may, as matter of law, pronounce them to be idem sonans; but if they do not necessarily sound alike, the question whether they are idem sonans is a question of fact for the jury."

3. *Ala.*—*Munkers v. State*, 87 Ala. 94, 6 So. 357. *Ga.*—*Veal v. State*, 116 Ga. 589, 42 S. E. 705. *Mo.*—*State v. Havelly*, 21 Mo. 498.

4. *Veal v. State*, 116 Ga. 589, 42 S. E. 705.

5. *Louisiana & A. R. Co. v. State*, 85 Ark. 12, 106 S. W. 969 (under Kirby's Dig., §2232); *People v. Oliveria*, 127 Cal. 376, 59 Pac. 772.

6. *Louisiana & A. R. Co. v. State*, 85 Ark. 12, 106 S. W. 969; *People v. Kelly*, 6 Cal. 210.

7. *State v. Coppenburg*, 2 Strobb. (S. C.) 273.

8. *State v. Hand*, 6 Ark. 165.

9. *State v. Coppenburg*, 2 Strobb. (S. C.) 273.

10. *Com. v. Hagarman*, 10 Allen (Mass.) 401, holding that where the

first count contained the name in full, the subsequent counts might describe accused as "the said John," although the complainant's name was also John.

11. *State v. Coppenburg*, 2 Strobb. (S. C.) 273.

12. *Phillips v. State*, 35 Ark. 384.

13. *Ark.*—*Phillips v. State*, 35 Ark. 384. *Cal.*—*People v. Oliveria*, 127 Cal. 376, 59 Pac. 772; *People v. Monteith*, 73 Cal. 7, 14 Pac. 373. *Ind.*—*Drake v. State*, 145 Ind. 210, 41 N. E. 799, 44 N. E. 188; *O'Connor v. State*, 97 Ind. 104; *Kennedy v. State*, 62 Ind. 136; *West v. State*, 48 Ind. 483; *Dukes v. State*, 11 Ind. 557. *Mass.*—*Com. v. Robinson*, 165 Mass. 426, 43 N. E. 121; *Com. v. Hagarman*, 10 Allen 401. *Tenn.*—*State v. Brown*, 3 Heisk. 1. *Tex.*—*Muscarez v. State*, 41 Tex. 226; *Smith v. State*, 70 Tex. Crim. 68, 156 S. W. 645; *Skinner v. State* (Tex. Crim.), 154 S. W. 1007 (where accused not misled); *Bartley v. State*, 47 Tex. Crim. 41, 83 S. W. 190; *Chessby v. State* (Tex. Crim.), 74 S. W. 548.

14. *Smith v. State*, 70 Tex. Crim. 68, 156 S. W. 645.

accused need not be alleged when the injury, within the contemplation of the statute is done to the public generally, rather than to a specific person,¹⁵ in most instances, the offense against the state is complete only as the wrongful act operates upon or affects the person or property of some third person, in which case the name of the third person, without whom the crime cannot be committed, is essential to the statement of a complete offense, and must be alleged,¹⁶ unless the neces-

15. **Ala.**—*Owens v. State*, 52 Ala. 400. **Ia.**—*State v. Standard Oil Co.*, 150 Iowa 46, 129 N. W. 336; *State v. Clark*, 141 Iowa 297, 119 N. W. 719; *State v. Leasman*, 137 Iowa 191, 114 N. W. 1032 (throwing stones at train); *State v. Beebe*, 115 Iowa 128, 88 N. W. 358 (names of persons frequenting house of prostitution); *State v. Aldeman*, 40 Iowa 375. **N. J.**—*State v. Cooney*, 72 N. J. L. 76, 60 Atl. 60, which was a prosecution for false swearing at election. **S. D.**—*State v. Carlisle*, 30 S. D. 475, 139 N. W. 127. **Wash.**—*State v. Considine*, 16 Wash. 358, 47 Pac. 755 (employing female in place prohibited by statute); *State v. Bodeckar*, 11 Wash. 417, 39 Pac. 645. **Wyo.**—*Koppala v. State*, 15 Wyo. 398, 89 Pac. 576, 93 Pac. 662.

[a] **Crimes Not Injuring Particular Person.**—There are crimes which may be committed by the accused in the secrecy and solitude of his room which do not directly or immediately affect any other person, and to charge such a crime it is ordinarily necessary to do no more than to charge the doing of the act and the unlawful or felonious intent. For example, the accused may be charged with the unlawful possession of burglar's tools, he may adulterate food with intent to sell the same in violation of law, or may keep intoxicating liquors with intent to sell in violation of the prohibitory law, and a charge of an offense of this class may be made without alleging the purpose of the accused to injure any particular person. *State v. Clark*, 141 Iowa 297, 119 N. W. 719.

[b] Under statutes showing intention to prohibit cruelty to animals, allegations of ownership are unnecessary. *State v. Leasman*, 137 Iowa 191, 114 N. W. 1032. See 6 STANDARD PROC. 318.

[c] **Wherever the crime consists of a series of acts**, (1) such as the engaging in the business of selling with-

out a license (*State v. Williams*, 11 S. D. 64, 75 N. W. 815), (2) or practicing dentistry without a license, the names of third parties need not be alleged. *State v. Carlisle*, 30 S. D. 475, 139 N. W. 127.

[d] **The maiden name of the defendant's first wife in an indictment for bigamy need not be alleged.** *Hutchins v. State*, 28 Ind. 34.

16. **Ala.**—*Crittenden v. State*, 134 Ala. 145, 32 So. 273; *Russell v. State*, 71 Ala. 348; *Grattan v. State*, 71 Ala. 344; *Morningstar v. State*, 52 Ala. 405. **Ark.**—*State v. Cadle*, 19 Ark. 613; *State v. Parnell*, 16 Ark. 506, 63 Am. Dec. 72. **Fla.**—*Moulie v. State*, 37 Fla. 321, 20 So. 554; *Jones v. State*, 22 Fla. 532. **Ga.**—*Irwin v. State*, 117 Ga. 722, 45 S. E. 59; *Martin v. State*, 115 Ga. 255, 41 S. E. 576; *Eaves v. State*, 113 Ga. 749, 39 S. E. 318; *Rouse v. State*, 4 Ga. 136. **Ill.**—*People v. Stricker*, 258 Ill. 618, 102 N. E. 216; *People v. Reilly*, 257 Ill. 538, 101 N. E. 54, Ann. Cas. 1914A, 1112; *Vincendeau v. People*, 219 Ill. 474, 76 N. E. 675; *Vandermark v. People*, 47 Ill. 122; *Willis v. People*, 2 Ill. 399; *People v. Roth*, 185 Ill. App. 162. **Ind.**—*Waters v. State*, 174 Ind. 545, 92 N. E. 537; *Padgett v. State*, 167 Ind. 179, 78 N. E. 663; *Zook v. State*, 47 Ind. 463; *Alexander v. State*, 48 Ind. 394; *State v. Irvin*, 5 Blackf. 343; *State v. Stucky*, 2 Blackf. 289. **Ia.**—*State v. Standard Oil Co.*, 150 Iowa 46, 129 N. W. 336; *State v. Clark*, 141 Iowa 297, 119 N. W. 719; *State v. Jackson*, 128 Iowa 543, 105 N. W. 51; *State v. Allen*, 32 Iowa 248; *State v. McConkey*, 20 Iowa 574. **Kan.**—*State v. Witt*, 34 Kan. 488, 8 Pac. 769. **La.**—*State v. Griffin*, 48 La. Ann. 1409, 20 So. 905. **Md.**—*State v. Blizzard*, 70 Md. 385, 17 Atl. 270, 14 Am. St. Rep. 366. **Mich.**—*People v. Minnock*, 52 Mich. 628, 18 N. W. 390. **Mo.**—*State v. Grisham*, 90 Mo. 163, 2 S. W. 223. **N. Y.**—*People v. Fish*, Sheldon 537. **R. I.**—*State v. Murphy*, 17 R. I. 698,

sity therefor has been dispensed with by statute.¹⁷ This requirement is based upon the necessity of identifying or giving certainty to the transaction or offense upon which the pleading is based.¹⁸

b. *How Name Alleged.*—(I) *In General.*—Less strictness was always required in giving the names of third parties than in giving the names of the accused.¹⁹ Certainty to a common intent is all that is required in such case at common law.²⁰

The general rule is to insert the true name of the party, if known,²¹ but the name by which a person is commonly known may be employed in an indictment, though differing from his true or baptismal name,²²

24 Atl. 473, 16 L. R. A. 550. **S. C.** State *v.* Scurry, 3 Rich. 68. **Tenn.** Haworth *v.* State, Peek 70. **Tex.** Washington *v.* State, 41 Tex. 583; Daugherty *v.* State, 41 Tex. Crim. 661, 56 S. W. 620. **Va.**—Com. *v.* Peas, 4 Leigh 692. **Eng.**—Reg. *v.* Frost, 3 C. L. R. 665, 6 Cox C. C. 526.

[a] This is the rule in the case of robbery, larceny, obtaining property under false pretenses, and bribery. State *v.* Clark, 141 Iowa 297, 119 N. W. 719.

[b] The averment must be such as to identify the person. Langston *v.* State, 8 Ala. App. 129, 63 So. 38.

[c] Upon the marriage of the third party after the commission of the offense the indictment may charge the offense against such third person in her maiden name. Rutherford *v.* State, 18 Tex. App. 92.

17. State *v.* Leasman, 137 Iowa 191, 114 N. W. 1032 (holding name of third party need only be alleged "when material"); Davis *v.* Com., 99 Va. 838, 38 S. E. 191.

[a] A statute dispensing with the necessity of allegations as to name of party injured where intent to injure, cheat or defraud is an essential element of the offense, is not applicable alone to offenses of cheating, forgery and like offenses, but is also applicable to offenses like attempts to poison. Davis *v.* Com., 99 Va. 838, 38 S. E. 191.

18. Padgett *v.* State, 167 Ind. 179, 78 N. E. 663; Black *v.* State, 57 Ind. 109.

[a] So that the accused cannot be twice tried for the same offense. People *v.* Reilly, 257 Ill. 538, 101 N. E. 54. Ann. Cas. 1914A. 1112; Little *v.* People, 157 Ill. 153, 42 N. E. 389; State *v.* Allen, 32 Iowa 491.

19. People *v.* McDonald, 178 Ill. App. 159.

20. **Ala.**—Lyon *v.* State, 61 Ala. 224; Thompson *v.* State, 48 Ala. 165. **Ill.** Durham *v.* People, 5 Ill. 172, 39 Am. Dec. 407. **Ind.**—Walters *v.* State, 174 Ind. 545, 92 N. E. 537, reasonable certainty. **S. C.**—State *v.* Anderson, 3 Rich. 172; State *v.* Crank, 2 Bailey 66, 23 Am. Dec. 117. **Tex.**—Cotton *v.* State, 4 Tex. 260; Henry *v.* State, 7 Tex. App. 388. **Eng.**—Rex *v.* Lovell, 2 East P. C. 990, 1 Leach S. C. 282.

21. **Cal.**—People *v.* Freeland, 6 Cal. 96. **Ga.**—Rouse *v.* State, 4 Ga. 136. **Tex.**—Rutherford *v.* State, 13 Tex. App. 92.

22. **Ala.**—State *v.* Glaze, 9 Ala. 283; Langston *v.* State, 8 Ala. App. 129, 63 So. 38. **Ark.**—State *v.* Seely, 30 Ark. 162. **Cal.**—People *v.* Woods, 65 Cal. 121, 3 Pac. 466; People *v.* Leong Quong, 60 Cal. 107; People *v.* Freeland, 6 Cal. 96. **Fla.**—Pyke *v.* State, 47 Fla. 93, 36 So. 577; Reddick *v.* State, 25 Fla. 112, 433, 5 So. 704. **Ga.**—Jones *v.* State, 65 Ga. 147. **Ill.**—Vandermark *v.* People, 47 Ill. 122. **Ind.**—State *v.* McEwen, 151 Ind. 485, 51 N. E. 1053; Henry *v.* State, 113 Ind. 304, 15 N. E. 593; Ehlert *v.* State, 93 Ind. 76. **Ky.**—Robinson *v.* Com., 88 Ky. 386, 11 S. W. 210. **Me.**—State *v.* Peterson, 70 Me. 216; State *v.* Bundy, 64 Me. 507. **Mass.** Com. *v.* Trainor, 123 Mass. 414. **Miss.** McBeth *v.* State, 50 Miss. 81. **N. Y.** Cowley *v.* People, 21 Hun 415, 8 Abb. N. C. 1. **N. C.**—State *v.* Davis, 109 N. C. 780, 14 S. E. 55; State *v.* Johnson, 67 N. C. 55. **Tenn.**—State *v.* France, 1 Overt. 434. **Tex.**—Bell *v.* State, 25 Tex. 574; Edmanson *v.* State, 64 Tex. Crim. 413, 142 S. W. 887, wherein description was one Edmanson, commonly known as Slim Edmanson. **Wash.**—State *v.* Myrberg, 56 Wash. 384, 105 Pac. 622. **Eng.**—Rex *v.* Norton, 1 Russ. & Ry. C. C. 509.

[a] To charge the name by which

and though his other name be alleged to be to the grand jurors unknown.²³ Where such person has or is known by two or more names, he may be described by either or any one,²⁴ or all of his names.²⁵

The use of a feminine name in an indictment or information sufficiently imports that the person referred to is a female.²⁶ If the third party was an infant child having no name, an indictment alleging such facts is sufficient.²⁷

(II.) **Where Unknown.**—In case the third party is not known by any name, his name may be alleged to be unknown to the grand jury or the prosecuting attorney as the case may be,²⁸ although the grand jury

the third person is commonly known by sufficiently complies with the requirement of a statute providing that the facts constituting the offense must be averred "in such a manner as to enable a person of common understanding to know what is intended." *Langston v. State*, 8 Ala. App. 129, 63 So. 38.

[b] An indictment charging deceased's name was "Greek George" is sufficient, though it does not allege his true name to be unknown. *People v. Freeland*, 6 Cal. 96.

[c] Where the third person is in the indictment referred to by the name he or she is generally known by in the neighborhood where the crime was committed, the fact that the baptismal or true name is otherwise does not show a fatal variance. *State v. Blakeley*, 83 Minn. 432, 86 N. W. 419; *State v. Myrberg*, 56 Wash. 384, 105 Pac. 622, *Frieda and Valfreda*.

23. *De Olles v. State*, 20 Tex. App. 145. See *infra*, IX, E, 2, b, (II).

24. **Ga.**—*Whittington v. State*, 121 Ga. 193, 48 S. E. 948; *Hailey v. State*, 107 Ga. 711, 33 S. E. 418; *Jones v. State*, 63 Ga. 456; *Johnson v. State*, 46 Ga. 269. **Ind.**—*Henry v. State*, 113 Ind. 304, 15 N. E. 593. **Me.**—*State v. Bundy*, 64 Me. 507. **Tex.**—*Rutherford v. State*, 13 Tex. App. 92. **Va.**—*Taylor v. Com.*, 20 Gratt. 825.

[a] Where defendant was charged with the murder of "Ham Jones" there is no fatal variance where it appears that deceased was also known by the name of "Hamp Culbreath." *Jones v. State*, 63 Ga. 456.

[b] The state may designate the deceased by different names in separate counts, as against a demurrer. *Walker v. State*, 146 Ala. 45, 41 So. 878.

25. Where the person is described by

several of the names by which he is known, the fact that it is not alleged that either of the names mentioned was the person's true name, or that his true name was to the grand jury unknown, does not render the indictment defective. *Swain v. State*, 8 Ala. App. 26, 62 So. 446.

26. *People v. Mansfield*, 181 Ill. App. 710.

[a] The indictment need not allege that the other person involved was a female where a name such as Lena, imputing a person of the female sex, is used. *People v. De Mas*, 173 Ill. App. 130.

27. *Triggs v. State* (Tex. Crim.), 53 S. W. 104; *Puryear v. State*, 28 Tex. App. 73, 11 S. W. 929.

28. **U. S.**—*United States v. Scott*, 74 Fed. 213; *United States v. Davis*, 4 Cranch C. C. 333, 25 Fed. Cas. No. 14,924. **Ala.**—*Cheek v. State*, 38 Ala. 227; *Bryant v. State*, 36 Ala. 270; *Jolley v. State*, 5 Ala. App. 135, 59 So. 710. **Ark.**—*Edmonds v. State*, 34 Ark. 720; *Kelley v. State*, 25 Ark. 392; *Reed v. State*, 16 Ark. 499. **Cal.**—*People v. Freeland*, 6 Cal. 96. **Colo.**—*Hamilton v. People*, 24 Colo. 301, 51 Pac. 425. **Conn.**—*State v. Wilson*, 30 Conn. 500, 507. **Ga.**—*Nelms v. State*, 84 Ga. 466, 10 S. E. 1087, 20 Am. St. Rep. 377. **Ind.**—*Walters v. State*, 174 Ind. 545, 92 N. E. 537; *Ashley v. State*, 92 Ind. 559; *McLaughlin v. State*, 45 Ind. 338; *Brooster v. State*, 15 Ind. 190; *State v. Irvin*, 5 Blackf. 343. **Mass.**—*Com. v. Sherman*, 13 Allen 248; *Com. v. Stoddard*, 9 Allen 280; *Com. v. Tompson*, 2 Cush. 551. **Miss.**—*Grogan v. State*, 63 Miss. 147. **Neb.**—*Sofield v. State*, 61 Neb. 600, 85 N. W. 840. **N. Y.**—*White v. People*, 32 N. Y. 465, *affirming* 55 Barb. 606. **Pa.**—*Com. v. Kaas*, 3 Brewst. 422. **Tex.**—*State v. Elmore*, 44 Tex. 102; *State v. Snow*, 41 Tex. 596; *State*

might have ascertained the name, if they had made the proper inquiry of the witnesses on whose testimony the indictment was found.²⁹

c. *Christian Name, Initials, and Middle Names.*—The indictment must aver the Christian name of the third party, or allege his Christian name to be unknown.³⁰ Such name need not, however, be set out in full, but it may be alleged by initials,³¹ especially where the person

v. Haws, 41 Tex. 161; *Bradford v. State*, 72 Tex. Crim. 76, 160 S. W. 1185; *Rutherford v. State*, 13 Tex. App. 92. **Can.**—*Reg. v. Blackie*, 1 Nova Scotia Dec. 383.

[a] "That which, from the nature of the case, cannot be alleged, need not be; and it is of frequent occurrence that the name of the person injured is unknown. Justice must not fail, nor the community go unprotected for such cause. If the name is unknown, and it is so averred it need not be proved." *Nelms v. State*, 84 Ga. 466, 10 S. E. 1087, 20 Am. St. Rep. 377.

[b] Thus the name of the principal need not be given where unknown in an indictment against an accessory. *Com. v. Kaas*, 3 Brewst. (Pa.) 422. And see *Dugger v. State*, 27 Tex. App. 95, 10 S. W. 763.

[c] No description of such third person need be given. *Bradford v. State*, 72 Tex. Crim. 76, 160 S. W. 1185, holding an allegation that deceased was a "certain Mexican man" sufficient.

[d] If a third party's name is alleged to be unknown, the state need not prove that it was unknown. *Childress v. State*, 86 Ala. 77, 5 So. 775; *State v. Wilson*, 30 Conn. 500, 507.

[e] The inference, in cases where the names of persons to whom it is necessary to refer are not set out in the indictment, is that they are unknown, although this fact is not affirmatively stated in the indictment. *Martin v. State*, 115 Ga. 255, 41 S. E. 576.

[f] Under a statute making it an offense to sell or remove property on which a lien created by law exists, since it is impossible to ascertain there is a lien on property without knowing or ascertaining there is a person, natural or artificial, in whose favor it exists, the name of the third party must be alleged. To allege the name of such third party was unknown is insufficient. *Hill v. State*, 78 Ala. 1.

[g] **Unknown Person.**—An indictment

for assault committed upon an unknown person, is sufficient without alleging that such third person was "to the grand jurors" unknown. *United States v. Davis*, 4 Cranch C. C. 333, 25 Fed. Cas. No. 14,924.

29. *Com. v. Sherman*, 13 Allen (Mass.) 248; *Com. v. Stoddard*, 9 Allen (Mass.) 280. *Contra*, *McLaughlin v. State*, 45 Ind. 338; *Blodget v. State*, 3 Ind. 403.

30. *Johnson v. State*, 59 Ala. 37; *Morningstar v. State*, 52 Ala. 405.

31. **Ala.**—*Jones v. State*, 181 Ala. 63, 61 So. 434; *Haley v. State*, 63 Ala. 83; *Gerrish v. State*, 53 Ala. 476; *Franklin v. State*, 52 Ala. 414; *Thompson v. State*, 48 Ala. 165; *Roden v. State*, 5 Ala. App. 247, 59 So. 751. **Ark.**—*State v. Seely*, 30 Ark. 162; *State v. Webster*, 30 Ark. 166. **Ga.**—*Bernhard v. State*, 76 Ga. 613. **Ill.**—*People v. Reilly*, 257 Ill. 538, 101 N. E. 54, Ann. Cas. 1914A. 1112; *Vandermark v. People*, 47 Ill. 122; *People v. Reilly*, 175 Ill. App. 45. **Ind.**—*Walters v. State*, 174 Ind. 545, 92 N. E. 537. **Kan.** *State v. Flaek*, 48 Kan. 146, 29 Pac. 571. **La.**—*State v. Prince*, 42 La. Ann. 817, 8 So. 591. **Me.**—*State v. Cameron*, 86 Me. 196, 29 Atl. 984. **Mo.**—*State v. Sweeney*, 56 Mo. App. 409. **N. C.** *State v. Brite*, 73 N. C. 26. **S. C.**—*State v. Anderson*, 3 Rich. 172. **Tex.**—*State v. Block*, 31 Tex. 560; *Bradford v. State*, 72 Tex. Crim. 76, 160 S. W. 1185. **Va.** *Brown v. Com.*, 86 Va. 466, 10 S. E. 745.

[a] A party against whom an offense has been committed may be described in an indictment by his initials, by his middle name or first name, or by a nick name, and if the proof establishes with certainty that the name alleged is the one by which he is usually known there will be no variance. *People v. McDonald*, 178 Ill. App. 159.

[b] Even if it should be held that the full Christian name of a third party necessary to the description of a crime should be given in the indictment, most authorities hold that the

in question is as well known by his initials as he is by his full name.³²

d. *Additions and Descriptions.*—The statute of additions extended only to the party indicted.³³ Accordingly, neither the official character of the third party,³⁴ nor any other words of addition need be used to describe the third parties where not an essential element of the offense.³⁵ Such terms as Jr. and Sr. need not be employed,³⁶ or when employed need not be proved.³⁷

e. *Alias.*—The injured person may be designated by an alias,³⁸ and an indictment so designating him is not subject to demurrer because of failure to aver the alias Christian name,³⁹ or to allege that it was unknown to the grand jury.⁴⁰

f. *Corporations, Associations and Partnerships.*—According to some authorities, the mere averment of a name which may import either a corporation, or a voluntary association, or a simple partnership, is not sufficient;⁴¹ the indictment must further show that such

question whether letters are the full Christian name cannot be raised on the indictment alone, without proof. *People v. Reilly*, 257 Ill. 538, 101 N. E. 54, Ann. Cas. 1914A, 1112.

32. *Ala.*—*Lyon v. State*, 61 Ala. 224. *Ill.*—*Vandermark v. People*, 47 Ill. 122, it being a question for the jury whether he was known in the community as well by that as his full name. *N. C.*—*State v. Henderson*, 68 N. C. 348.

33. *Com. v. Varney*, 10 Cush. (Mass.) 402. See *supra*, IX, E, 1, d.

34. *Wright v. State*, 18 Ga. 383.

35. *Ill.*—*Durham v. People*, 5 Ill. 172, 39 Am. Dec. 407. *Ind.*—*Geraghty v. State*, 110 Ind. 103, 11 N. E. 1; *Allen v. State*, 52 Ind. 486. *Me.*—*State v. Grant*, 22 Me. 171. *Mass.*—*Com. v. Parmenter*, 101 Mass. 211; *Com. v. East Boston Ferry Co.*, 13 Allen 589; *Com. v. Varney*, 10 Cush. 402, holding profession, occupation or place of residence of party libeled need not be alleged. *Eng.*—*Rex v. Sulls*, 2 Leach C. C. 861, 2 Hale P. C. 182.

36. *State v. Grant*, 22 Me. 171. Compare *supra*, IX, E, 1, d.

[a] The fact that there are two persons of the same name (1) does not render the indictment defective because they are not distinguished by "Jr." and "Sr." *Teague v. State*, 144 Ala. 42, 40 So. 312. (2) In *King v. Peace*, 3 B. & Ald. 579, 5 E. C. L. 334, which was an indictment for an assault upon E. E., and it appeared that there were two persons of the same name, mother and daughter, the indict-

ment was held sufficient, but it did not appear that there was any usual designation of the daughter as junior or younger. (3) But "where there are two persons of the same name, father and son, residing in the same time; and the latter uses a well known addition to his name as "Jr." or "Younger," to differentiate him from his father, an indictment in order to allege any offense committed with him or upon him should connect with his name the ordinary addition which is, by himself and others, used to distinguish him from his father. In the absence of such addition the indictment must be understood to allege the offense to have been committed with or upon the latter. *State v. Vittum*, 9 N. H. 519; *Rex v. Bailey*, 7 Car. & P. 264, 32 E. C. L. 604.

37. *Geraghty v. State*, 110 Ind. 103, 11 N. E. 1.

38. *Kennedy v. State*, 39 N. Y. 245. Compare *supra*, IX, E, 1, e.

39. *Falkner v. State*, 151 Ala. 77, 44 So. 409.

40. *Falkner v. State*, 151 Ala. 77, 44 So. 409.

41. *Ala.*—*Burrow v. State*, 147 Ala. 114, 41 So. 987; *Emmonds v. State*, 87 Ala. 12, 6 So. 54. *Cal.*—*People v. Schwartz*, 32 Cal. 160 (wherein it was held necessary to be alleged in arson); *People v. O'Brien*, 8 Cal. App. 641, 97 Pac. 679. *Ky.*—*Stamper v. Com.*, 30 Ky. L. Rep. 579, 99 S. W. 304. *N. Y.*—*Cohen v. People*, 5 Park. Crim. 330. *Tex.*—*Nasets v. State* (Tex. Crim.), 32 S. W. 698; *Thurmond v.*

name represents either a corporation, partnership or joint stock company, as the case may be.⁴² But other authorities hold that incorporation need not be alleged,⁴³ especially where the name itself imports a corporation.⁴⁴ It is not necessary, however, to state the names of the shareholders.⁴⁵ If incorporation is not an essential element of the crime it need not be alleged,⁴⁶ but where it is such an element it must

State, 20 Tex. App. 539, 17 S. W. 1098; White v. State, 24 Tex. App. 231, 5 S. W. 857, 5 Am. St. Rep. 879. **Vt.** State v. Mead, 27 Vt. 722.

[a] An averment that "said company being legally established" is not equivalent to an averment that the company is a corporation. On the contrary it is no averment at all, in a legal sense, for it is not the averment of a fact, and tenders no issue. People v. Schwartz, 32 Cal. 160, 166.

[b] Merely to allege ownership (1) in Southern Ry. Co. (Burrow v. State, 117 Ala. 114, 41 So. 987), (2) or in Wells, Fargo & Co. (People v. Bogart, 26 Cal. 245), (3) American Merchants Union Express Company (Wallace v. People, 63 Ill. 451), without allegations as to whether a partnership or a corporation is insufficient.

42. **Ala.**—Emmonds v. State, 87 Ala. 12, 6 So. 54; Johnson v. State, 73 Ala. 483. **Cal.**—People v. Bogart, 36 Cal. 245; People v. Schwartz, 32 Cal. 160. **Ill.**—People v. Brander, 244 Ill. 26, 91 N. E. 59, 135 Am. St. Rep. 301; Wallace v. People, 63 Ill. 451. **Kan.**—State v. Suppe, 60 Kan. 566, 57 Pac. 106. **Mo.** State v. Henschel, 250 Mo. 263, 157 S. W. 311; State v. Clark, 223 Mo. 48, 122 S. W. 665; State v. Kelley, 206 Mo. 685, 105 S. W. 606; State v. Horned, 178 Mo. 59, 76 S. W. 953. **N. Y.** Cohen v. People, 5 Park. Crim. 330. **Tex.**—Nasets v. State (Tex. Crim.), 32 S. W. 698. **Vt.**—State v. Mead, 27 Vt. 722.

[a] It is sufficient if the indictment states simply that it is a corporation. Duncan v. State, 29 Fla. 439, 10 So. 815.

[b] Whether incorporated under special or general laws need not be stated. State v. Loomis, 27 Minn. 521, 8 N. W. 758.

[c] **Specifying State of Incorporation.**—An allegation that the corporation was organized under the laws of a specified state or county is unnecessary and surplusage. People v. Stricker, 170 Ill. App. 485; McCarney v. Peo-

ple, 83 N. Y. 408, 38 Am. Rep. 456.

43. **Del.**—State v. Rollo, 3 Penne. 421, 54 Atl. 683. **Mo.**—State v. Shields, 89 Mo. 259, 1 S. W. 336. **N. M.**—Territory v. Garcia, 12 N. M. 87, 75 Pac. 34. **N. C.**—State v. Grant, 104 N. C. 908, 10 S. E. 554; Stanley v. Richmond, etc. R. Co., 89 N. C. 331. **Tenn.**—Owen v. State, 5 Sneed 493. **Eng.**—Woolf v. Steamboat Co., 62 E. C. L. 103.

See Duncan v. State, 29 Fla. 439, 10 So. 815.

44. **Ga.**—Alsobrook v. State, 126 Ga. 100, 54 S. E. 805; Leps v. State, 120 Ga. 139, 47 S. E. 572; Gray v. State, 6 Ga. App. 428, 65 S. E. 191; Ager v. State, 2 Ga. App. 158, 58 S. E. 374. **Ind.**—Johnson v. State, 65 Ind. 204. **N. J.**—Fisher v. State, 40 N. J. L. 169; State v. Weller, 20 N. J. L. 521. **Ore.** State v. Adler, 71 Ore. 70, 142 Pac. 344.

[a] The following have been held to import a corporation: (1) Southern Express Company, Western Express Company (Gray v. State, 6 Ga. App. 428, 65 S. E. 191), (2) Amenkus Furniture and Undertaking Company. Ager v. State, 2 Ga. App. 158, 58 S. E. 374.

[b] Though corporate capacity be alleged in such case it need not be proved where not put in issue. It may be rejected as surplusage. Ager v. State, 2 Ga. App. 158, 58 S. E. 374.

[c] If a certain church be alleged to be the owner of property, the persons composing it need not be specified, unless it affirmatively appears that the church is not a corporation. Smith v. State, 63 Ga. 168.

[d] If the corporation is a public, chartered institution, incorporated under general law, since the court will take judicial notice thereof it is not necessary to aver that it was a corporation or duly chartered. Owen v. State, 5 Sneed (Tenn.) 493. See generally the title "Judicial Notice;" and 7 ENCY. OF EV. 1026.

45. Emmonds v. State, 87 Ala. 12, 6 So. 54.

46. **Cal.**—People v. McDonnell, 80

be alleged.⁴⁷ It is sufficient to prove a de facto existence, even though incorporation be alleged.⁴⁸ A slight variance between the name alleged and that proved is not fatal.⁴⁹ It is sufficient to allege the name by which the corporation is generally known, though that is not its correct name, where it sufficiently appears what corporation is intended.⁵⁰

Partnerships and Associations.—If the name alleged be that of a partnership,⁵¹ or an association, such as is authorized to own property by the name alleged,⁵² the names of the individuals composing such partnership or association must be alleged, unless such specification is dispensed with by statute.⁵³

Property vested in a body of persons must not be laid as the property of that body,⁵⁴ but should be described as belonging to the indi-

Cal. 285, 22 Pac. 190, 13 Am. St. Rep. 159, wherein incorporation of Bank of England was held unnecessary to be alleged in an indictment for counterfeiting its bank notes. **Fla.**—*Duncan v. State*, 29 Fla. 439, 10 So. 815. **N. Y.** *People v. Jackson*, 8 Barb. 637.

[a] Where the corporation was not an injured party. *People v. O'Brian*, 8 Cal. App. 641, 97 Pac. 679.

47. Under a statute making it an offense to wilfully obstruct a street in an incorporated town, an indictment therefor must allege the town named was incorporated. *Martin v. State*, 72 Tex. Crim. 454, 162 S. W. 1145.

48. **Cal.**—*People v. Schwartz*, 32 Cal. 160. **Fla.**—*Duncan v. State*, 29 Fla. 439, 10 So. 815. **Ill.**—*People v. Stricker*, 170 Ill. App. 485. **Neb.** *Braithwaite v. State*, 28 Neb. 832, 45 N. W. 247. **Ohio.**—*Burke v. State*, 34 Ohio St. 79.

See 3 ENCY. OF EV. 594.

49. *Rogers v. State*, 90 Ga. 463, 16 S. E. 205; *Jackson v. State*, 76 Ga. 551.

50. **Del.**—*State v. Rollo*, 3 Penne. 421, 54 Atl. 683. **Ga.**—*Rogers v. State*, 90 Ga. 463, 16 S. E. 205; *Jackson v. State*, 76 Ga. 551. **Mich.**—*People v. Ferguson*, 119 Mich. 373, 78 N. W. 334.

Contra.—*Com. v. Pope*, 12 Cush. (Mass.) 272, wherein "company" was used instead of "corporation" as used in corporate name.

51. **Ala.**—*Emmonds v. State*, 87 Ala. 12, 6 So. 54. **Cal.**—*People v. Bogart*, 36 Cal. 245. *Contra.* *People v. Ah Sing*, 19 Cal. 598. **Ill.**—*People v. Stricker*, 258 Ill. 618, 102 N. E. 216; *Staadens v. People*, 82 Ill. 432, 25 Am. Rep. 333;

Wallace v. People, 63 Ill. 451. **Ind.** *Hogg v. State*, 3 Blackf. 326. **Mass.** *Com. v. Trimmer*, 1 Mass. 476. **Mo.** *State v. Henschel*, 250 Mo. 263, 157 S. W. 311; *State v. Clark*, 223 Mo. 48, 122 S. W. 665. **S. C.**—*State v. Owens*, 10 Rich. 169. **Vt.**—*State v. Mead*, 27 Vt. 722.

[a] **Reason.**—This is required in order to negative defendant's ownership, by showing that the property, general or special, against which the crime is charged, is in another. Otherwise it is not shown but that the defendant is a partner and entitled to do, with respect to the partnership property, the precise thing charged against him as a crime. *Emmonds v. State*, 87 Ala. 12, 6 So. 54.

[b] Where ownership in a corporation is alleged and it is shown that the name alleged was a partnership of individuals, the variance is fatal. *People v. Stricker*, 258 Ill. 618, 102 N. E. 216.

52. *People v. Brander*, 244 Ill. 26, 91 N. E. 59, 135 Am. St. Rep. 301; *Staadens v. People*, 82 Ill. 432, 25 Am. Rep. 333; *Wallace v. People*, 63 Ill. 451.

53. *People v. Brander*, 244 Ill. 26, 91 N. E. 59, 135 Am. St. Rep. 301; *State v. Williams*, 103 Ind. 235, 2 N. E. 585.

54. *Wallace v. People*, 63 Ill. 451.

[a] It was indicated with sufficient certainty that the organization was a voluntary, unincorporated association, in *Hughes v. State*, 109 Ark. 403, 160 S. W. 209, wherein it was alleged that accused was the "agent, bailee, and treasurer of Local No. 313 (known as the Bartender's Union of Little Rock,

viduals composing the company.⁵⁵ An averment that the property involved was the property of a designated "association" without alleging incorporation or such facts as would show that said association could own property by that name, is insufficient.⁵⁶

g. *Misnomer and Errors in Spelling of Names.*⁵⁷ — At common law if a necessary allegation of the name of the third party is erroneous in a material respect,⁵⁸ or the name is alleged to be unknown, when in fact it was actually known,⁵⁹ the defect is fatal. Not every misspelling of the name of a third person, however, whom it may be necessary to mention, will vitiate the indictment, unless the difference causes a material change in the pronunciation or sound of the name.⁶⁰ The

Ark.) of the Hotel and Restaurant Employes' International Alliance of Bartender's League of America, the same being a labor organization and affiliated with the American Federation of Labor." The court said: "The words 'union,' 'league,' and 'federation' in their ordinary acceptation imply an unincorporated union or association of persons for a common purpose."

55. *Wallace v. People*, 63 Ill. 451.

56. *People v. Brander*, 244 Ill. 26, 91 N. E. 59, 135 Am. St. Rep. 301.

57. As to misspelling of words generally, see *supra*, IX, C, 2, e.

In name of accused, see *supra*, IX, E, 1, g.

58. *Ala.*—*Morningstar v. State*, 52 Ala. 405. *Ark.*—*State v. Williams*, 68 Ark. 241, 243, 57 S. W. 792, 82 Am. St. Rep. 288. *Cal.*—*People v. Oreileus*, 79 Cal. 178, 21 Pac. 724; *People v. McNealy*, 17 Cal. 332. *Ga.*—*Irwin v. State*, 117 Ga. 722, 45 S. E. 59. *Ill.* *People v. Roth*, 185 Ill. App. 162.

[a] "The object in requiring accuracy and harmony in the allegations and the proofs as to the names of third parties in criminal prosecutions is to insure the establishment of their identity and to guard against unjust convictions and punishments of parties charged with crime." *People v. McDonald*, 178 Ill. App. 159.

[b] Where defendant is charged with abandoning his wife, and she is described by her middle name, instead of her first name, the variance is not fatal. *People v. McDonald*, 178 Ill. App. 159.

[c] Where the name as written in the indictment may be pronounced (although such may not be the strictly correct pronunciation) in the same way as the name given in the evidence, the variance will not be regarded as fatal,

unless the variant orthography be such as would be likely to mislead the defendant in preparing his defense. *State v. White*, 34 S. C. 59, 12 S. E. 661, 27 Am. St. Rep. 783.

[d] A mistake in the first initial of the name does not render the indictment fatally defective. *Bernhard v. State*, 76 Ga. 613.

59. *Ala.*—*Winter v. State*, 90 Ala. 637, 8 So. 556; *Wells v. State*, 88 Ala. 239, 7 So. 272; *Childress v. State*, 86 Ala. 77, 5 So. 775. *Ga.*—*Rouse v. State*, 4 Ga. 136. *Ind.*—*McLaughlin v. State*, 45 Ind. 338. *Mass.*—*Com. v. Thornton*, 14 Gray 41.

60. *Ala.*—*Caldwell v. State*, 146 Ala. 141, 41 So. 473 (*Lydia and Liddie*); *Underwood v. State*, 72 Ala. 220 (*Fooley* instead of *Foley*); *Page v. State*, 61 Ala. 16. *Ark.*—*Birones v. State*, 105 Ark. 82, 150 S. W. 416. *Ill.*—*O'Donnell v. People*, 224 Ill. 218, 79 N. E. 639, *Dorgan and Durgan*. *Kan.*—*State v. Witt*, 34 Kan. 488, 8 Pac. 769. *Mass.* *Com. v. Warren*, 143 Mass. 568, 10 N. E. 178. *Minn.*—*State v. Blakeley*, 83 Minn. 432, 86 N. W. 419, *Tony Baron and Tony Barrom*. *S. C.*—*State v. White*, 34 S. C. 59, 12 S. E. 661, 27 Am. St. Rep. 783. *Tex.*—*Dickson v. State*, 34 Tex. Crim. 1, 28 S. W. 815, 30 S. W. 807, 53 Am. St. Rep. 694, *July and Julia*.

[a] *Idem sonans* means of the same sound. It exists when the attentive ear finds difficulty in distinguishing the names when pronounced. *Erickson v. State*, 14 Ariz. 253, 127 Pac. 754.

[b] Where the indictment describes a person murdered as "a certain Mexican man," whose Christian name and surname are to the grand jury after said unknown," the fact that the grand jury should in one count miss and call him "John" and in the other

true rule is sometimes stated to be that if the names may be sounded alike, without doing violence to the power of the letters found in the variant orthography, then the variance is immaterial.⁶¹

The question of whether one name is idem sonans with another is not a question of spelling, but of pronunciation, depending less upon rule than upon usage.⁶² The rule as generally stated is that if two

“Juan” makes no material difference; nor does it render the indictment defective. *Bradford v. State*, 72 Tex. Crim. 76, 160 S. W. 1185.

61. Ala.—*Rooks v. State*, 83 Ala. 79, 3 So. 720; *Ward v. State*, 28 Ala. 53. Ind.—*Black v. State*, 57 Ind. 109. Tex.—*Walker v. State*, 13 Tex. App. 618, 641; *Henry v. State*, 7 Tex. App. 388, 392.

[a] **Not Idem Sonans.**—The following have been held not to be idem sonans: (1) “Zachary” and “Zacharia” (*Lawrence v. State*, 59 Ala. 61), (2) “Mincher” and “Minchen” (*Adams v. State*, 67 Ala. 89), (3) Matt and Max (*Vincendeau v. People*, 219 Ill. 474, 76 N. E. 675), (4) Hyde and Hite (*State v. Williams*, 68 Ark. 241, 243, 57 S. W. 792, 82 Am. St. Rep. 288), (5) David and Davids (*Davids v. People*, 192 Ill. 176, 61 N. E. 537), (6) McKaskey and McKloskey (*Black v. State*, 57 Ind. 109), (7) Donnel and Donald (*Donnel v. United States*, 1 Morris [Iowa] 141, 39 Am. Dec. 457), (8) Cobb and Cobbs (*Jacobs v. State*, 61 Ala. 448), (9) Frank and Franks (*Parchman v. State*, 2 Tex. App. 228, 27 Am. Rep. 435), (10) Wilkin and Wilkins (*Brown v. State*, 28 Tex. App. 65, 11 S. W. 1022), (11) Wood and Woods. *Neiderluck v. State*, 21 Tex. App. 320, 327, 17 S. W. 467.

[b] The following have been held idem sonans: (1) “Booth” and “Boothe” (*Jackson v. State*, 74 Ala. 26), (2) “Louis” and “Lewis” (*Block v. State*, 66 Ala. 493), (3) Edmondson and Edmundson (*Edmundson v. State*, 17 Ala. 179, 52 Am. Dec. 169), (4) Nowlin and Nowlan (*Briones v. State*, 105 Ark. 82, 159 S. W. 416), (5) “Burdet” and “Boudet,” Boredet or Bouredet (*Aaron v. State*, 37 Ala. 106), (6) “Felicio” and “Feliciano” (*Perez v. Territory*, 14 Ariz. 163, 125 Pac. 483), (7) Beneux and Bonnauux (*Beneux v. State*, 20 Ark. 97), (8) Garzia and Garcia (*Rape v. State*, 34 Tex. Crim. 615, 31 S. W. 652), (9) Witt and Wid (*Veal v. State*, 116 Ga. 589, 42 S. E.

705), (10) Patterson and Petterson (*State v. Bean*, 19 Vt. 530), (11) Battles and Battels (*Leath v. State*, 132 Ala. 26, 31 So. 108), (12) Veike and Vieke (*Selby v. State*, 161 Ind. 667, 69 N. E. 463), (13) Isreal and Israel (*Boren v. State*, 32 Tex. Crim. 637, 25 S. W. 775), (14) Johnson and Johnston (*State v. Jones*, 55 Minn. 329, 56 N. W. 1068; *Truslow v. State*, 95 Tenn. 196, 31 S. W. 987), (15) Danner and Dannaher (*Gahan v. People*, 58 Ill. 160), (16) “Dugald McInniss” and “Dougal McGinniss” (*Barnes v. People*, 18 Ill. 52, 65 Am. Dec. 699), (17) Stanton and Staunton (*People v. Spoor*, 235 Ill. 230, 85 N. E. 207, 126 Am. St. Rep. 197, 14 Am. & Eng. Ann. Cas. 638), (17) Thornton J. Dawney and Thorn Downey (*Hix v. People*, 157 Ill. 382, 41 N. E. 862), (18) Bernhart and Banhart, Benhart, Beauhart (*State v. Witt*, 34 Kan. 488, 8 Pac. 769), (19) Larson and Larsen (*Gustavenson v. State*, 10 Wyo. 300, 68 Pac. 1006), (20) Adanson and Adamson (*James v. State*, 7 Blackf. [Ind.] 325), (21) Beckwith and Beckworth (*Stewart v. State*, 4 Blackf. [Ind.] 171, 29 Am. Dec. 364), (22) Geessler and Geissler. *Cleaveland v. State*, 20 Ind. 444.

[c] **The doctrine of interchangeability of names**, by which the question is whether or not a person is known by one name as well as the other, is not the same as the doctrine of idem sonans, and is often applicable where the latter does not apply. *State v. Williams*, 68 Ark. 241, 243, 57 S. W. 792, 82 Am. St. Rep. 288.

62. Ariz.—*Erickson v. State*, 14 Ariz. 253, 127 Pac. 754. Cal.—*People v. Fick*, 89 Cal. 144, 26 Pac. 759. Mass.—*Com. v. Stone*, 103 Mass. 421; *Com. v. Donovan*, 13 Allen 571. Mont.—*State v. Thompson*, 10 Mont. 549, 27 Pac. 349, 351.

[a] **In the pronunciation of proper names** a greater latitude is indulged than in any other class of words. *Ward v. State*, 28 Ala. 60.

names spelled differently, necessarily sound alike, the court may, as a matter of law, pronounce them to be *idem sonans*,⁶³ especially where the question arises on demurrer to the pleadings;⁶⁴ but if they do not necessarily sound alike the question whether they are *idem sonans* is a question of fact for the jury.⁶⁵ When the name of the third party has been once fully and correctly stated in the indictment, a manifest error in the subsequent repetition thereof is not material,⁶⁶ especially where "said" or "aforesaid" is used prior to the subsequent repetition of the name.⁶⁷

Statutes in some states now provide, however, that a misnomer as to third persons is not material, when the indictment is otherwise sufficient to identify the act.⁶⁸ But such a statute does not cure the

63. **U. S.**—United States *v.* Hinman, *Baldw.* 292, 26 Fed. Cas. No. 15,370. **Ariz.**—Erickson *v.* State, 14 *Ariz.* 253, 127 *Pac.* 754. **Ark.**—State *v.* Williams, 68 *Ark.* 241, 243, 57 *S. W.* 792, 82 *Am. St. Rep.* 288. **Mass.**—Com. *v.* Warren, 143 *Mass.* 568, 10 *N. E.* 178. **N. Y.** People *v.* Cooke, 6 *Park. Crim.* 31. **Tex.**—Spoonmore *v.* State, 25 *Tex. App.* 358, 8 *S. W.* 280.

[a] Generally the issue as to whether a name is *idem sonans* is a question for the court alone. *Rooks v. State*, 83 *Ala.* 79, 3 *So.* 720; *Sayres v. State*, 30 *Ala.* 15.

64. *Erickson v. State*, 14 *Ariz.* 253, 127 *Pac.* 754; *State v. Havelly*, 21 *Mo.* 498.

65. **U. S.**—United States *v.* Hinman, *Baldw.* 292, 26 Fed. Cas. No. 15,370. **Ala.**—Underwood *v.* State, 72 *Ala.* 220. **Ariz.**—Erickson *v.* State, 14 *Ariz.* 253, 127 *Pac.* 754. **Ark.**—State *v.* Williams, 68 *Ark.* 241, 243, 57 *S. W.* 792, 82 *Am. St. Rep.* 288. **Cal.**—People *v.* Fick, 89 *Cal.* 144, 26 *Pac.* 759, *Toy Fong and Choy Fong. Mass.*—Com. *v.* Warren, 143 *Mass.* 568, 10 *N. E.* 178. **N. J.** State *v.* Potts, 9 *N. J.* 26, 32, 17 *Am. Dec.* 449.

[a] If by local usage the names have the same pronunciation it is a question of fact for the jury. *Munkers v. State*, 87 *Ala.* 94, 6 *So.* 357.

66. *State v. Upton*, 12 *N. C.* 513 (wherein "Anne" was afterward spelled as "Anny"); *Cotton v. State*, 4 *Tex.* 230; *Wells v. State*, 4 *Tex. App.* 20 (wherein Chin Chan, a Chinaman was later referred to as Chin Chang); *Catlett v. State* (*Tex. Crim.*), 61 *S. W.* 485; *Hall v. State*, 32 *Tex. Crim.* 594, 25 *S. W.* 292.

[a] But an indictment charging as-

sault with intent to commit rape upon one McKaskey, in another part as McKlaskey, and finally as McKloskey is too uncertain. *Black v. State*, 57 *Ind.* 109.

67. **Ky.**—Wilkey *v.* Com., 104 *Ky.* 325, 47 *S. W.* 219; *Jennie Tyre and Jane Tyre. Mass.*—Com. *v.* Hunt, 4 *Pick.* 252. **Mo.**—State *v.* Wall, 39 *Mo.* 532; *State v. Dickerson*, 24 *Mo.* 365. **N. Y.**—Phelps *v.* People, 72 *N. Y.* 365. **S. C.**—State *v.* Coppenburg, 2 *Strobh.* 273. **Eng.**—Reg. *v.* Crespin, 11 *Q. B.* 913, 116 *Eng. Reprint* 715, 12 *Jur.* 433, 63 *E. C. L.* 913.

See *Means v. State*, 99 *Ga.* 205, 25 *S. E.* 682, wherein Frances Slaton was afterward referred to as "the Slaton."

[a] When the name has been once set forth in full, the person named may thereafter be referred to by the use of the Christian name alone preceded by the word "said," provided there is no other person mentioned in the indictment, of the same Christian name, to whom the words could refer. *State v. Pike*, 65 *Me.* 111.

68. **Cal.**—People *v.* Smith, 112 *Cal.* 333, 44 *Pac.* 663; *People v. Seifert*, 14 *Cal. App.* 102, 111 *Pac.* 270 (*Penal Code*, §956); *People v. Oreibus*, 79 *Cal.* 178, 21 *Pac.* 724. **Ind. Ter.** *James v. United States*, 7 *Ind. Ter.* 250, 104 *S. W.* 607. **Ia.**—State *v.* Congrove, 109 *Iowa* 66, 80 *N. W.* 227; *State v. Porter*, 97 *Iowa* 450, 66 *N. W.* 745; *State v. Hall*, 97 *Iowa* 400, 66 *N. W.* 725. **Minn.**—State *v.* Blakeley, 83 *Minn.* 432, 86 *N. W.* 419; *State v. Grimes*, 50 *Minn.* 123, 52 *N. W.* 275; *State v. Boylson*, 3 *Minn.* 325. **Okla.**—Ponosky *v.* State, 8 *Okla. Crim.* 116, 126 *Pac.* 451. **S. D.**—State *v.* Vincent, 16 *S. D.* 62, 91 *N. W.* 347.

failure to allege the name where the indictment is thereby rendered uncertain as to the act charged.⁶⁹

3. Pleading Written Instruments or Papers.⁷⁰—a. *In General.* Statutes in some states provide that where a charge is predicated upon a written or printed instrument, it is sufficient to describe the instrument by name or designation,⁷¹ without setting it out in *haec verba*,⁷² but they do not dispense with the necessity of so individuating the offense as to enable defendant to prepare for trial.⁷³ In the absence of statute, however, if the basis of the offense be a written instrument, it should be set out in *haec verba*,⁷⁴ or the substance of the instru-

[a] **The purpose of such a statute** is to abrogate the common law rule, and to make the more rational one that it is immaterial what might be the name of the owner of the property, provided the evidence should show to the satisfaction of the jury that the person named in the indictment was identical with the person who owned the property. *James v. United States*, 7 Ind. Ter. 250, 104 S. W. 607.

69. *People v. Oreileus*, 79 Cal. 178, 21 Pac. 724 (wherein indictment for assault upon one Fernida Lumes and proof was of assault upon Trinidad Sanchez); *People v. McNealy*, 17 Cal. 332 (wherein indictment was for assault upon Sin Groon and proof of assault was upon Lin Goon); *State v. Blakeley*, 83 Minn. 43, 86 N. W. 419, *approving* and *following* *State v. Boylson*, 3 Minn. 438.

70. **In declarations or complaints in civil actions**, see 6 STANDARD PROC. 697; 11 STANDARD PROC. 989, et seq.

71. *Riley v. State*, 168 Ind. 657, 81 N. E. 726.

72. **Ind.**—*Riley v. State*, 168 Ind. 657, 81 N. E. 726. **Miss.**—*Roberts v. State*, 72 Miss. 110, 16 So. 233. **Wash.** *State v. Wright*, 9 Wash. 96, 37 Pac. 313.

73. *Riley v. State*, 168 Ind. 657, 81 N. E. 726.

As to necessity for certainty and particularity sufficient to enable accused to prepare for trial generally, see *supra*, IX, C, 4, a.

74. See the following cases: **U. S.** *United States v. Howell*, 64 Fed. 110; *United States v. Wentworth*, 11 Fed. 52. **Ala.**—*McAllister v. State*, 156 Ala. 122, 47 So. 161; *Barnett v. State*, 54 Ala. 579; *Langford v. State*, 45 Ala. 26. **Ill.**—*Trask v. People*, 151 Ill. 523, 38 N. E. 248. **Ind.**—*Whitney v. State*, 10 Ind. 404. **Ia.**—*State v. Henderson*, 135 Iowa 499, 113 N. W. 328; *State*

v. Johnson, 26 Iowa 407, 96 Am. Dec. 158 (forgery); *State v. Calendine*, 8 Iowa 288. **Ky.**—*Kinnaird v. Com.*, 134 Ky. 575, 121 S. W. 489. **Mass.**—*Com. v. Tarbox*, 1 Cush. 66; *Com. v. Wright*, 1 Cush. 46; *Com. v. Houghton*, 8 Mass. 107. **N. J.**—*State v. Potts*, 9 N. J. L. 26, 17 Am. Dec. 449. **N. Y.**—*People v. Kingsley*, 2 Cow. 522, 14 Am. Dec. 520; *People v. Wise*, 3 N. Y. Crim. 303. **Tenn.**—*Hooper v. State*, 8 Humph. 93, 101, forgery. **Tex.**—*Baker v. State*, 14 Tex. App. 332.

[a] "It was a well settled rule of common law pleading, that when the words of a document are essential ingredients of an offense, as in forgery, passing counterfeit money, selling lottery tickets, sending threatening letters, libel (*Whart. Cr. Pl. & Pr.*, §167, 8th ed.), or a challenge to fight, or for printing, publishing, or distributing obscene papers (*Commonwealth v. Tarbox*, 1 Cush. 66, 66 n.), the document should be set out in words and figures, and the indictment must profess to set out the paper . . ." *People v. Wise*, 3 N. Y. Crim. 303, 310.

[b] "A person who is charged with the commission of a penal or criminal offense that grows out of a writing, or alteration in a writing, made by him is entitled, under all the rules of criminal procedure, to be informed by an inspection of the indictment of the nature of the charge, so that he may be prepared to meet it; and he cannot have this information unless the writing alleged to have been executed or altered is incorporated in the indictment." *Kinnaird v. Com.*, 134 Ky. 575, 121 S. W. 489.

[c] **Variance** in address of drawee of forged instrument is immaterial, as this is an immaterial part. *Trask v. People*, 151 Ill. 523, 38 N. E. 248; *State v. Henderson*, 135 Iowa 499, 113

ment should be stated.⁷⁵ The most frequent application of the rule is to indictments for forgery, libel, sending threatening letters and the like.⁷⁶

Exceptions to General Rule.—To the general rule, there are circumstances constituting exceptions, however,⁷⁷ such as where the instrument or paper is in the possession of the accused,⁷⁸ is lost,⁷⁹ or destroyed,⁸⁰ or for some other reason is not accessible to the grand jury or informant.⁸¹ Likewise, where the documents are so numerous that they

N. W. 328. As to variance generally between forged instrument as proved and as set out in the indictment, see 8 STANDARD PROC. 1156.

75. **Ala.**—*McAllister v. State*, 156 Ala. 122, 47 So. 161; *Langford v. State*, 45 Ala. 26, 28, so described that the court by inspection may pronounce whether it is such an instrument as may be the basis of the offense charged or not. **Ia.**—*State v. Henderson*, 135 Iowa 499, 113 N. W. 328. **Tex.**—*Baker v. State*, 14 Tex. App. 332.

[a] **Stating the legal effect** of such an instrument or writing is not sufficient, however. *United States v. Watson*, 17 Fed. 145.

76. *Barnett v. State*, 54 Ala. 579.

[a] Indeed, "the rule which requires a setting out of the entire instrument or its tenor seems limited mainly, if not wholly, to cases of forging, counterfeiting money, and threatening letters." *United States v. French*, 57 Fed. 382, *quoted* with approval in *United States v. Heinze*, 161 Fed. 425.

[b] "In these cases the offense depends wholly on the character of the instrument. The court can determine only from the instrument, whether it is of the character of which forgery can be committed, or whether its matter falls within the legal definition of libellous; or whether the letter is within the statute punishing the offense." *Barnett v. State*, 54 Ala. 579, 585.

In indictments for counterfeiting, see 6 STANDARD PROC. 12, et seq.

In indictments for forgery, see 8 STANDARD PROC. 1148, et seq.

In indictments for criminal libel, see the title "Libel and Slander."

In indictments for sending threatening letters, see the title "Post Office."

77. **U. S.**—*United States v. Howell*, 64 Fed. 110. **Mass.**—*Com. v. Houghton*, 8 Mass. 107. **Tenn.**—*Hooper v. State*, 8 Humph. 93, 101.

78. **U. S.**—*United States v. Went-*

worth, 11 Fed. 52. **Ill.**—*People v. Stricker*, 258 Ill. 618, 102 N. E. 216. **Ind.**—*State v. Callahan*, 124 Ind. 364, 24 N. E. 732; *Munson v. State*, 79 Ind. 541, last two cases of forged instruments. **Ky.**—*Kinnaird v. Com.*, 134 Ky. 575, 121 S. W. 489. **Mass.**—*Com. v. Houghton*, 8 Mass. 107. **N. J.**—*State v. Potts*, 9 N. J. L. 26, 17 Am. Dec. 449. **N. Y.**—*People v. Kingsley*, 2 Cow. 522, 14 Am. Dec. 520. **Tenn.**—*Hooper v. State*, 8 Humph. 93.

79. **U. S.**—*United States v. Howell*, 64 Fed. 110. **Ind.**—*State v. Callahan*, 124 Ind. 364, 24 N. E. 732; *Munson v. State*, 79 Ind. 541. **Ky.**—*Kinnaird v. Com.*, 134 Ky. 575, 121 S. W. 489. **N. J.**—*State v. Potts*, 9 N. J. L. 26, 17 Am. Dec. 449. **N. Y.**—*People v. Badgley*, 16 Wend. 53; *People v. Kingsley*, 2 Cow. 522, 14 Am. Dec. 520.

80. **U. S.**—*United States v. Howell*, 64 Fed. 110; *United States v. Wentworth*, 11 Fed. 52. **Ill.**—*People v. Stricker*, 258 Ill. 618, 102 N. E. 216. **Ind.**—*State v. Callahan*, 124 Ind. 364, 24 N. E. 732; *Munson v. State*, 79 Ind. 541. **Ky.**—*Kinnaird v. Com.*, 134 Ky. 575, 121 S. W. 489. **Mass.**—*Com. v. Houghton*, 8 Mass. 107. **N. J.**—*State v. Potts*, 9 N. J. L. 26, 17 Am. Dec. 449. **N. Y.**—*People v. Badgley*, 16 Wend. 53; *People v. Kingsley*, 2 Cow. 522, 14 Am. Dec. 520. **Tenn.**—*Hooper v. State*, 8 Humph. 93, 101.

[a] **Partial Destruction.**—Where the indictment averred facts showing a partial destruction of an instrument charged to have been feloniously altered, it was held to bring the case within the spirit and meaning of the exception in favor of instruments, which have been destroyed when the indictment is returned. *Munson v. State*, 79 Ind. 541.

81. **U. S.**—*United States v. Howell*, 64 Fed. 110, where the prosecution has not in its possession, and is unable to procure, the instrument or writing. **Ill.**—*People v. Stricker*, 258 Ill. 618, 102

cannot be stated at length, or in detail, without incumbering the record to an extent beyond all practical rules of convenience, they may be stated generally.⁸² But a sufficient reason, why the instrument or paper is not set forth, must always be alleged,⁸³ as well as a general statement of the substance of the writing,⁸⁴ that the defendant may be sufficiently advised of the charge against him.⁸⁵

It is a rule also that it is not necessary to set out an instrument in *hæc verba*, unless it becomes directly the subject-matter or foundation of the indictment.⁸⁶ If it be rather an incident which enhances

N. E. 216. **Ind.**—*State v. Callahan*, 124 Ind. 364, 24 N. E. 732, where its whereabouts are unknown to the grand jury returning the indictment. **Tenn.**—*Hooper v. State*, 8 Humph. 93, 101, where the instrument cannot be produced.

[a] A mere statement that "the grand jury is not now in possession of said instrument, and for that reason it cannot be filed herewith," is not sufficient to excuse the failure to set it out in the indictment. *Kinnaird v. Com.*, 134 Ky. 575, 121 S. W. 489.

82. *United States v. Winslow*, 195 Fed. 578.

83. **U. S.**—*United States v. Howell*, 64 Fed. 110. **Ind.**—*State v. Callahan*, 124 Ind. 364, 24 N. E. 732; *Thomas v. State*, 103 Ind. 419, 2 N. E. 808; *Whitney v. State*, 10 Ind. 404. **Ky.**—*Kinnaird v. Com.*, 134 Ky. 575, 121 S. W. 489. **Mass.**—*Com. v. Houghton*, 8 Mass. 107. **N. J.**—*State v. Potts*, 9 N. J. L. 26, 17 Am. Dec. 449. **N. Y.**—*People v. Badgley*, 16 Wend. 53; *People v. Kingsley*, 2 Cow. 522, 14 Am. Dec. 520.

[a] This is a rule of pleading, not of evidence, to prevent an exception to the indictment, not to legitimate secondary or inferior evidence. *State v. Potts*, 9 N. J. L. 26, 17 Am. Dec. 449.

[b] The fact that two reasons are stated why the instrument is not set out in *hæc verba*, which are connected by a disjunctive conjunction, does not render the indictment bad. These averments "do not relate to the statement of the charge or definition of the offense, but only a statement of an excuse or reason for not setting out a copy of the instrument. Contradictory and repugnant allegations even in an indictment or information do not constitute a ground to quash the same unless it contains matter which if true would constitute a bar to the prosecution." *State v. Callahan*, 124 Ind. 364,

24 N. E. 732. As to effect of repugnant allegations, see *supra*, IX, C, 6; of use of disjunctive, see *supra*, IX, C, 5.

84. **U. S.**—*United States v. Howell*, 64 Fed. 110. **Ill.**—*Wallace v. People*, 27 Ill. 45. **Ind.**—*State v. Callahan*, 124 Ind. 364, 24 N. E. 732; *Munson v. State*, 79 Ind. 541. **Ky.**—*Kinnaird v. Com.*, 134 Ky. 575, 121 S. W. 489. **N. Y.**—*People v. Badgley*, 16 Wend. 53; *People v. Kingsley*, 2 Cow. 522, 14 Am. Dec. 520.

[a] Failure to allege whether certain false statements made to a bank official were oral or in writing does not render the indictment demurrable where the substance is stated. *State v. Henderson*, 135 Iowa 499, 113 N. W. 328.

85. *United States v. Howell*, 64 Fed. 110, wherein the court said: "Even though the reasons for not setting out in *hæc verba* or describing the instrument or writing more particularly may be legally sufficient, the indictment must still contain such a description of the forged and counterfeit instrument or writing as will sufficiently tend to identify and individualize it, so that the defendant may be advised of the charge against him." See also *Barnett v. State*, 54 Ala. 579.

86. *Pooler v. United States*, 127 Fed. 509, 517, 62 C. C. A. 307; *United States v. Winslow*, 195 Fed. 578; *United States v. Heinze*, 161 Fed. 425; *United States v. Grunberg*, 131 Fed. 137; *Musgrave v. State*, 133 Ind. 297, 32 N. E. 885. In this case, which was a prosecution for attempting to defraud an insurance company, "it was not necessary to incorporate the policy of insurance in the indictment. No offense making it necessary to set forth the policy was charged or attempted to be charged. The money it was that the conspirators desired, and to obtain the money, they formed their evil scheme and made their false pre-

the punishment, than the foundation of the prosecution, it may be set out according to its legal effect.⁸⁷

Obscene Matter.—Even though the instrument which is the subject of the indictment be obscene, it should be set forth or the reason for its omission be alleged.⁸⁸ Where, however, the instrument is so obscene as to render it improper that it should appear on the record, it need not be set out in *hæc verba*;⁸⁹ but in such case, a reason for the omis-

tenses. The policy was merely an incidental or collateral matter, valuable as evidence of a contract and as an incidental matter showing that the pretense was such as was likely to deceive, and would probably deceive, but not the foundation or support of the indictment."

87. *United States v. Keen*, 1 McLean 429, 26 Fed. Cas. No. 15,510.

[a] In an indictment for knowingly selling a bottle of goods upon which there was a counterfeit label, it is sufficient to describe the label in general terms by its dimensions and the purport of the words upon it. *People v. Stricker*, 258 Ill. 618, 102 N. E. 216.

[b] But if words are used as descriptive of the instrument, though they might have been omitted, yet being stated, must be proved. *United States v. Keen*, 1 McLean 429, 26 Fed. Cas. No. 15,510.

88. **Fla.**—*Reyes v. State*, 34 Fla. 181, 15 So. 875. **Ill.**—*McNair v. People*, 89 Ill. 441. **Mass.**—*Com. v. Tarbox*, 1 Cush. 66. **Vt.**—*State v. Brown*, 27 Vt. 619.

89. **U. S.**—*Bartell v. United States*, 227 U. S. 427, 33 Sup. Ct. 382, 57 L. ed. 583; *Dunlop v. United States*, 165 U. S. 486, 17 Sup. Ct. 375, 41 L. ed. 799; *Rosen v. United States*, 161 U. S. 29, 16 Sup. Ct. 434, 40 L. ed. 606 (reviewing authorities); *United States v. Bennett*, 16 Blatchf. 338, 24 Fed. Cas. No. 14,571. **Fla.**—*Reyes v. State*, 34 Fla. 181, 15 So. 875. **Ill.**—*Fuller v. People*, 92 Ill. 182; *McNair v. People*, 89 Ill. 441. **Ind.**—*Thomas v. State*, 103 Ind. 419, 2 N. E. 808. **Ky.**—*Kinnaird v. Com.*, 134 Ky. 575, 121 S. W. 489. **Mass.**—*Com. v. Tarbox*, 1 Cush. 66; *Com. v. Holmes*, 17 Mass. 336. **Mich.**—*People v. Girardin*, 1 Mich. 90. **Mo.**—*State v. Van Wye*, 136 Mo. 227, 37 S. W. 938, 58 Am. St. Rep. 627, reviewing authorities. **N. Y.**—*People v. Kaufman*, 14 App. Div. 305, 43 N. Y. Supp. 1046. **Ohio.**—*State v. Zurhorst*, 75 Ohio

St. 232, 79 N. E. 238. **Pa.**—*See Com. v. Sharpless*, 2 Serg. & R. 91, 7 Am. Dec. 632. **R. I.**—*State v. Smith*, 17 R. I. 371, 22 Atl. 282. **Vt.**—*State v. Brown*, 27 Vt. 619.

[a] "The doctrine to be deduced from the American cases is that the constitutional right of the defendant to be informed of the nature and cause of the accusation against him entitles him to insist, at the outset, by demurrer or by motion to quash, and after verdict, by motion in arrest of judgment, that the indictment shall apprise him of the crime charged with such reasonable certainty that he can make his defense and protect himself after judgment against another prosecution for the same offense; that this right is not infringed by the omission from the indictment of indecent and obscene matter, alleged as not proper to be spread upon the records of the court, provided the crime charged, however general the language used, is yet so described as reasonably to inform the accused of the nature of the charge sought to be established against him; and that, in such case, the accused may apply to the court before the trial is entered upon for a bill of particulars, showing what parts of the paper would be relied on by the prosecution as being obscene, lewd, and lascivious, which motion will be granted or refused, as the court, in the exercise of a sound legal discretion, may find necessary to the ends of justice." *Rosen v. United States*, 161 U. S. 29, 40, 16 Sup. Ct. 480, 40 L. ed. 606.

[b] **Reason of Rule.**—To require the obscene matter to be set out would be to require that the public itself should give permanency and notoriety to indecency, in order to punish it. *Thomas v. State*, 103 Ind. 419, 2 N. E. 808. To same effect, see: **Mass.**—*Com. v. Holmes*, 17 Mass. 336. **Mich.**—*People v. Girardin*, 1 Mich. 90. **N. Y.**—*People v. Kaufman*, 14 App. Div. 305, 43 N. Y.

sion must appear by proper averments;⁹⁰ and there must be such a description as will inform the accused of what particular paper is referred to.⁹¹ This latter proposition is true, notwithstanding the prosecution be for a violation of a statute relative to obscene publications.⁹²

b. *How Set Out.*⁹³—The general rule that when the tenor of a

Supp. 1046. **Ohio.**—*State v. Zurhorst*, 75 Ohio St. 232, 79 N. E. 238.

[c] **The English authorities** seem to sustain a position contrary to the preponderance of American decisions upon this point. See *Bradlaugh v. The Queen*, L. R. 3 Q. B. Div. (1877-8) 607, 614, wherein several of the foregoing American decisions were examined and discussed but were not followed, the appellate court overruling Cockburn, C. J., and Mellor, J., before whom the case was tried (*Queen v. Bradlaugh*, 2 Q. B. D. 1876-7, 569), and holding that it was necessary to set out the words of the obscene libel or book, in *haec verba*.

[d] "The strict ruling in *Queen v. Bradlaugh*, *supra*, was soon remedied by an act of parliament. Act 43, Victoria No. 24; Act 15, Victoria No. 4; *Ex parte Collins*, 9 N. S. W. L. R. 497." *State v. Van Wye*, 136 Mo. 227, 241, 37 S. W. 938, 58 Am. St. Rep. 627.

90. **Fla.**—*Reyes v. State*, 34 Fla. 181, 15 So. 875. **Ill.**—*McNair v. People*, 89 Ill. 441. **Ky.**—*Kinnaird v. Com.*, 134 Ky. 575, 121 S. W. 489. **Mass.** *Com. v. Tarbox*, 1 Cush. 66. **N. Y.** *People v. Kaufman*, 14 App. Div. 305, 43 N. Y. Supp. 1046, *distinguishing* *People v. Hallenbeck*, 52 How. Pr. 502, and *People v. Daniby*, 63 Hun 579, 13 N. Y. Supp. 467, upon the ground that in neither of these cases was the omission of the obscene matter excused by a statement in the indictment itself, that it was too gross to be placed upon record. **R. I.**—*State v. Smith*, 17 R. I. 371, 22 Atl. 282.

[a] **The usual averment** is that the book or paper is so obscene that it would be offensive to the court, and improper to be placed on the records thereof, and that therefore the grand jury did not set it forth in the indictment. *Thomas v. State*, 103 Ind. 449, 427, 2 N. E. 808. And see: **Mass.** *Com. v. Holmes*, 17 Mass. 337. **N. Y.** *People v. Kaufman*, 14 App. Div. 305, 43 N. Y. Supp. 1046. **Ohio.**—*State v.*

Zurhorst, 75 Ohio St. 232, 79 N. E. 238. **R. I.**—*State v. Smith*, 17 R. I. 371, 22 Atl. 282.

[b] An averment merely that the writing was "indecent, obscene, offensive, immoral, and disgusting" is insufficient, being a mere conclusion of the pleader. *Kinnaird v. Com.*, 134 Ky. 575, 121 S. W. 489.

91. **U. S.**—*United States v. Clarke*, 40 Fed. 325. **Fla.**—*Reyes v. State*, 34 Fla. 181, 15 So. 875. **Ind.**—*Thomas v. State*, 103 Ind. 449, 2 N. E. 808. **Mass.** *Com. v. McCance*, 164 Mass. 162, 41 N. E. 133, 29 L. R. A. 61; *Com. v. Tarbox*, 1 Cush. 66. **Vt.**—*State v. Brown*, 27 Vt. 619.

[a] **The indictment should give such description** as decency permits. *Reyes v. State*, 34 Fla. 181, 15 So. 875, failure to do so fatal defect, not cured by verdict.

[b] "**The degree of particularity**, with which the paper could be described without exposing its grossness, would depend something upon the nature of that feature, whether it consisted in the words used or the general description given. In the former case it could not be more particularly described than it here is without offending decency." *State v. Brown*, 27 Vt. 619.

[c] **It is only necessary** to identify the obscene book or publication sufficiently to apprise the defendant of what particular book or publication is intended, and to aver its obscenity, giving as an excuse for not setting forth the obscene matter that it is so gross as to be offensive to the court and improper to be placed upon its records. *People v. Kaufman*, 14 App. Div. 305, 43 N. Y. Supp. 1046.

92. *Reyes v. State*, 34 Fla. 181, 15 So. 875; *McNair v. People*, 89 Ill. 441.

[a] It is not sufficient to charge such offense simply in the language of the statute. *State v. Hayward*, 83 Mo. 299.

93. In indictment for forgery, see generally 8 STANDARD PROC. 1154.

writing is required to be set forth, the indictment should contain an exact copy thereof,⁹⁴ was originally enforced with great strictness.⁹⁵ Indeed, whenever the indictment undertook to state the contents of a written or printed matter, whether necessary or not, it was required to be set out in the very words of the writing.⁹⁶ But under the more modern practice, the rule is not so strict,⁹⁷ and the variance or omission of a letter in a word,⁹⁸ or of a word itself,⁹⁹ will not vitiate the pleading where the meaning is not thereby changed.¹ But the relaxation of the old rule does not authorize numerous abbreviations.²

The omission of matter not properly a part of the instrument or paper upon which the prosecution is based will not vitiate the indictment.³ Indeed, such matters need not be set out therein.⁴ The in-

94. See *supra*, IX, E, 4, a.

95. *State v. Jay*, 34 N. J. L. 368.

96. *Langdale v. People*, 100 Ill. 263; *Com. v. Tarbox*, 1 Cush. (Mass.) 66, obscure publication.

97. *State v. Jay*, 34 N. J. L. 368.

[a] All such mistakes will be disregarded which can fairly come within the rule *de minimis*. *State v. Jay*, 34 N. J. L. 368.

98. *State v. Jay*, 34 N. J. L. 368.

99. **Some Words Illegible.**—The indictment is not bad where the copy set forth omits a few words, which is explained by alleging that at a designated place in the original pointed out and exhibited by asterisks or stars included in brackets in the foregoing copy there was one line of writing of about six words, dimmed and erased, caused by the folding and wear to such an extent that the same is undecipherable, and the original writing thereof is wholly lost and unknown to deponent and therefore the true purport and effect of such part cannot be set out. *Thomas v. State*, 103 Ind. 419, 2 N. E. 808.

1. "This rule appears to have originated in the remarks of Justice Powys, in *Regina v. Drake*, 2 Salk. 660, but was afterwards ratified by Lord Mansfield, in *Rex v. Beach*, 1 Cowp. 229. The same disposition to throw aside the extravagant nicety of the ancient decisions has been exhibited in other reported cases. 1 *Leach* 145; *United States v. Hinman*, Baldwin 292; *State v. Bean*, 19 Vt. 530; *People v. Warner*, 5 Wend. 271; *Douglass* 193. The relaxation of the old doctrine to this extent appears to be founded in good sense, and has in its favor judicial

opinions of much weight." *State v. Jay*, 34 N. J. L. 368.

2. *State v. Jay*, 34 N. J. L. 368.

3. *Langdale v. People*, 100 Ill. 263.

[a] The omission, in an indictment for libel, of the date and signature of at the end of the libel, not affecting the meaning, is not a fatal variance. *Com. v. Harmon*, 2 Gray (Mass.) 289. And see generally the title "**Libel and Slander**."

4. **Thus, indorsements** (1) upon the paper or instrument need not be set out, for as a rule they are no part thereof. **N. Y.**—*Miller v. People*, 52 N. Y. 304, 11 Am. Rep. 706. **Ohio.** *Hess v. State*, 5 Ohio 5, 22 Am. Dec. 767. **Va.**—*Perkins v. Com.*, 7 Gratt. 651, 56 Am. Dec. 123, wherein the court said that it was "of opinion that, as this prosecution was only for forging the writing which purported to be a negotiable note, there was no necessity that the indictment should set out the endorsements, or any other matter written upon the same paper, constituting no part of the note itself, and not entering into the essential description of that instrument. It is enough to set out in the indictment the note itself, without any other extrinsic marks or writings upon the same paper." (2) It constitutes no variance that it is not set out. *Miller v. People*, 52 N. Y. 304, 11 Am. Rep. 706; *Perkins v. Com.*, 7 Gratt. (Va.) 651.

[a] Neither is it necessary to insert the marks, letters or figures used in the margin of a bill of exchange or bankbill for ornament, or the more easy detection of forgeries, such forming no part thereof. *People v. Franklin*, 3 Johns. Cas. (N. Y.) 299.

[b] **That an internal revenue stamp**

dietment need not allege in terms that the instrument is under seal.⁵ The meaning of misspelled words in the instrument or writing may be set forth by innuendo averments.⁶

Introductory Words.—If an exact copy of the instrument be required to be set out, the indictment must undertake and profess to set out the instrument in *hæc verba* by appropriate language introducing the same;⁷ but there need be no technical form of words for expressing that it is so set forth.⁸

Instrument in Foreign Language.—If the instrument which is the basis of the prosecution is in a foreign language, it must be translated and explained.⁹

c. *By Exhibit*.¹⁰—While the practice of attaching a copy of an instrument as an exhibit, instead of incorporating it into the body of the indictment, is a very loose and dangerous practice,¹¹ and one not to be encouraged,¹² it seems that it is sufficient as against a demurrer to the indictment.¹³

attached to an instrument is not set forth in the indictment constitutes no variance, since it is no part of the instrument itself. *Miller v. People*, 52 N. Y. 304, 11 Am. Rep. 706.

5. *Webster v. People*, 92 N. Y. 422.

[a] Where the indictment set forth a copy of a deed, which stated, in the attesting clause thereto, that it was under seal, this fact and the allegation that it was a deed was a substantial averment that it was under seal. *Webster v. People*, 92 N. Y. 422.

6. *Colter v. State*, 40 Tex. Crim. 165, 49 S. W. 379.

7. *Com. v. Tarbox*, 1 Cush. (Mass.) 66 (obscene matter); *Com. v. Wright*, 1 Cush. (Mass.) 46, 64.

[a] Such was the rule of common law. *People v. Wise*, 3 N. Y. Crim. 303, 310.

8. The exact copy is usually introduced by the word "tenor," which always means an exact copy. **Ia.**—*State v. Johnson*, 26 Iowa 407, 96 Am. Dec. 158. **Mass.**—*Com. v. Wright*, 1 Cush. 46, 65; *Com. v. Houghton*, 8 Mass. 107; *Com. v. Stevens*, 1 Mass. 203. **N. Y.** *People v. Warner*, 5 Wend. 271. **Tenn.** *Fogg v. State*, 9 Yerg. 392.

At the common law, (1) the words "to the tenor following" (*People v. Wise*, 3 N. Y. Crim. 303, 310), (2) or "as follows" (*People v. Wise*, 3 N. Y. Crim. 303, 310) were the proper words to be used. (3) But if the instrument be set forth in *hæc verba*, the mere fact that it is introduced by the words "of the purport and effect following,

to-wit," does not vitiate the indictment. *State v. Johnson*, 26 Iowa 407, 414, 96 Am. Dec. 158. (4) The words "in substance" did not require an exact copy at common law, however (*Com. v. Wright*, 1 Cush. [Mass.] 46; *People v. Wise*, 3 N. Y. Crim. 303, 310; *People v. Warner*, 5 Wend. [N. Y.] 271, ["in substance and to the effect following" does not require exact copy]), (5) nor was "purport" sufficient. *Com. v. Wright*, 1 Cush. (Mass.) 46, 65; *People v. Wise*, 3 N. Y. Crim. 303, 310.

9. **Cal.**—*People v. Ah Sum*, 92 Cal. 648, 28 Pac. 680. **Ill.**—*Duffin v. People*, 107 Ill. 113, 47 Am. Rep. 431. **Eng.** *Rex v. Goldstein*, 3 B. & B. 201, 7 E. C. L. 685.

As to necessity for use of English language generally, see *supra*, IX, C, 2, b.

10. **As to exhibits to pleadings at common law and equity**, see the title "Exhibits."

11. *State v. Williams*, 32 Minn. 537, 21 N. W. 746.

12. *State v. Williams* 32 Minn. 537, 21 N. W. 746.

13. *State v. Williams*, 32 Minn. 537, 21 N. W. 746, wherein the court said: "This practice . . . is certainly novel in criminal pleading. . . . it is, of course, quite common in civil pleadings, but when we consider the liability of an exhibit to become detached, and the difficulty of properly and conclusively identifying it, such a practice ought not to obtain in criminal pleading. If

4. **Averments as to Property and Ownership Thereof.**—a. *Describing Realty.*—An indictment or information for an offense which can only be committed in relation to real property must so describe the real property which was the subject of the offense that it can be known or identified,¹⁴ or the indictment will be fatally defective.¹⁵ Certainty to a common intent is necessary.¹⁶ For some offenses, however,¹⁷ the location of the realty need not be specifically described; it is sufficient if it is alleged to be in a given city or town.¹⁸

b. *Describing Personalty.*—(I.) **In General.**¹⁹—Personal property in respect to which the offense charged is alleged to have been committed must be particularly described, when the character,²⁰ value²¹

an indictment in this form is presented to the court, we think it would be eminently proper for him on his own motion to refuse to receive it, and to return it to the grand jury with instructions to have it drawn in better form; and we are not now prepared to say that, if the objection were raised by a defendant upon arraignment, by motion to set aside the indictment, the court would not be justified in granting the motion and resubmitting the case to the grand jury. But, as against a demurrer, we can see no principle of law upon which we can hold that an exhibit attached to an indictment, and referred to in it as attached thereto, and marked and expressly made a part thereof, should not be considered a part of the indictment, the same as if incorporated in the body of the pleading."

14. *Com. v. Brown*, 15 Gray (Mass.) 189; *State v. Gaffrey*, 3 Pinn. (Wis.) 369.

[a] **In arson** the offense is local and a local description of the building. The words "there situate" are material. *State v. Gaffrey*, 3 Pinn. (Wis.) 369. See the title "**Arson.**"

[b] **An indictment for fraudulently conveying real estate**, without giving notice of an incumbrance, does not describe the real estate conveyed with sufficient certainty by describing it as "a certain parcel of real estate situated in Salem in the county of Essex." *Com. v. Brown*, 15 Gray (Mass.) 189.

[c] **Under an Indictment of a House as a "Dram Shop."**—*Norris' House v. State*, 3 Greene (Iowa) 513. See the title "**Intoxicating Liquors.**"

15. *Com. v. Brown*, 15 Gray (Mass.) 189; *State v. Gaffrey*, 3 Pinn. (Wis.) 369.

16. *Com. v. Brown*, 15 Gray (Mass.)

189; *State v. Malloy*, 34 N. J. L. 410.

As to degree of certainty required generally, see *supra*, IX, C. 4, c.

17. Such as keeping and maintaining (1) a common nuisance (*Com. v. Logan*, 12 Gray [Mass.] 136; *Com. v. Gallagher*, 1 Allen [Mass.] 592; *Com. v. Welsh*, 1 Allen [Mass.] 1), (2) or for a malicious attempt to injure a certain dam. *Com. v. Tolman*, 149 Mass. 229, 21 N. E. 377, 14 Am. St. Rep. 414, 3 L. R. A. 747.

18. **An indictment for obstructing a way** (1) need not give any further description than the town in which the particular obstruction occurred. *Com. v. Hall*, 15 Mass. 240. (2) So an indictment for obstructing a highway (*Com. v. Hall*, 15 Mass. 240; 11 STANDARD PROC. 152), (3) or for not repairing a highway (*Com. v. Newbury*, 2 Pick. [Mass.] 51; 11 STANDARD PROC. 118) need not set out the termini of the highway.

19. See generally the titles "**Burglary**;" "**Embezzlement**;" "**Larceny**;" "**Obtaining Property by False Pretenses**."

20. **Fla.**—*Goff v. State*, 60 Fla. 13, 53 So. 327; *Grant v. State*, 35 Fla. 581, 17 So. 225, 48 Am. St. Rep. 263. **Ga.**—*Brown v. State*, 86 Ga. 633, 13 S. E. 20. **Ill.**—*West v. People*, 137 Ill. 189, 27 N. E. 34, 34 N. E. 254. **Ind.**—*Funk v. State*, 149 Ind. 338, 49 N. E. 266; *Whitney v. State*, 10 Ind. 404. **La.**—*State v. Hoyer*, 40 La. Ann. 744, 4 So. 829. **Me.**—*State v. Dawes*, 75 Me. 51, one case of merchandise, insufficient. **Neb.**—*Korab v. State*, 93 Neb. 66, 139 N. W. 717, L. R. A. (N. S.) 1915E, 84; *Prumps v. State*, 40 Neb. 545, 59 N. W. 125. **N. H.**—*State v. Silverman*, 76 N. H. 269, 82 Atl. 536. **Wash.**—*State v. Dinkhouse*, 10 Wash. 87, 28 Pac. 822.

21. **Me.**—*State v. Dawes*, 75 Me. 51.

or number²² of such property is an ingredient of the offense,²³ or is necessary to enable the defendant to prepare for trial,²⁴ or to enable the defendant to protect himself from being tried for an offense other than the one he was indicted for;²⁵ and if, for any reason, this cannot be done, the reason why it cannot be done should be stated in the indictment.²⁶ The property should be described as it was at the time of the commission of the offense.²⁷

(II.) Money.²⁸ — Unless a statute dispenses with the necessity of a particular description of the money or bank notes, as is sometimes the case,²⁹ the indictment or information should designate the par-

Mich.—*Merwin v. People*, 26 Mich. 298, 12 Am. Rep. 314. **S. C.**—*State v. Gossett*, 9 Rich. 428, 432.

[a] It is not sufficient to charge same under a videlicet in such case. *People v. Higbie*, 66 Barb. (N. Y.) 131.

[b] When value is not an element of the offense, it is sufficient to allege that the particular object, naming it, was a valuable thing, without specifying any particular value. *People v. Stetson*, 4 Barb. (N. Y.) 151, approved in *People v. Higbie*, 66 Barb. (N. Y.) 131.

22. *Clark v. State*, 59 Fla. 9, 52 So. 518.

[a] Thus in larceny for the purpose of giving individuality to the act charged the indictment should with reasonable certainty state the species or names and the number of the articles or things alleged to have been stolen, so as to show that the things or articles are personal property and the subject of larceny and that the proofs are of the same property, and to prevent embarrassment to the accused in making his defense and to protect him against a prosecution for the same offense. *Clark v. State*, 59 Fla. 9, 52 So. 518.

23. *People v. Higbie*, 66 Barb. (N. Y.) 131.

24. **Ga.**—*Brown v. State*, 116 Ga. 559, 42 S. E. 795, 15 Am. Crim. Rep. 429. **Ind.**—*Funk v. State*, 149 Ind. 338, 49 N. E. 266. **Ia.**—*State v. Smith*, 88 Iowa 1, 55 N. W. 16. **Kan.**—*State v. Fields*, 70 Kan. 391, 78 Pac. 833, neat cattle. **Neb.**—*Korab v. State*, 93 Neb. 66, 139 N. W. 717, L. R. A. (N. S.) 1915 B, 83. **N. H.**—*State v. Silverman*, 76 N. H. 309, 82 Atl. 536.

[a] The objects of the rule of criminal pleading, which requires property in reference to which an offense is alleged to have been committed to be definitely described in the indictment,

are to identify the offense, to give the defendant full notice of the nature of the charge, to inform the court what sentence should be passed if he is convicted, and to prevent his being put in jeopardy again for the same cause. *Com. v. Strangford*, 112 Mass. 289.

25. **Fla.**—*Clark v. State*, 59 Fla. 9, 52 So. 518. **Ga.**—*Brown v. State*, 116 Ga. 559, 42 S. E. 795, 15 Am. Crim. Rep. 429. **Me.**—*State v. Dawes*, 75 Me. 51. **R. I.**—*State v. Nelson*, 27 R. I. 31, 60 Atl. 589.

26. *Burney v. State*, 87 Ala. 80, 6 So. 391. **Kan.**—*State v. Segermond*, 40 Kan. 107, 19 Pac. 370, 10 Am. St. Rep. 169. **Me.**—*State v. Dawes*, 75 Me. 51. **Miss.**—*Baggett v. State*, 69 Miss. 625, 13 So. 816. **N. H.**—*State v. Silverman*, 76 N. H. 309, 82 Atl. 536.

[a] An indictment charging the smuggling of "certain goods, wares and merchandise, to wit: six cases containing silk goods of the value of \$30,000, a more particular description of which is to the jurors unknown" is a sufficient description. *United States v. Claffin*, 13 Blatchf. 178, 25 Fed. Cas. No. 14,798.

27. *United States v. Jones*, 31 Fed. 718, wherein an indorsement upon a note made after the note had been stolen was not required to be mentioned.

28. See the titles "Embezzlement;" "Larceny;" "Obtaining Property Under False Pretenses."

29. **Cal.**—*People v. Chuey Ying Git*, 100 Cal. 437, 34 Pac. 1080. **Ill.**—*People v. Clark*, 256 Ill. 14, 20, 99 N. E. 866, Ann. Cas. 1913E, 214. **Ind.**—*Randall v. State*, 132 Ind. 539, 32 N. E. 305; *Riggs v. State*, 104 Ind. 261, 3 N. E. 886. **Ky.**—*Travis v. Com.*, 16 Ky. L. Rep. 253, 27 S. W. 863; *Com. v. Mann*, 12 Ky. L. Rep. 477, 14 S. W. 685. **Mass.**—*Com. v. Bennett*, 118 Mass. 443. **Mich.**—*People v. Hanaw*, 107 Mich. 337, 65 N. W.

ticular denomination and description of the money involved, if known to the grand jury or the prosecuting officer, as the case may be;²⁹ a mere description of money as so many dollars, without more, is not sufficient.³¹ If it is impossible to particularly describe the money, the strictness of the foregoing rule is relaxed. It may be described as particularly as the testimony of the witnesses will permit, and then

231; *Brown v. People*, 29 Mich. 232. **Mo.**—*State v. Feazell*, 132 Mo. 176, 33 S. W. 788; *State v. Rush*, 95 Mo. 199, 8 S. W. 221; *State v. Burnett*, 81 Mo. 119. **N. J.**—*State v. Barr*, 61 N. J. L. 131, 38 Atl. 817. **Wyo.**—*McGinnis v. State*, 17 Wyo. 106, 96 Pac. 525, use of word "money" sufficient. **Eng.**—*St. 7 and 8 Geo. IV*, ch. 29, §48.

[a] As to the constitutionality of such statutes, see: **Ill.**—*People v. Clark*, 256 Ill. 14, 99 N. E. 866, Ann. Cas. 1913E, 214, and note; **Ind.**—*Randall v. State*, 132 Ind. 539, 32 N. E. 305; *Riggs v. State*, 104 Ind. 261, 3 N. E. 886. **Mass.**—*Com. v. Bennett*, 118 Mass. 443. **Mich.**—*People v. Hanaw*, 107 Mich. 337, 65 N. W. 231; *Brown v. People*, 29 Mich. 232; and *supra*, IX, A.

[b] While an indictment at common law charging the larceny of money, without other words of description, would not be good, still we are of the opinion that it is within the power of the legislature to provide that it shall be sufficient, in charging an offense where the subject of the crime is money and the grade of the offense does not depend upon the amounts, to simply use the word "money," without the addition of other words of particular description. *People v. Clark*, 256 Ill. 14, 99 N. E. 866, Ann. Cas. 1913E, 214.

[c] That the money is lawful money need not be alleged. *Rains v. State*, 137 Ind. 83, 36 N. E. 532; *State v. Noland*, 111 Mo. 473, 19 S. W. 715.

[d] It is sufficient to allege generally under such statutes that the property which was the subject of the offense was "money." **U. S.**—*United States v. Bornemann*, 36 Fed. 257. **Mass.**—*Com. v. Grimes*, 10 Gray 470, 71 Am. Dec. 666. **Miss.**—*Baggett v. State*, 69 Miss. 625, 13 So. 816. **N. J.**—*State v. Barr*, 61 N. J. L. 131, 32 Atl. 817. **Tenn.**—*Graham v. State*, 5 Humph. 40, money is generic term covering bank notes.

30. **Ala.**—*Leonard v. State*, 115 Ala. 80, 22 So. 564; *Huffman v. State*, 89 Ala. 33, 8 So. 28; *Reed v. State*, 88 Ala. 36, 6 So. 840; *Burney v. State*, 87 Ala.

80, 6 So. 391; *Grant v. State*, 55 Ala. 291; *Du Bois v. State*, 50 Ala. 139. **Ark.**—*Barton v. State*, 29 Ark. 68. **Cal.**—*People v. Cox*, 40 Cal. 275; *People v. Ball*, 14 Cal. 101, 73 Am. Dec. 631. **Ill.**—*People v. Hunt*, 251 Ill. 446, 449, 96 N. E. 220, 36 L. R. A. (N. S.) 933; *People v. Miller*, 178 Ill. App. 292. **Ky.**—*Rhodius v. Com.*, 2 Duv. 159. **Mich.**—*Merwin v. People*, 26 Mich. 298, 12 Am. Rep. 314. **Tenn.**—*State v. Longbottoms*, 11 Humph. 39.

[a] "Money should be described as so many pieces of the current gold or silver coin of the country, of a particular denomination, according to the facts. The species of coin must be specified." *People v. Ball*, 14 Cal. 101, 73 Am. Dec. 631.

31. **Ala.**—*Leonard v. State*, 115 Ala. 80, 22 So. 564; *Burney v. State*, 87 Ala. 80, 6 So. 391. **Ark.**—*Barton v. State*, 29 Ark. 68, even on arrest of judgment. **Cal.**—*People v. Cox*, 40 Cal. 275; *People v. Ball*, 14 Cal. 101, 73 Am. Dec. 631. **Fla.**—*Sullivan v. State*, 44 Fla. 155, 32 So. 106; *Grant v. State*, 35 Fla. 581, 17 So. 225, 48 Am. St. Rep. 263. **Ill.**—*People v. Hunt*, 251 Ill. 446, 448, 96 N. E. 220, 36 L. R. A. (N. S.) 933; *People v. Miller*, 178 Ill. App. 292. **Mich.**—*Merwin v. People*, 26 Mich. 298, 12 Am. Rep. 314. **Miss.**—*Baggett v. State*, 69 Miss. 625, 13 So. 816.

[a] Where the money was alleged to be United States currency, proof that it was greenbacks is not a variance. *Gady v. State*, 83 Ala. 51, 3 So. 429.

[b] "Sixty dollars of the current gold coin of the United States, of the value," etc., is a sufficient description. *McKane v. State*, 11 Ind. 195.

[c] "Twenty dollars of lawful money of the United States," sufficient description of stolen money. *Burrus v. State* (Tex. Crim.), 172 S. W. 981.

[d] The term "dollar" is an expression of value, as well as the name of a coin, and hence the word "dollars" is uncertain as a description, since it may be used to denote a number of

the indictment may allege that further particulars are to the grand jurors unknown.³² The truthfulness of such excuse becomes a matter in issue, in such case, which must be proved.³³

With respect to notes, checks and other writings, the name or designation by which they are commonly known is sufficient without a more particular description under some statutes.³⁴

(III.) **Degree of Certainty.**—While the property should be described with reasonable certainty, certainty to a common intent is sufficient,³⁵ which is construed to mean such certainty as will enable the jury to say whether the thing proved is the same as that upon which the indictment is founded.³⁶ The description need not be so minute as

cents or dimes, as well as of dollars, but is certain as an expression of value. *State v. Stimson*, 24 N. J. L. 9.

32. **Ala.**—*Leonard v. State*, 115 Ala. 80, 22 So. 564; *Owens v. State*, 104 Ala. 18, 16 So. 575; *Burney v. State*, 87 Ala. 80, 6 So. 391. **Fla.**—*Enson v. State*, 58 Fla. 37, 50 So. 948, 138 Am. St. Rep. 92; *Stolbhar v. State*, 55 Fla. 167, 47 So. 4; *Lewis v. State*, 55 Fla. 54, 45 So. 998; *Lang v. State*, 42 Fla. 595, 28 So. 856. **Ill.**—*People v. Hunt*, 251 Ill. 416, 96 N. E. 220, 36 L. R. A. (N. S.) 933. **Ind.**—*Hamilton v. State*, 60 Ind. 193, 28 Am. Rep. 653. **Mich.**—*Brown v. People*, 29 Mich. 232. **Miss.**—*Baggett v. State*, 69 Miss. 625, 13 So. 816. **Tex.** *Ware v. State*, 2 Tex. App. 547.

[a] An indictment for robbery otherwise sufficient which charges that the defendant feloniously took one twenty-five cent piece of the silver coin of the United States of America, and sixty-five cents lawful money of the United States of America, the particular description of which is otherwise to the grand jury unknown, is not defective for failure to allege a sufficient description of the property or for indefiniteness or for failure to charge that the twenty-five cent piece was lawful money of the United States. *Smith v. State*, 1 Ala. App. 140, 55 So. 449.

[b] It will be enough to state that a better description than that given is unknown to the county solicitor or to the grand juror as the case may be. *Enson v. State*, 58 Fla. 37, 50 So. 948, 138 Am. St. Rep. 92.

[c] **In embezzlement of public funds** it would be impracticable, if not impossible, to identify and pursue the particular coins or bills embezzled, and such particularity is therefore unne-

cessary. *United States v. Bornemann*, 36 Fed. 257.

33. *Enson v. State*, 58 Fla. 37, 50 So. 948, 138 Am. St. Rep. 92; *People v. Hunt*, 251 Ill. 446, 96 N. E. 220, 36 L. R. A. (N. S.) 933.

[a] But if the description is sufficient, a further averment as to a more particular description being to the grand jury unknown is surplusage. *Brown v. State*, 120 Ala. 342, 25 So. 182.

34. *State v. McCoy*, 63 W. Va. 69, 59 S. E. 758.

[a] An indictment for robbery of "one promissory note of the value of \$850.85, one purse of the value of 25 cents and one time check of the value of 50 cents," sufficiently describes the property. *State v. McCoy*, 63 W. Va. 69, 59 S. E. 758.

[b] A description of bank bills as "sundry bank bills of some banks respectively to the said jurors unknown, of the amount and value in all of" a certain number of dollars, is sufficient. *Com. v. Grimes*, 10 Gray (Mass.) 470, 71 Am. Dec. 666.

[c] One lot of Kentucky bank notes, without even specifying the bank, is too indefinite. *Rhodus v. Com.*, 2 Duv. (Ky.) 159.

35. **Ark.**—*State v. Parker*, 34 Ark. 158, 36 Am. Rep. 5. **Fla.**—*Clark v. State*, 59 Fla. 9, 52 So. 518. **Me.**—*State v. Dawes*, 75 Me. 51. **N. J.**—*State v. Barr*, 61 N. J. L. 131, 32 Atl. 817; *State v. Stimson*, 24 N. J. L. 9. **N. Y.**—*People v. Jackson*, 8 Barb. 637.

36. *State v. Parker*, 34 Ark. 158, 36 Am. Rep. 5. See also *Clark v. State*, 59 Fla. 9, 52 So. 518.

[a] Such certainty as will enable the jury to say whether the chattel proved to have been stolen is the same with that upon which the indictment

to impose unreasonable burdens upon the prosecution or otherwise defeat justice; nor need such description be so certain and definite as to identify it from other property of the same class."

Any words of description which make clear to the common understanding the articles in respect to which the offense is charged, are sufficient.³⁹ It is not sufficient, however, to merely charge the property with respect to which the offense is alleged to have been committed as the "personal property,"⁴⁰ or the "goods" of a designated person.⁴¹ But only such a description is necessary as the circumstances of the

is founded, and as will show judicially to the court that it could have been the subject matter of the offense charged. *People v. Jackson*, 8 Barb. (N. Y.) 637.

[b] Describing an instrument "in words and figures, as follows, to wit," imports an exact copy. *McDonnell v. State*, 58 Ark. 242, 24 S. W. 105. See *supra*, IX, E, 3, b.

37. **U. S.**—*Dunbar v. United States*, 156 U. S. 185, 15 Sup. Ct. 325, 39 L. ed. 390. **Cal.**—*People v. Berman*, 67 Cal. 20, 7 Pac. 3; *People v. Platt*, 67 Cal. 21, 7 Pac. 1. **Fla.**—*Clark v. State*, 59 Fla. 9, 52 So. 518. **La.**—*State v. Asberry*, 37 La. Ann. 124.

38. **Ala.**—*Sellers v. State*, 49 Ala. 357, cotton. **Fla.**—*Clark v. State*, 59 Fla. 9, 52 So. 518. **Ind.**—*Miller v. State*, 165 Ind. 566, 76 N. E. 245. **N. M.**—*Territory v. Valles*, 15 N. M. 228, 103 Pac. 984.

[a] "It is no valid objection to an indictment that the description of the property in respect to which the offense is charged to have been committed is broad enough to include more than one specific article." *Dunbar v. United States*, 156 U. S. 185, 15 Sup. Ct. 325, 39 L. ed. 390.

[b] The following have been held to be sufficient descriptions: (1) one feather bed, eight bed quilts, six pillows, six pillow shams, six vases, one lamp, one collar case and two collars, ten table dishes, two pair window curtains, one rug, three pictures, two ladies hats, one sugar dish, and one cake plate (*Clark v. State*, 59 Fla. 9, 52 So. 518), (2) "one watch" (*Williams v. State*, 27 Ind. 150), (3) "one watch and chain" (*Powell v. State*, 88 Ga. 37, 13 S. E. 829), (4) "one gold-filled case watch and chain and one diamond ring" (*People v. Burns*, 121 Cal. 529, 53 Pac. 1096), (5) "one double case

silver watch" (*Patterson v. State*, 122 Ga. 587, 50 S. E. 489), (6) "one gold watch" (*Pfister v. State*, 84 Ala. 432, 4 So. 395), (7) "one trunk" (*Churchwell v. State*, 117 Ala. 124, 126, 23 So. 729), (8) "one book" (*Turner v. State*, 192 Ind. 425, 1 N. E. 869), (9) "a piano" (*Nordlinger v. United States*, 24 App. Cas. (D. C.) 466, 70 L. R. A. 227), (10) "two ears of corn" (*Harris v. State*, 100 Ala. 129, 14 So. 538), (11) "an article of clothing," without giving the color (*State v. Martin*, 82 N. C. 672), (12) "a pair of shoes" (*Palmer v. State*, 136 Ind. 393, 36 N. E. 130), (13) "two bales of cotton" (*Peters v. State*, 100 Ala. 10, 14 So. 896), (14) "one fertilizer." *State v. Elia*, 108 La. 553, 32 So. 476.

39. **U. S.**—*Dunbar v. United States*, 156 U. S. 185, 15 Sup. Ct. 325, 39 L. ed. 390. **Fla.**—*Clark v. State*, 59 Fla. 9, 52 So. 518. **Neb.**—*Korab v. State*, 93 Neb. 66, 139 N. W. 717, L. R. A. (N. S.) 1915 B, 83.

40. *Korab v. State*, 93 Neb. 66, 139 N. W. 717, L. R. A. (N. S.) 1915 B, 83.

41. *Wells v. State*, 90 Miss. 516, 43 So. 610.

[a] It has been held insufficient (1) to describe the property as, "furs of various kinds" (*State v. Silverman*, 76 N. H. 309, 82 Atl. 536), (2) "sundry bank bills, amounting together to the sum of \$97, and of the value of \$97." *Hamblett v. State*, 18 N. H. 284.

[b] In an accusation of cheating and swindling, an allegation that the defendant, by reason of his false and fraudulent representations, obtained from the prosecutor "groceries consisting of meats and other groceries, of the value of one dollar and ten cents," is not sufficient as against a special deceiver. *Barker v. State*, 6 Ga. App. 413, 65 S. E. 57.

case will permit,⁴² and where a particular description cannot be given it is sufficient to describe the property generally and allege that a more particular description is unknown to the grand jury.⁴³ Such an allegation is material and must be proved as laid where there is no sufficient description of the property.⁴⁴ The descriptive words are taken in their common and ordinarily accepted meaning.⁴⁵

(IV.) **Value.**—While the value of the property which is the subject-matter of the crime need not be alleged where not an essential element of the offense,⁴⁶ or where the statute which is violated merely requires the offense to be committed in relation to property of value,⁴⁷ if value is an essential element of the offense charged, it must be alleged.⁴⁸ Thus, if value affects or determines the punishment to be inflicted,⁴⁹ or the degree of the offense⁵⁰ it must be specifically alleged.

Where several articles, all of one kind, are described, their value may be alleged in the aggregate or collectively,⁵¹ but where articles of different kinds are the subject of the offense, the value of each

42. *Com. v. Strangford*, 112 Mass. 289; *Malcolmson v. State*, 25 Tex. App. 267, 8 S. W. 468.

43. *Com. v. Strangford*, 112 Mass. 289; *Malcolmson v. State*, 25 Tex. App. 267, 8 S. W. 468.

[a] The fact that the grand jury or the prosecuting officer could have ascertained by diligence a better description of the property cannot avail defendant. *Enson v. State*, 58 Fla. 37, 50 So. 948, 138 Am. St. Rep. 92.

44. *Enson v. State*, 58 Fla. 37, 50 So. 948, 138 Am. St. Rep. 92.

[a] But if the description given is sufficient to identify the property, an allegation that a better description of the property is unknown is immaterial and may be regarded as surplusage. *Carden v. State*, 89 Ala. 130, 7 So. 801; *Clark v. State*, 59 Fla. 9, 52 So. 518; *Enson v. State*, 58 Fla. 37, 50 So. 948, 138 Am. St. Rep. 92.

45. *State v. Parker*, 34 Ark. 158, 36 Am. Rep. 5.

46. *Ala.*—*Adams v. State*, 60 Ala. 52. *Ark.*—*Grise v. State*, 37 Ark. 456, cruelty to animals. *Cal.*—*People v. Rice*, 73 Cal. 220, 14 Pac. 851. *Conn.*—*Whiting v. State*, 14 Conn. 487, 492, 36 Am. Dec. 499. *Fla.*—*Jones v. State*, 64 Fla. 92, 59 So. 892, L. R. A. (N. S.) 1915 B, 71, wherein offense was larceny of cattle. *La.*—*State v. Hill*, 46 La. Ann. 736, 15 So. 145. *Me.*—*State v. Perley*, 86 Me. 427, 30 Atl. 74, 41 Am. St. Rep. 564. *Mo.*—*State v. Sharp*, 106 Mo. 106, 17 S. W. 225. *Neb.*—*Wilson v. State*, 43 Neb. 745, 62 N. W. 209.

N. Y.—*People v. Jefferey*, 82 Hun 409, 31 N. Y. Supp. 267; *People v. Higbie*, 66 Barb. 131; *People v. Stetson*, 4 Barb. 151. *N. C.*—*State v. Brown*, 113 N. C. 645, 18 S. E. 51. *Tex.*—*Williams v. State*, 34 Tex. Crim. 523, 31 S. W. 405; *Hamilton v. State* (Tex. Crim.), 24 S. W. 32.

47. It is sufficient to allege merely that the property was of value. *Rose v. State*, 117 Ala. 77, 23 So. 638; *Norris v. State*, 50 Ala. 126; *Williams v. State*, 44 Ala. 396.

48. *Merwin v. People*, 26 Mich. 298, 12 Am. Rep. 314.

49. *Ala.*—*Sheppard v. State*, 42 Ala. 531; *State v. Garner*, 8 Port. 447. *Ark.*—*Kightlinger v. State*, 105 Ark. 172, 150 S. W. 690; *Ware v. State*, 33 Ark. 567. *Fla.*—*Grant v. State*, 35 Fla. 581, 17 So. 225, 48 Am. St. Rep. 263. *Ga.*—*Davis v. State*, 40 Ga. 229. *Ill.*—*Brown v. People*, 173 Ill. 34, 50 N. E. 106; *Clark v. People*, 2 Ill. 117. *Ind.*—*Ritchey v. State*, 7 Blackf. 168. *S. C.*—*State v. Perry*, 87 S. C. 535, 70 S. E. 304. *Tex.*—*State v. Heath*, 41 Tex. 426.

That every fact influencing the punishment must be averred, see *supra*, IX, D, 1.

50. *State v. Perry*, 87 S. C. 535, 70 S. E. 304.

51. *Cal.*—*People v. Robles*, 34 Cal. 591. *Mass.*—*Com. v. Butterick*, 100 Mass. 1, 97 Am. Dec. 65; *Com. v. Cahill*, 12 Allen 540; *Com. v. O'Connell*, 12 Allen 451; *Com. v. Grimes*, 10 Gray 470, 71 Am. Dec. 666. *Wash.*—*State v. Brew*, 4 Wash. 95, 29 Pac. 762, 31 Am. St. Rep. 904.

different kind should be stated, not merely the collective value of the whole.⁵² Money need not be alleged to be of any particular value where it is alleged to be currency or money of the United States, as the court will take judicial notice that it is of a commercial value equal to that imported on its face.⁵³ Where the decimal point is used in figures stating the value, the omission of the dollar sign does not vitiate the indictment.⁵⁴

c. Ownership.—If the ownership of the property involved in the offense is not an element of the crime, it need not be alleged.⁵⁵ In some crimes against property, however, ownership is a material fact,

52. *Reeder v. State*, 86 Ark. 341, 111 S. W. 272; *Com. v. Cahill*, 12 Allen (Mass.) 540; *Hope v. Com.*, 9 Mete. (Mass.) 134.

[a] Otherwise there can be no conviction, for unless the jury finds all the articles were taken, there is no value of the goods stated. *Reeder v. State*, 86 Ark. 341, 111 S. W. 272.

53. *Ala.*—*Turner v. State*, 124 Ala. 59, 61, 27 So. 272; *Thomas v. State*, 117 Ala. 84, 23 So. 659; *Carr v. State*, 104 Ala. 4, 16 So. 150; *Huffman v. State*, 89 Ala. 33, 8 So. 28; *Gady v. State*, 83 Ala. 51, 3 So. 429; *Duvall v. State*, 63 Ala. 12; *Grant v. State*, 55 Ala. 201. *Ark.*—*Kightlinger v. State*, 105 Ark. 172, 150 S. W. 690. *Cal.*—*People v. Riley*, 75 Cal. 98, 16 Pac. 544. *Ill.* *Kruse v. People*, 84 Ill. App. 620. *Ind.* *Hammond v. State*, 121 Ind. 512, 23 N. E. 515. *Ore.*—*State v. Howe*, 27 Ore. 138, 44 Pac. 672. *Eng.*—*Rex v. Forsyth, Russ. & Ry.* 274.

[a] *Dollars.*—It is also sufficient on the question of value, to allege that the "fifty dollars in money" was "of the value of fifty dollars," as the courts will judicially recognize that the word "dollar" is the money unit of the United States and is of the value of 100 cents. *Braswell v. State*, 9 Ga. App. 879, 72 S. E. 445. See also *Speer v. State*, 50 Tex. Crim. 273, 97 S. W. 469.

54. *State v. Wainwright*, 128 Tenn. 544, 162 S. W. 583, larceny (citing many civil cases and distinguishing earlier cases in Tennessee as being tax cases where strict construction necessary); *State v. Schwartz*, 64 Wis. 432, 25 N. W. 417, forgery.

[a] There being a decimal point the court should infer the dollar mark. *State v. Wainwright*, 128 Tenn. 544, 162 S. W. 583.

55. *Grise v. State*, 37 Ark. 456, cruelty to animals.

[a] "Acts in the nature of malicious mischief, such as wanton injury to animals and the like, have usually been construed as necessarily involving an intent to injure the owner of the animal or other property described. 2 Bishop's New Criminal Procedure, section 843; 2 McClain's Criminal Law, section 830; *State v. Deal*, 92 N. C. 802. But, where the language of the statute indicates an intention to prohibit cruelty to animals, allegations of ownership have been held to be unnecessary. *Com. v. Whitman*, 118 Mass. 458; *Grise v. State*, 37 Ark. 456; *Benson v. State*, 1 Tex. App. 6; *State v. Brocker*, 32 Tex. 612; 2 McClain's Criminal Law, section 1164. So, where the crime of malicious injury to property is so described that it consists of injury to the public rather than to a specific owner, allegation of ownership is held to be unnecessary. *Owens v. State*, 52 Ala. 400; Bishop's Directions and Forms, section 727." *State v. Leasman*, 137 Iowa 191, 114 N. W. 1032.

[b] An indictment for burglariously breaking and entering a house in the night time, with intent to commit larceny, is good if it charge the breaking and entering with intent to commit larceny, without charging whose goods the defendant intended to steal. *People v. Shaber*, 32 Cal. 36.

[c] Nor is it necessary to allege the ownership of the building in the complaint, or even in an information, where the building is otherwise so described that the defendant cannot be misled as to the property referred to. *People v. Price*, 143 Cal. 351, 77 Pac. 73; *People v. White*, 116 Cal. 17, 19, 47 Pac. 771; *People v. Main*, 114 Cal. 632, 46 Pac. 612; *People v. Rogers*, 81 Cal. 209, 22 Pac. 592.

and in such cases the indictment must negative ownership in the defendant. In such case the name of the owner, if known, should be alleged;⁵⁶ or, if his name is unknown, this fact should be stated.⁵⁷

If the averment of ownership is material and must be proved, a variance entitles defendant to an acquittal,⁵⁸ except in those states where the statutes provide that an erroneous allegation as to the ownership of the property involved is not material as long as the property is sufficiently described in other respects to identify the offense.⁵⁹ The danger of variance in this respect, may be guarded against either by alleging in the alternative in the same count, ownership in different

56. **U. S.**—United States *v.* Watkins, 3 Cranch C. C. 441, 458, 28 Fed. Cas. No. 16, 649. **Ala.**—Bowen *v.* State, 106 Ala. 178, 17 So. 335; Emmonds *v.* State, 87 Ala. 12, 6 So. 54; Washington *v.* State, 72 Ala. 272; Graves *v.* State, 63 Ala. 134; Johnson *v.* State, 59 Ala. 37. **Ark.**—McCowan *v.* State, 58 Ark. 17, 22 S. W. 955; Boles *v.* State, 58 Ark. 35, 22 S. W. 887. **Cal.**—People *v.* Hanselman, 76 Cal. 460, 18 Pac. 425, 9 Am. St. Rep. 238; People *v.* Hall, 19 Cal. 425. **Colo.**—Miller *v.* People, 13 Colo. 166, 21 Pac. 1025. **Fla.**—Moulie *v.* State, 37 Fla. 321, 20 So. 554; Grant *v.* State, 35 Fla. 581, 17 So. 225, 48 Am. St. Rep. 263. **Ga.**—Cooper *v.* State, 89 Ga. 222, 15 S. E. 291; Norfleet *v.* State, 9 Ga. App. 853, 72 S. E. 447. **Ill.**—Willis *v.* People, 2 Ill. 399. **Ia.**—State *v.* Clark, 141 Iowa 297, 119 N. W. 719. **Md.**—State *v.* King, 95 Md. 125, 51 Atl. 1102; State *v.* Blizzard, 70 Md. 385, 17 Atl. 270, 14 Am. St. Rep. 366. **Mo.**—State *v.* Ellis, 119 Mo. 437, 24 S. W. 1017. **Neb.**—Winslow *v.* State, 26 Neb. 308, 41 N. W. 1116. **N. H.**—State *v.* Concord Railroad, 59 N. H. 85. **N. Y.**—People *v.* Bennett, 37 N. Y. 117, 93 Am. Dec. 551; People *v.* Romaine, 1 Wheel. Crim. Cas. 369; People *v.* Smith, 1 Park. Crim. 329. **N. D.**—State *v.* Collins, 4 N. D. 433, 61 N. W. 467. **Ore.**—State *v.* Sterritt, 19 Ore. 352, 24 Pac. 523. **Pa.**—Com. *v.* Haggel, 7 Kulp 10. **Tex.**—Higgins *v.* State (Tex. App.), 19 S. W. 503; Otero *v.* State, 30 Tex. App. 450, 17 S. W. 1081; Crane *v.* State, 26 Tex. App. 482, 9 S. W. 773. **Vt.**—See State *v.* Casavant, 64 Vt. 405, 23 Atl. 636. **W. Va.**—State *v.* Hupp, 31 W. Va. 355, 6 S. E. 919.

See 4 STANDARD PROC. 499; and the title "Larceny."

[a] **Bankruptcy.**—An indictment averring ownership in the estate of the

bankrupt and later in the bankrupt himself is not so repugnant as to vitiate the indictment. United States *v.* Comstock, 161 Fed. 644.

57. State *v.* Pierce, 7 Ala. 728.

[a] An indictment charging the ownership in a person to the grand jurors unknown, need not allege that such unknown person was other than the defendant. Reed *v.* State, 32 Tex. Crim. 139, 22 S. W. 403.

58. Johnson *v.* State, 111 Ala. 66, 20 So. 590; Washington *v.* State, 72 Ala. 272.

59. **Ark.**—Hughes *v.* State, 109 Ark. 403, 160 S. W. 209; Ivey *v.* State, 109 Ark. 446, 160 S. W. 208. **Cal.**—People *v.* Price, 143 Cal. 351, 77 Pac. 73; People *v.* Davis, 135 Cal. 162, 67 Pac. 59. **Ky.**—Com. *v.* McGarvey, 158 Ky. 570, 165 S. W. 973; Newton *v.* Com., 158 Ky. 4, 164 S. W. 108.

[a] This statute has been held to apply to the following crimes: (1) Housebreaking (Johnson *v.* Com., 87 Ky. 189, 7 S. W. 927), (2) burglary (Olive *v.* Com., 5 Bush [Ky.] 376), (3) arson (Overstreet *v.* Com., 147 Ky. 471, 144 S. W. 751; Com. *v.* Napier, 27 Ky. L. Rep. 131, 84 S. W. 536), (4) robbery (Bibb *v.* Com., 33 Ky. L. Rep. 726, 112 S. W. 401), (5) obtaining money under false pretenses (Hennessy *v.* Com., 88 Ky. 304, 11 S. W. 13), (6) receiving stolen goods, knowing them to be stolen. Com. *v.* McGarvey, 158 Ky. 570, 165 S. W. 973; Taylor *v.* Com., 25 Ky. L. Rep. 374, 75 S. W. 244. See also Newton *v.* Com., 158 Ky. 5, 164 S. W. 108, in which the court said that, in an indictment for receiving stolen goods, the allegation of ownership is merely for the purpose of identifying and describing the stolen property, and is not an essential element of the crime denounced by the statute.

persons, where such practice is proper,⁶⁰ or by introducing several counts with varying allegations of ownership.⁶¹

Manner of Alleging Ownership.—In charging ownership no particular words need be used.⁶² Ownership of personal property is usually alleged by using the words "of the moneys of" the owner, or "of the property of," or "of the goods and chattels of" a designated person.⁶³ The words "belonging to" are sufficient.⁶⁴ Generally it is sufficient to aver the ownership of the property involved in the actual possessor, though he is not the actual owner,⁶⁵ and this is expressly so provided by statute in some states.⁶⁶ And if the offense be one against the possession alone ownership should be alleged in the person or persons in actual possession rather than in the owner.⁶⁷ Accordingly it is ordinarily sufficient to charge ownership in a bailee,⁶⁸ in a sheriff in possession under attachment proceedings,⁶⁹ in a conditional purchaser,⁷⁰ or in a purchaser in good faith from one who had no title,⁷¹ in the occupant or tenant of the house or building,⁷² or in the husband though the legal title of the land be in the wife, where both reside upon the premises and occupy it as a home,⁷³ or where the

60. *Johnson v. State*, 111 Ala. 66, 20 So. 590.

61. *Johnson v. State*, 111 Ala. 66, 20 So. 590; *Washington v. State*, 72 Ala. 272.

62. *Strobhar v. State*, 55 Fla. 167, 47 So. 4.

63. *Strobhar v. State*, 55 Fla. 167, 47 So. 4.

[a] An allegation that the defendant did unlawfully break and enter a certain building, to wit, the warehouse of a designated person, is a sufficient allegation of ownership in larceny. *Presley v. State*, 61 Fla. 46, 54 So. 367.

64. *Strobhar v. State*, 55 Fla. 167, 47 So. 4.

65. **Ala.**—*Burrow v. State*, 147 Ala. 114, 41 So. 987; *Peck v. State*, 147 Ala. 100, 41 So. 759; *Walker v. State*, 111 Ala. 29, 31, 20 So. 612 (alleging title in wife of deceased as possessor sufficient); *Hill v. State*, 104 Ala. 61, 16 So. 114; *Fowler v. State*, 100 Ala. 96, 14 So. 860. **Ga.**—*Gilbert v. State*, 116 Ga. 819, 43 S. E. 47; *Hall v. State*, 7 Ga. App. 115, 66 S. E. 390; *Bradley v. State*, 2 Ga. App. 622, 58 S. E. 1064. **Ill.**—*Smith v. People*, 115 Ill. 17, 3 N. E. 733. **Ia.**—*State v. Williams*, 120 Iowa 36, 94 N. W. 255; *State v. Burns*, 109 Iowa 436, 80 N. W. 515. **La.**—*State v. Smith*, 104 La. 464, 29 So. 20. **Mo.**—*State v. Tyrrell*, 98 Mo. 354, 11 S. W. 734. **Neb.**—*Bahn v. State*, 60 Neb. 487, 83 N. W. 674. **Nev.**—*State v. Simas*, 25 Nev.

422, 62 Pac. 242. **N. Y.**—*Mason v. People*, 26 N. Y. 200. **Tex.**—*Lamater v. State*, 38 Tex. Crim. 249, 42 S. W. 304; *Linhart v. State*, 33 Tex. Crim. 504, 27 S. W. 260.

66. *Powers v. State*, 72 Tex. Crim. 290, 162 S. W. 833; *Smith v. State*, 53 Tex. Crim. 643, 111 S. W. 939.

67. *Thomas v. State*, 97 Ala. 3, 12 So. 409; *Ritchey v. State*, 7 Blackf. (Ind.) 168.

68. **Ala.**—*Fowler v. State*, 100 Ala. 96, 14 So. 860. **Fla.**—*Kennedy v. State*, 31 Fla. 428, 12 So. 858. **Ga.**—*Wimbish v. State*, 89 Ga. 294, 15 S. E. 325. **N. Y.**—*People v. Smith*, 1 Park. Crim. 329. **N. C.**—*State v. Powell*, 103 N. C. 424, 9 S. E. 627, 14 Am. St. Rep. 821, 4 L. R. A. 291.

69. *Linhart v. State*, 33 Tex. Crim. 504, 27 S. W. 260.

70. *Fowler v. State*, 100 Ala. 96, 14 So. 860.

71. *Goode v. State*, 60 Ark. 5, 28 S. W. 510.

72. **Ky.**—*Com. v. Elliston*, 14 Ky. L. Rep. 216, 20 S. W. 214. **Me.**—*State v. Whittier*, 21 Me. 341, 38 Am. Dec. 272. **Mo.**—*State v. Tyrrell*, 98 Mo. 354, 11 S. W. 734. **Tex.**—*Reed v. State*, 34 Tex. Crim. 597, 31 S. W. 404. **Wash.**—*State v. Johnson*, 4 Wash. 593, 30 Am. Dec. 672.

But see 4 STANDARD PROC. 602.

73. *Young v. State*, 100 Ala. 126, 14 So. 872.

See 4 STANDARD PROC. 602.

husband has possession of the wife's personality.⁷⁴ Ordinarily, however, in those states where the wife's ownership is complete and independent of the husband, the ownership of the wife's property should be alleged in the wife,⁷⁵ unless the offense is against the possession, in which case ownership may be laid in either the husband or wife.⁷⁶

Statutes sometimes provide that where the property is the separate property of a married woman, the ownership may be alleged in her or her husband.⁷⁷ In case the owner of personal property is dead, ownership thereof should be alleged in his personal representative,⁷⁸ or in the estate,⁷⁹ or the heirs;⁸⁰ but the ownership of realty should be alleged to be in the heir or devisee.⁸¹

Joint Owners.—Some statutes provide that if property is owned in common or jointly by two or more persons, the ownership may be alleged to be in all or either of them.⁸²

Corporations.—An allegation of ownership in a corporation of a designated name is sufficient⁸³ without showing whether it is a foreign or domestic corporation.⁸⁴ Alleging ownership in one of its agents is not sufficient, however.⁸⁵

Partnership.—While at common law it was necessary in charging offenses against the property of a partnership, to allege ownership in the partnership,⁸⁶ and to allege the names of the individuals composing the firm, for otherwise it is not shown that the defendant is not one of the partners,⁸⁷ under statutes providing that an erroneous

74. *Robinson v. State*, 84 Ala. 434, 4 So. 774; *Lavender v. State*, 60 Ala. 60; *Davis v. State*, 17 Ala. 415.

75. *Payne v. State*, 140 Ala. 148, 37 So. 74; *Kirby v. State*, 139 Ala. 87, 36 So. 721; *Rollins v. State*, 98 Ala. 79, 13 So. 280.

76. *Payne v. State*, 140 Ala. 148, 37 So. 74; *Kirby v. State*, 139 Ala. 87, 36 So. 721; *Rollins v. State*, 98 Ala. 79, 13 So. 280.

77. *Smith v. State*, 53 Tex. Crim. 643, 111 S. W. 939; *Hames v. State*, 46 Tex. Crim. 562, 81 S. W. 708; *Lucas v. State*, 36 Tex. Crim. 397, 37 S. W. 427; *Combs v. State* (Tex. Crim.), 49 S. W. 585.

78. *Ala.*—*Walker v. State*, 111 Ala. 29, 31, 20 So. 612. *Mo.*—*State v. Hammons*, 226 Mo. 604, 605, 126 S. W. 422; *State v. Horned*, 178 Mo. 59, 76 S. W. 953; *State v. Ellis*, 119 Mo. 437, 24 S. W. 1017. *N. M.*—*Territory v. Valles*, 15 N. M. 228, 103 Pac. 984.

79. *Ala.*—*Beall v. State*, 53 Ala. 460; *Pleasant v. State*, 17 Ala. 190. *Cal.*—*People v. Hall*, 19 Cal. 425. *Mo.*—*State v. Hammons*, 226 Mo. 604, 126 S. W. 422. *N. M.*—*Territory v. Valles*, 15 N. M. 228, 103 Pac. 984.

80. *Walker v. State*, 111 Ala. 29,

31, 20 So. 612, alleging ownership in wife and minor children fatal.

81. *Walker v. State*, 111 Ala. 29, 31, 20 So. 612.

[a] In the case of real estate it may be charged as the property of the estate and the heirs of a deceased person named. *State v. Paul*, 81 Iowa 596, 47 N. W. 773.

82. See statutes of various states and following: *Ala. Code*, 1907, §7147; *Headley v. State*, 106 Ala. 109, 17 So. 714; *Harris v. State*, 60 Ala. 50; *Powers v. State*, 72 Tex. Crim. 290, 162 S. W. 833; *Smith v. State*, 53 Tex. Crim. 643, 111 S. W. 939.

[a] The Alabama statute applies only to personalty and therefore does not apply to the crime of stealing growing crops. *Harris v. State*, 60 Ala. 50.

83. *Bailey v. State*, 116 Ala. 437, 22 So. 918.

84. *Bailey v. State*, 116 Ala. 437, 22 So. 918.

85. *Aldridge v. State*, 88 Ala. 113, 7 So. 48, 16 Am. St. Rep. 23. See *supra*, IX, E, 2, f.

86. *Ivy v. State*, 109 Ark. 403, 160 S. W. 208.

87. *Emmonds v. State*, 87 Ala. 12, 6

allegation as to the name of the owner of the property is not material where the offense is sufficiently described otherwise, an error as to the names of the partners is immaterial.⁸⁸ Indeed, the names of the partners need not be alleged under such statute.⁸⁹ Ownership in one of several partners may be alleged under some statutes.⁹⁰

5. Averments as to Offense. — a. *In General.* — It is an elementary principle of criminal law that the indictment or information must state that a crime has been committed, either by direct and positive averment in the language of the statute or its equivalent, or by stating facts which show that such crime has been committed by the defendant.⁹¹

Offense Consisting of a Course of Conduct. — If the offense charged is complicated, consisting of a course of conduct, it is not necessary to set out the individual acts constituting the forbidden course of conduct.⁹²

b. *Manner or Means of Committing Offense.* — At an early date, in capital cases at least, it was held necessary to allege the means by which the offense was committed,⁹³ though in crimes of a lower grade,

So. 54. See *supra*, IX, E, 2, f.

88. *Ivy v. State*, 109 Ark. 446, 160 S. W. 208; *Andrews v. State*, 100 Ark. 184, 139 S. W. 1134.

89. *Hughes v. State*, 109 Ark. 403, 160 S. W. 209, *overruling McCowan v. State*, 58 Ark. 17, 22 S. W. 955; *Ivy v. State*, 109 Ark. 446, 160 S. W. 208.

90. *Smith v. State*, 133 Ala. 145, 31 So. 806, 91 Am. St. Rep. 21; *Headley v. State*, 106 Ala. 109, 17 So. 714. See *supra*, IX, E, 2, f.

91. See the following: Cal.—*People v. Terrill*, 127 Cal. 99, 59 Pac. 836; *People v. Eppinger*, 105 Cal. 36, 38 Pac. 538; *People v. Williams*, 35 Cal. 671; *People v. Schmitz*, 7 Cal. App. 330, 94 Pac. 497, 419. Conn.—*Barth v. State*, 18 Conn. 438. Ga.—*McLane v. State*, 4 Ga. 335. Ind.—*Walters v. State*, 174 Ind. 545, 92 N. E. 537; *Vannatta v. State*, 31 Ind. 210. Mo.—*State v. Stapp*, 246 Mo. 338, 151 S. W. 971.

And see generally *supra*, IX, D, 1; *infra*, IX, E, 5, h.

[a] "In no case can the indictment be aided by imagination or presumption. The presumptions are all in favor of innocence, and, if the facts stated may or may not constitute a crime, the presumption is that no crime is charged." *People v. Terrill*, 127 Cal. 99, 100, 59 Pac. 836, *quoted in People v. Schmitz*, 7 Cal. App. 330, 94 Pac. 419.

92. U. S.—*United States v. Simmons*, 96 U. S. 360, 24 L. ed. 819 (carry-

ing on business of distilling with intent to defraud the government of the tax); *United States v. Gooding*, 12 Wheat. 460, 6 L. ed. 693; *United States v. Ford*, 34 Fed. 26. Ala.—*Lawson v. State*, 20 Ala. 65, 56 Am. Dec. 182 (did live in fornication); *Sterne v. State*, 20 Ala. 43. Mass.—*Com. v. Pray*, 13 Pick. 359. Mo.—*State v. Van Wye*, 136 Mo. 227, 37 S. W. 938, 58 Am. St. Rep. 627, publishing or disseminating obscene papers or books. N. H. *State v. Dowers*, 45 N. H. 543; *State v. Prescott*, 33 N. H. 212. Eng.—*Rex v. Higginson*, 2 Burr. 1232, 97 Eng. Reprint 806.

See such titles as "Adultery;" "Disorderly Conduct;" "Disorderly House;" "Gaming;" "Intoxicating Liquors;" "Lewdness;" "Vagrancy."

[a] Wherever the crime consists of a series of acts, they need not be specially described, for it is not each or all the acts of themselves, but the practice or habit which produces the principal evil and constitutes the crime. *Com. v. Pray*, 13 Pick. (Mass.) 359.

[b] Common Scold.—U. S.—*United States v. Royal*, 3 Cranch C. C. 618, 27 Fed. Cas. No. 16,201. Mass.—*Com. v. Pearson*, 23 Pick. 280; *Com. v. Pray*, 13 Pick. 359. N. J.—*Baker v. State*, 53 N. J. L. 45, 20 Atl. 858.

[c] Common Night Walker.—*State v. Dowers*, 45 N. H. 543.

93. *State v. Verrill*, 54 Me. 408, 414.

[a] "At the common law an aver-

it was not.⁹⁴ Even now, unless it affirmatively appears from the indictment that the instrument or means used to effect the offense is unknown,⁹⁵ it is necessary to describe the instrument or means used, where the same is of the essence of the offense sought to be charged,⁹⁶ as where the offense consists in the means employed,⁹⁷ or where the means determines the degree of the offense,⁹⁸ or which of two offenses was charged against accused.⁹⁹ So also, the manner of committing the offense must be averred where it is made an essential part thereof.¹

As a rule, however, the manner or means by which an offense is committed are not a part of the offense itself, and need not be averred²

ment of the means with which the offense charged was committed was necessary to a good and sufficient indictment for murder." *Gaines v. State*, 146 Ala. 16, 22, 41 So. 865. As to necessity for averment in homicide cases now, see 11 STANDARD PROC. 587, et seq.

94. *State v. Verrill*, 54 Me. 408.

[a] **Reason for Distinction.**—"From an examination of the decided cases, it appears that this distinction was made, not on account of any principle involved in the higher crime different from those of a lower, but solely from the great care and tenderness which judicial tribunals manifested for the life of the citizen." *State v. Verrill*, 54 Me. 408.

95. As to averment that the means or manner is unknown, see *infra*, this section.

96. *Gaines v. State*, 146 Ala. 16, 22, 41 So. 865; *Rogers v. State*, 117 Ala. 192, 23 So. 82; *Hornsby v. State*, 94 Ala. 55, 10 So. 22; *Johnson v. State*, 32 Ala. 583; *Territory v. Carland*, 6 Mont. 14, 9 Pac. 578.

97. See the following: *State v. Grant*, 86 Iowa 216, 53 N. W. 120; *State v. Potter*, 28 Iowa 551; *State v. Jones*, 13 Iowa 269; *State v. Mayberry*, 48 Me. 218; *State v. Roberts*, 34 Me. 320.

[a] In prosecutions for conspiracy, it frequently happens that the act charged becomes criminal only by reason of the means to be employed, in which case the means must be set out. 5 STANDARD PROC. 300.

[b] In prosecution for seduction, an indictment charging the commission of the offense "by persuasion and promises of marriage, and by other false and fraudulent means," without setting out in what such other false and fraudulent means consisted, was

demurrable upon that ground in *Langston v. State*, 109 Ga. 153, 35 S. E. 166, 779. See generally the title "**Seduction.**"

98. *Chicago, etc. Coal Co. v. People*, 114 Ill. App. 75, *affirmed*, 214 Ill. 421, 73 N. E. 770; *State v. Verrill*, 54 Me. 408, 414.

99. *Territory v. Carland*, 6 Mont. 14, 9 Pac. 578.

1. *State v. Finch*, 3 West. L. M. 82, 2 Ohio Dec. (Reprint) 431, under a statute punishing one unlawfully assaulting or threatening another, "in a menacing manner."

2. See the following: **U. S.**—*United States v. Wentworth*, 11 Fed. 52. **Ala.** *Gaines v. State*, 146 Ala. 16, 41 So. 865. **Ariz.**—*Marquez v. Territory*, 13 Ariz. 135, 108 Pac. 258, means causing death. **Cal.**—*People v. Hyndman*, 99 Cal. 1, 33 Pac. 782. **Ga.**—*Travis v. State*, 83 Ga. 372, 9 S. E. 1063; *Snell v. State*, 13 Ga. App. 158, 79 S. E. 71. **Ill.**—*People v. Darr*, 179 Ill. App. 130. **Ia.**—*State v. Grant*, 86 Iowa 216, 53 N. W. 120. **La.**—*State v. Smith*, 41 La Ann 791, 6 So. 623. **Me.**—*State v. Ames*, 64 Me. 386; *State v. Verrill*, 54 Me. 408, 414. **Md.**—*State v. Falkenham*, 73 Md. 463, 21 Atl. 370. **N. Y.** *People v. Knapp*, 206 N. Y. 373, 384, 99 N. E. 841, Ann. Cas. 1914B, 243; *People v. Bush*, 4 Hill 133; *People v. Farrell*, 8 N. Y. Supp. 230. **Va.** *Crimp's Case*, 84 Va. 927, 6 S. E. 620, 10 Am. St. Rep. 895.

[a] "The means or manner of effecting the criminal intent or the circumstances evincive of the design with which the act, illegal in itself, was done are generally considered to be matters of evidence to the jury to demonstrate the intent, and not necessary to be incorporated in the indictment." *Snell v. State*, 13 Ga. App. 158, 79 S. E. 71, *citing* *Travis v. State*, 83 Ga.

in order to comply with the constitutional requirement that the accused is entitled to be informed of the nature and cause of the accusation against him;³ and such averment is dispensed with by express provision of statute in some states.⁴

When the means by which an offense was committed are unknown to the grand jury, this fact may be alleged,⁵ even though by proper diligence the grand jury might have learned the nature of the instrument.⁶ Such an allegation is sufficient unless it be shown that the grand jury did know the means used.⁷

Allegations in Alternative.—Statutes sometimes provide that where the crime may be committed by the use of different means, the indictment or information may allege the means in the alternative.⁸ In such case, each alternative averment must be construed as a separate count,⁹ and must describe the means with the same definiteness and particularity, as would have been required, had the charge been made in separate counts.¹⁰

c. *As to Knowledge, Intent, Feloniousness, Etc.*—(I.) **Knowledge.** (A.) **IN GENERAL.**—If knowledge is an element of the offense, it must be alleged that the act charged was knowingly done.¹¹ Especially is

372, 9 S. E. 1063. For similar statement, see *United States v. Wentworth*, 11 Fed. 52.

As to alleging method of accomplishing result generally in a prosecution for conspiracy, see 5 STANDARD PROC. 300, et seq.

As to necessity for stating instrument or means, used to effectuate murderous intent, in indictment for an assault with intent to kill, see 11 STANDARD PROC. 587; necessity for stating manner or means in prosecution for simple assault, see 3 STANDARD PROC. 31.

3. See *supra*, IX, A.

4. See the following: **Ind.**—*Littell v. State*, 133 Ind. 577, 33 S. E. 417. **Mass.**—*Com. v. Jordan*, 207 Mass. 259, 267, 93 N. E. 809. **Miss.**—*Newcomb v. State*, 37 Miss. 383. **N. J.**—*Graves v. State*, 45 N. J. L. 347, 357, 46 Am. Rep. 778. **N. C.**—*State v. Moore*, 104 N. C. 743, 10 S. E. 183. **Ohio.**—*Wolf v. State*, 19 Ohio St. 248, 254. **Pa.**—*Goersen v. Com.*, 99 Pa. 388, 398; *Campbell v. Com.*, 84 Pa. 187, 198; *Catheart v. Com.*, 37 Pa. 108. **Tex.**—*Caldwell v. State*, 28 Tex. App. 566, 581, 14 S. W. 122. **Wis.**—*Rowan v. State*, 30 Wis. 129, 11 Am. Rep. 559.

5. **Ala.**—*Gaines v. State*, 146 Ala. 16, 22, 41 So. 865 (by statutory provision); *Terry v. State*, 120 Ala. 286, 25 So. 176; *Newell v. State*, 115 Ala. 54, 22 So. 572. **Ariz.**—*Marquez v. Territory*, 13 Ariz. 135, 108 Pac. 258. **Me.**

See *State v. Verrill*, 54 Me. 408, *reviewing and approving Com. v. Webster*, 5 Cush. (Mass.) 295, 52 Am. Dec. 711. **Mass.**—*Com. v. Webster*, 5 Cush. 295, 52 Am. Dec. 711.

6. *Terry v. State*, 118 Ala. 79, 23 So. 776; *Marquez v. Territory*, 13 Ariz. 135, 108 Pac. 258.

7. *Terry v. State*, 118 Ala. 79, 23 So. 776.

8. **Ala.**—*Dudley v. State*, 185 Ala. 27, 64 So. 309 (under Code, 1907, §7149); *Gaines v. State*, 146 Ala. 16, 22, 41 So. 865; *Wilson v. State*, 84 Ala. 126, 4 So. 383. **Kan.**—*State v. O'Neil*, 51 Kan. 651, 33 Pac. 287, 24 L. R. A. 555. **Tex.**—*Hunter v. State* (Tex. Crim.), 166 S. W. 164, under art. 473, Code Crim. Proc. **Wash.**—*State v. Pettit*, 74 Wash. 510, 133 Pac. 1014, under Rem. & Ball. Code, §2059.

As to propriety of alternative averments generally, see *supra*, IX, C, 5. But see *Hunter v. State* (Tex. Crim.), 166 S. W. 164; *Harris v. State*, 58 Tex. Crim. 523, 126 S. W. 890; *Lewellen v. State*, 54 Tex. Crim. 640, 114 S. W. 1179.

9. *Smith v. State*, 142 Ala. 14, 28, 39 So. 329, *citing Thomas v. State*, 111 Ala. 51, 20 So. 617.

10. *Rogers v. State*, 117 Ala. 192, 23 So. 82.

11. **U. S.**—*United States v. Carll*, 105 U. S. 611, 26 L. ed. 1135; *United States v. Buzzo*, 18 Wall. 125, 21 L.

this true, where knowledge is by statute made an essential ingredient of the offense.¹² But an averment that the act or acts charged were "knowingly" done is not necessary where the statute defining the offense does not make knowledge an element thereof.¹³ Nor is an

ed. 812; *United States v. Nathan*, 61 Fed. 936; *United States v. Schuler*, 6 McLean 28, 27 Fed. Cas. No. 16,234. **Ala.**—*Davis v. State*, 68 Ala. 58, 44 Am. Rep. 128; *Stein v. State*, 37 Ala. 123. **Ark.**—*Gabe v. State*, 6 Ark. 519, 54 Am. Dec. 217. **Cal.**—*People v. Smith*, 103 Cal. 563, 37 Pac. 516; *Ex parte Goldman*, 7 Cal. Unrep. 254, 88 Pac. 819. **Ind.**—*Bader v. State*, 176 Ind. 268, 94 N. E. 1009; *State v. Sutton*, 170 Ind. 473, 84 N. E. 824; *State v. Williams*, 139 Ind. 43, 38 N. E. 339, 47 Am. St. Rep. 255; *State v. Ross*, 4 Ind. 541. **Kan.**—*State v. Lawrence*, 43 Kan. 125, 23 Pac. 157. **Ky.**—*Com. v. Taylor*, 96 Ky. 394, 29 S. W. 138; *Com. v. Stout*, 7 B. Mon. 247. **Mass.**—*Com. v. Filburn*, 119 Mass. 297; *Com. v. Dean*, 110 Mass. 64. **Mich.**—*People v. Fitzgerald*, 92 Mich. 328, 52 N. W. 726; *People v. Behee*, 90 Mich. 356, 51 N. W. 515. **Miss.**—*Gates v. State*, 71 Miss. 874, 16 So. 342; *Morman v. State*, 24 Miss. 54. **Mo.**—*State v. Gardner*, 2 Mo. 23. **Mont.**—*State v. Danzer*, 35 Mont. 269, 88 Pac. 952. **N. H.**—*State v. Gove*, 34 N. H. 510. **N. J.**—*State v. Stimson*, 24 N. J. L. 478. **N. M.**—*Territory v. Cortez*, 15 N. M. 92, 103 Pac. 264. **N. Y.**—*People v. Lohman*, 2 Barb. 216. **Ohio.**—*Birney v. State*, 8 Ohio 230; *Gatewood v. State*, 4 Ohio 386. **R. I.**—*State v. Maloney*, 12 R. I. 251. **S. C.**—*State v. Brown*, 2 Spears 129. **Va.**—*Com. v. Israel*, 4 Leigh 675. **Wis.**—*State v. Bloedow*, 45 Wis. 279. **Wyo.**—*Stutsman v. Cheyenne*, 18 Wyo. 491, 113 Pac. 321. **Eng.**—*Reg. v. Philpotts*, 47 E. C. L. 112.

See also titles dealing with particular offenses.

12. **U. S.**—*United States v. Carll*, 105 U. S. 611, 26 L. ed. 1135; *United States v. Walkinds*, 6 Fed. 152. **Ala.**—*Davis v. State*, 68 Ala. 58, 44 Am. Rep. 128. **Cal.**—*People v. Smith*, 103 Cal. 563, 37 Pac. 516; *People v. Mitchell*, 92 Cal. 590, 28 Pac. 597, 788. **Ill.**—*People v. Tait*, 261 Ill. 197, 103 N. E. 750. **Ind.**—*Powers v. State*, 87 Ind. 97. **Mass.**—*Com. v. Boynton*, 12 Cush. 499; *Com. v. Elwell*, 2 Mete. 190, 35 Am. Dec. 398. **Miss.**—*Gates v. State*,

71 Miss. 874, 16 So. 342. **Ohio.**—*Rich v. State*, 8 Ohio 111; *Gatewood v. State*, 4 Ohio 386. **Va.**—*Bailey v. Com.*, 78 Va. 19. **Can.**—*Rex v. Graf*, 19 Ont. L. R. 238.

That indictment for statutory offense should follow the statute, see *infra*, IX, E, 5, f.

[a] The omission to allege knowledge where an essential ingredient of the offense is not a defect or imperfection of form and is not cured by verdict. *United States v. Carll*, 105 U. S. 611, 26 L. ed. 1135.

[b] An indictment charging defendant with passing a counterfeit coin with intent to defraud, but not alleging that defendant knew it was counterfeit does not charge a violation of the United States statutes, for it discloses no criminal intent in respect to the coin, but only against the individual sought to be defrauded. *United States v. Carll*, 105 U. S. 611, 26 L. ed. 1135, explained in *Dunbar v. United States*, 156 U. S. 185, 15 Sup. Ct. 325, 39 L. ed. 390.

[c] Under a statute making an officer liable to indictment for failure to act after legal information of certain things are given him, the gist of the offense is the manner in which this information was given and must be set forth. *State v. Jones*, 91 Ark. 5, 120 S. W. 154.

13. **U. S.**—*United States v. Malone*, 9 Fed. 897; *United States v. Smith*, 2 Mason 143, 150, 27 Fed. Cas. No. 16,338. **Ala.**—*Wilson v. State*, 61 Ala. 151. **Fla.**—*McCaskill v. State*, 55 Fla. 117, 45 So. 843. **Idaho.**—*State v. Keller*, 8 Idaho 699, 70 Pac. 1051. **Mo.**—*State v. Bullinger*, 54 Mo. 142. **N. M.**—*Territory v. Church*, 14 N. M. 226, 91 Pac. 720. **Ohio.**—*Haas v. State*, 1 Ohio N. P. 248. **Tex.**—*Simon v. State*, 31 Tex. Crim. 186, 20 S. W. 399, 716, 37 Am. St. Rep. 802. **Vt.**—*State v. Dana*, 59 Vt. 614, 10 Atl. 727; *State v. Wyman*, 59 Vt. 527, 8 Atl. 900, 59 Am. Rep. 753. **W. Va.**—*State v. Pennington*, 41 W. Va. 599, 23 S. E. 918.

[a] Another statement of the rule is: Where a statute prohibits generally

avermment of knowledge necessary where the statement of the act necessarily implies a knowledge on the part of the accused of the illegality thereof.¹⁴

The averment of knowledge, where necessary to be made, must extend to every fact of which knowledge is essential.¹⁵

Notice and Demand.—If the commission of an offense is only complete upon failure to comply with a notice,¹⁶ or a request or demand,¹⁷ such notice, request or demand must be alleged.

(B.) **How MADE.**—It is sufficient to allege that the defendant “knowingly” or “well knowing” did certain acts, subsequently stated, without a positive averment that defendant knew such facts.¹⁸ Indeed, it is sufficient that the words “wilful,” or “wilfully,”¹⁹ or “wilfully and unlawfully,”²⁰ or other similar words, are used in describing the

and is silent as to intention, it is clear that the pleader need not aver knowledge. *United States v. Malone*, 9 Fed. 897; *United States v. Smith*, 2 Mason 143, 150, 27 Fed. Cas. No. 16, 338. And see *Haas v. State*, 1 Ohio N. P. 248.

[b] **Surplusage.**—If the word “knowingly” is used, where the statute does not require it, it must be treated as surplusage. *Territory v. Church*, 14 N. M. 226, 91 Pac. 720.

14. **U. S.**—*United States v. Debs*, 65 Fed. 210; *United States v. Holmes*, 40 Fed. 750; *United States v. Jolly*, 37 Fed. 108. **Ala.**—*Stein v. State*, 37 Ala. 123, 132. **Ill.**—*Eells v. People*, 5 Ill. 498; *Chambers v. People*, 5 Ill. 351. **Ky.**—*Com. v. Stout*, 7 B. Mon. 247. **Mass.**—*Com. v. Raymond*, 97 Mass. 567; *Com. v. Elwell*, 2 Mete. 190, 35 Am. Dec. 398. **S. C.**—*State v. Brown*, 2 Spears 129. **Tex.**—*State v. West*, 10 Tex. 553. **Vt.**—*State v. Carpenter*, 20 Vt. 9.

[a] “Where knowledge must be presumed, and the event lies alike in the knowledge of all men, it is never necessary either to state or prove it.” 1 Chitty Crim. Law 321, quoted in *State v. West*, 10 Tex. 553.

[b] Where the gist of the offense is neglect, or carelessness, it would, as a general rule, be a solecism to speak of a guilty knowledge, since the neglect itself usually evidences the guilty mind. *Stein v. State*, 37 Ala. 123, 132.

15. *United States v. Nathan*, 61 Fed. 936, following *United States v. Clark*, 37 Fed. 196; *Com. v. Boynton*, 12 Cush. (Mass.) 499.

16. *State v. Lemay*, 13 Ark. 405.

17. *State v. Munch*, 22 Minn. 67 (wherein indictment against state

treasurer for embezzlement must allege demand); *State v. West*, 10 Tex. 553, citing 1 Chitty Crim. Law 322.

18. *Dunbar v. United States*, 156 U. S. 185, 15 Sup. Ct. 325, 39 L. ed. 390.

[a] An averment (1) that defendant “unlawfully, feloniously and knowingly made out and filed . . . a certain false and fraudulent claim,” sufficiently charges knowledge (*Bader v. State*, 176 Ind. 268, 94 N. E. 1009), (2) as does an averment that the persons charged feloniously bought “well knowing,” etc. (*Huggins v. State*, 41 Ala. 393), (3) or an averment that the accused did “unlawfully, knowingly, and designedly” hinder and oppose, in an indictment for assaulting and obstructing an officer. *Com. v. Kirby*, 2 Cush. (Mass.) 577.

19. **Ill.**—*Johnson v. People*, 94 Ill. 505. **Phil. Isl.**—*United States v. Bull*, 15 Phil. Isl. 7. **Tex.**—*Ex parte Cowden* (Tex. Crim.), 168 S. W. 539, holding “willful” is synonymous with “knowingly,” if not indeed more extensive.

20. **Ill.**—*People v. Tait*, 261 Ill. 197, 103 N. E. 750, proof of knowledge admissible under an allegation that act was “wilfully and unlawfully committed.” **Ore.**—*Wong v. Astoria*, 13 Ore. 538, 11 Pac. 295. **Wash.**—*State v. Muller*, 80 Wash. 368, 141 Pac. 910.

[a] “These words are sufficient to charge guilty knowledge and evil intent. He (accused) could not unlawfully and willfully do the act without knowing the character and quantity of the liquor, and where he was taking it. To allege the one necessarily implies the other, and negatives every excul-

act constituting the offense,²¹ though the statute uses the word "knowingly."²² Likewise, the use of the word "secretly" implies a guilty knowledge.²³

(II.) **Intent.**—(A.) **IN GENERAL.**—While a crime cannot be committed unless the person committing the acts supposed to constitute the crime entertains a criminal intent, if the act itself is unlawful without any express reference to any intent, then the only criminal intent involved is the intention to commit the interdicted acts, and it is not necessary to allege such intent, or any intent,²⁴ but this will be presumed from the allegation of the commission of the acts;²⁵ and even if alleged, it is a mere formal averment which need not be proved.²⁶

Whether, in an indictment for a statutory offense, it is necessary to charge a criminal intent is a question of statutory construction.²⁷ If the statute creating the offense is silent as to intent, there need be no intent alleged,²⁸ unless the act itself is not criminal in the absence

patory motive." *State v. Muller*, 80 Wash. 368, 141 Pac. 910.

As to necessity for use of word "willfully," see *infra*, IX, E, 5, c, (VI); of word "unlawfully," see *infra*, IX, E, 5, c, (IV).

21. Such as (1) "designedly and unlawfully" (*Com. v. Hulbert*, 12 Metc. [Mass.] 446), (2) or "advisedly." *King v. Fuller*, 1 Bos. & Pul. 180, 126 Eng. Reprint 847.

[a] It has been held insufficient to use the words "unlawfully and feloniously," where the statute uses the words "willfully and knowingly," however. *Com. v. Taylor*, 96 Ky. 394, 29 S. W. 138, wherein it is said that "the word 'feloniously' does not have the legal significance of either the word willfully or knowingly, or of both."

22. That the indictment need not follow literally the words of the statute in defining a statutory offense, but may use equivalent words, see *infra*, IX, E, 5, h.

23. *Sutton v. State*, 9 Ohio 133.

24. **U. S.**—*Wood v. United States*, 204 Fed. 55, 122 C. C. A. 369. **Ala.**—*Stein v. State*, 37 Ala. 123. **Ark.**—*Brittin v. State*, 10 Ark. 299; *Shover v. State*, 10 Ark. 259, Sabbath breaking. **Ga.**—*Chelsey v. State*, 121 Ga. 340, 49 S. E. 258; *Downing v. State*, 66 Ga. 160. **Ill.**—*McCutcheon v. People*, 69 Ill. 601; *Gunning v. People*, 86 Ill. App. 676, reversed on other grounds, 189 Ill. 165, 59 N. E. 491, 82 Am. St. Rep. 433. **Ind.**—*Knight & Jillson*

Co. v. Miller, 172 Ind. 27, 87 N. E. 823. **Kan.**—*State v. Bush*, 45 Kan. 138, 25 Pac. 614. **Mass.**—*Com. v. Hersey*, 2 Allen 173. **Tenn.**—*Standard Oil Co. v. State*, 117 Tenn. 618, 100 S. W. 705, 10 L. R. A. (N. S.) 1015. **Tex.**—*State v. Missouri, etc. R. Co.*, 99 Tex. 516, 91 S. W. 214, 5 L. R. A. (N. S.) 783. **Eng.**—*Rex v. Phillips*, 6 East 464, 2 Smith K. B. 550.

[a] If the information charges acts constituting a misdemeanor were done knowingly and willfully, no other intent need be alleged. *State v. Gregory*, 74 Kan. 467, 87 Pac. 370.

25. **Idaho.**—*People v. Butler*, 1 Idaho 231. **Kan.**—*State v. Bush*, 45 Kan. 138, 25 Pac. 614. **Mass.**—*Com. v. Hersey*, 2 Allen 173. **Tex.**—*Tomkins v. State*, 33 Tex. 228.

26. *Chelsey v. State*, 121 Ga. 340, 49 S. E. 258; *Com. v. Hersey*, 2 Allen (Mass.) 173.

27. *State v. Kuehnle*, 85 N. J. L. 220, 88 Atl. 1085, affirming 84 N. J. L. 164, 85 Atl. 1014.

28. **Colo.**—*Harding v. People*, 10 Colo. 387, 15 Pac. 727. **Idaho.**—*State v. Keller*, 8 Idaho 699, 70 Pac. 1051. **Ill.**—*Bolen v. People*, 184 Ill. 338, 56 N. E. 408; *McCutcheon v. People*, 69 Ill. 601. **Kan.**—*State v. Gregory*, 74 Kan. 467, 87 Pac. 370. **N. Y.**—*People v. Webster*, 17 Misc. 410, 40 N. Y. Supp. 1135. **Pa.**—*Com. v. Miller*, 31 Pa. Super. 309. **R. I.**—*State v. Smith*, 17 R. I. 371, 22 Atl. 282. **Can.**—*Rex v. Yaldon*, 17 Ont. L. R. 179.

of an evil intent.²⁹ But if the common law or a statute makes a particular intent an essential element of the offense,³⁰ or a criminal act is attempted but not accomplished, and the evil intent can only be punished,³¹ an indictment therefor must allege the act was done with the particular intent.

Though a word that conveys the idea of a physical effort to do the act, instead of the intent with which the act was done, is insufficient,³² an attempt to commit a wilful and malicious crime imports *ex vi termini* an intent to commit that crime. The attempt includes the intent.³³ An indictment against a principal in the second degree or

29. *Harrington v. State*, 54 Miss. 490; *State v. Startup*, 39 N. J. L. 423.

30. **U. S.**—*Evans v. United States*, 153 U. S. 584, 594, 14 Sup. Ct. 934, 939, 38 L. ed. 830; *United States v. Carll*, 105 U. S. 611, 26 L. ed. 1135; *Wood v. United States*, 204 Fed. 55, 122 C. C. A. 369; *United States v. Jackson*, 25 Fed. 548. **Ala.**—*Wester v. State*, 147 Ala. 121, 41 So. 969; *Davis v. State*, 68 Ala. 58, 44 Am. Rep. 128. **Ariz.**—*Downing v. United States*, 8 Ariz. 31, 68 Pac. 555. **Ark.**—*Mott v. State*, 29 Ark. 147; *State v. Eldridge*, 12 Ark. 608; *Brittin v. State*, 10 Ark. 299; *Gabe v. State*, 6 Ark. 519. **Cal.**—*People v. Mooney*, 127 Cal. 339, 59 Pac. 761; *People v. Turner*, 122 Cal. 679, 55 Pac. 685; *People v. Robles*, 117 Cal. 681, 49 Pac. 1042; *People v. Mize*, 80 Cal. 41, 45, 22 Pac. 80; *People v. Nelson*, 58 Cal. 104; *People v. Martin*, 52 Cal. 201. **Conn.**—*State v. McGee*, 81 Conn. 696, 72 Atl. 141; *State v. Costello*, 62 Conn. 128, 25 Atl. 477. **Ga.**—*Wood v. State*, 46 Ga. 322. **Ill.**—*People v. Jones*, 263 Ill. 564, 105 N. E. 744; *McCutcheon v. People*, 69 Ill. 601; *People v. Cohen*, 147 Ill. App. 393. **Ind.**—*State v. Freeman*, 6 Blackf. 248. **Ia.**—*State v. Rankin*, 150 Iowa 701, 130 N. W. 732; *State v. Judd*, 132 Iowa 296, 109 N. W. 892. **Ky.**—*Allen v. Com.*, 144 Ky. 222, 137 S. W. 1060. **Me.**—*Galeo v. State*, 107 Me. 474, 78 Atl. 867; *Barnett v. State*, 36 Me. 198; *State v. Robinson*, 33 Me. 564; *State v. Gurney*, 33 Me. 527; *Smith v. State*, 23 Me. 48, 54 Am. Dec. 607. **Md.**—*State v. Elborn*, 27 Md. 483. **Mass.**—*Com. v. York*, 9 Mete. 93; *Com. v. Dana*, 2 Mete. 329. **Mich.**—*Wilson v. People*, 24 Mich. 410. **Minn.**—*State v. Ullman*, 5 Minn. 13. **N. H.**—*State v. Gove*, 34 N. H. 510. **N. J.**—*State v. Malloy*, 34 N. J. L. 410. **N. Y.**—*Miller v. People*, 5 Barb. 203; *People v. Loh-*

man, 2 Barb. 216; *People v. Tighe*, 146 App. Div. 491, 131 N. Y. Supp. 693. **Tenn.**—*Vaughn v. State*, 3 Coldw. 102. **Tex.**—*Johnson v. State*, 1 Tex. App. 146. **Eng.**—*King v. Woodfall*, 5 Burr. 2661, 2664, 98 Eng. Reprint 398. **Can.**—*Cornwall v. Reg.*, 33 U. C. Q. B. 106.

31. *Com. v. Hersey*, 2 Allen (Mass.) 173.

[a] To illustrate the application of the rule take the case of an indictment for an assault with an intent to commit a rape. The act not being consummated, the gist of the offense consists in the intent with which the assault was committed. It must therefore be distinctly alleged and proved. But in an indictment for the crime of rape, no such averment is necessary. It is sufficient to allege the assault, and that the defendant had carnal knowledge of a woman by force and against her will. The averment of the act includes the intent and proof of the commission of the offense draws with it the necessary inference of the criminal intent. The same is true of indictments for assault with intent to kill, and murder. In the former the intent must be alleged and proved. In the latter, it is only necessary to allege and prove the act. *King v. Woodfall*, 5 Burr. 2661, 2664, 98 Eng. Reprint 398.

[b] **Defect of Form.**—Though statute makes an assault with an intent to rob the mails punishable, an indictment charging the assault, was wilful, but not alleging the assault was with intent to rob the mails, while bad on demurrer is good on motion in arrest of judgment as being matter of form only. *Downing v. United States*, 8 Ariz. 31, 68 Pac. 555.

32. *State v. Marshall*, 14 Ala. 411.

33. *Com. v. McLaughlin*, 105 Mass. 460.

an accessory before the fact to a crime requiring a specific intent must allege that the acts of the accused were done with the required intent.³⁴

(B.) HOW MADE. — An intent cannot be described like a physical, tangible fact, and therefore all that need be done is to characterize by appropriate words the intent essential to the existence of the particular offense charged;³⁵ and some statutes expressly provide that a general averment of the intent is sufficient.³⁶ It is not necessary, however, in offenses in which the intent constitutes the aggravation material to the punishment prescribed that the facts be alleged with the same particularity as where the prohibition of the statute is directed against the doing of an act which is made criminal.³⁷ If the intent is described in the statute by different terms stated disjunctively the indictment may use all of such terms conjunctively,³⁸ or may use either of the qualifying words alone;³⁹ but statutes in some states authorize such intents to be alleged in the alternative.⁴⁰

(III.) Feloniousness. — At the common law, the use of the word "feloniously" or its equivalent in charging a felony, was indispensable

34. **Mass.**—*Com. v. Adams*, 127 Mass. 15. **N. J.**—*State v. Seran*, 28 N. J. L. 519. **Tex.**—*Williams v. State*, 42 Tex. 292.

But see *Hotelling v. State*, 3 Ohio C. C. 630, 2 Ohio C. D. 366.

35. **U. S.**—*Evans v. United States*, 153 U. S. 584, 14 Sup. Ct. 934, 939, 38 L. ed. 830. **D. C.**—*Hyde v. United States*, 27 App. Cas. 362. **Ind.**—*Garmire v. State*, 104 Ind. 444, 4 N. E. 54; *State v. Miller*, 98 Ind. 70. **Ia.**—*State v. Mitchell*, 139 Iowa 455, 116 N. W. 808; *State v. Carpenter*, 23 Iowa 506. **N. Y.**—*People v. McLaughlin*, 70 Misc. 191, 126 N. Y. Supp. 177. **Phil. Isl.** *United States v. Gimeno*, 3 Phil. Isl. 233.

[a] "Thus in cases of fraudulently obtaining money under false pretenses, of forgery, of possession of counterfeit money, and the like, all that is necessary is to aver an intent and characterize it as an intent to do that which the statute prohibits in the particular case." *State v. Miller*, 98 Ind. 70.

[b] An indictment charging an assault with an intent to beat, strike, etc., and the infliction of great bodily injury, does not specifically charge an intent to commit great bodily injury. *State v. Harrison*, 82 Iowa 716, 47 N. W. 777; *State v. Clark*, 80 Iowa 517, 45 N. W. 910. But see *State v. Mitchell*, 139 Iowa 455, 116 N. W. 808, criticizing above decisions.

36. *Williams v. State*, 61 Ala. 33.

[a] The intent may be manifested "by so many acts upon the part of the accused, covering such a long period of time, as to render it difficult, if not wholly impracticable, to aver, with any degree of certainty, all the essential facts from which it may be fairly inferred. The means of affecting the criminal intent, or the circumstances evincive of the design with which the act was done, are considered to be matters of evidence to go to the jury to demonstrate the intent, and not necessary to be incorporated in an indictment." *Evans v. United States*, 153 U. S. 584, 14 Sup. Ct. 934, 939, 38 L. ed. 830.

37. *State v. Mitchell*, 139 Iowa 455, 116 N. W. 808, assault "with intent to do great bodily harm."

38. *People v. Ah Woo*, 28 Cal. 206; *State v. Philbin*, 38 La. Ann. 964.

As to charging facts in the alternative, see *supra*, IX, C, 5.

39. *State v. Philbin*, 38 La. Ann. 964.

40. *Dismukes v. State*, 83 Ala. 287, 3 So. 671, these statutes changed the common law rule and were intended to prevent a multiplicity of counts.

[a] Each alternative in such case must alone charge an indictable offense. *Hornsby v. State*, 94 Ala. 55, 10 So. 22; *Mays v. State*, 89 Ala. 37, 8 So. 28.

to an indictment.⁴¹ Such is still the rule in some states in the absence of statute,⁴² even where the grade of the offense has been raised by

41. See the following: **Ark.**—Mott v. State, 29 Ark. 147, 148. **Ill.**—Ervington v. People, 181 Ill. 408, 54 N. E. 981. **Ia.**—State v. Judd, 132 Iowa 296, 109 N. W. 892. **Ky.**—Kaelin v. Com., 84 Ky. 354, 1 S. W. 594; Stroud v. Com., 14 Ky. L. Rep. 179, 19 S. W. 976. **Miss.**—Bowler v. State, 41 Miss. 570. **Mo.**—State v. Williams, 30 Mo. 364. **Mont.**—State v. Rehnitz, 20 Mont. 488, 52 Pac. 264. **N. H.**—State v. Felch, 58 N. H. 1. **N. M.**—Territory v. Gonzales, 14 N. M. 31, 37, 89 Pac. 250.

[a] The ancient rule was, that the word "feloniously" is necessary in all indictments for felony, whether common law, or statutory. State v. Felch, 58 N. H. 1.

42. See the following: **Ark.**—Nelson v. State, 32 Ark. 192; Mott v. State, 29 Ark. 147; Edwards v. State, 25 Ark. 444; State v. Eldridge, 12 Ark. 608. **Del.**—State v. Brister, Houst. Crim. Cas. 150. **Fla.**—McCaskill v. State, 55 Fla. 117, 45 So. 843. **Ill.**—Bolen v. People, 184 Ill. 338, 56 N. E. 408; Ervington v. People, 181 Ill. 408, 54 N. E. 981. **Ind.**—Sovine v. State, 85 Ind. 576; Scudder v. State, 62 Ind. 13. **Ky.**—Hoskins v. Com., 145 Ky. 580, 140 S. W. 1040; Allen v. Com., 144 Ky. 222, 137 S. W. 1060; Howerton v. Com., 129 Ky. 482, 112 S. W. 606; Kaelin v. Com., 84 Ky. 354, 1 S. W. 594 (reviewing authorities and *distinguishing* Jane v. Com., 3 Mete. 18); Hocker v. Com., 33 Ky. L. Rep. 944, 111 S. W. 676; Hall v. Com., 15 Ky. L. Rep. 856, 26 S. W. 8; Stroud v. Com., 14 Ky. L. Rep. 179, 19 S. W. 976. **La.**—State v. Noel, 125 La. 309, 51 So. 215, essential in indictment for common-law offense of larceny. **Miss.**—Wile v. State, 60 Miss. 260; Bowler v. State, 41 Miss. 570; Sarab v. State, 28 Miss. 267. **Mo.**—State v. Dixon, 247 Mo. 668, 153 S. W. 1022; State v. Hanson, 231 Mo. 14, 132 S. W. 245; State v. Buchfelder, 231 Mo. 55, 132 S. W. 229; State v. McGee, 228 Mo. 413, 128 S. W. 966; State v. Keating, 202 Mo. 197, 204, 100 S. W. 648; State v. Feazell, 132 Mo. 176, 33 S. W. 788; State v. Clayton, 100 Mo. 516, 13 S. W. 819, 18 Am. St. Rep. 565; State v. Herrell, 97 Mo. 105, 10 S. W. 387, 70 Am. St. Rep. 289; State v. Deffenbacher, 51 Mo. 26;

State v. Williams, 30 Mo. 364; State v. Terry, 30 Mo. 368; State v. Gilbert, 24 Mo. 380; State v. Murdock, 9 Mo. 739; Jane v. State, 3 Mo. 61. **Mont.**—State v. Rehnitz, 20 Mont. 488, 52 Pac. 264. **N. Y.**—People v. Fish, 4 Park. Crim. 206. **N. C.**—State v. Holder, 153 N. C. 606, 69 S. E. 66; State v. Shaw, 117 N. C. 764, 23 S. E. 246; State v. Caldwell, 112 N. C. 854, 16 S. E. 1010; State v. Bryan, 112 N. C. 848, 16 S. E. 909; State v. Roper, 88 N. C. 656; State v. Purdie, 67 N. C. 25; State v. Jesse, 19 N. C. 297. **Okla.**—Wright v. United States, 18 Okla. 510, 90 Pac. 732, indictment for common-law offense of murder must allege that it was committed "feloniously" or with a "felonious intent." **Pa.**—Com. v. Schall, 12 Pa. Co. Ct. 554. **R. I.**—State v. Murphy, 17 R. I. 698, 24 Atl. 473, 16 L. R. A. 550. **Tex.**—State v. Small, 31 Tex. 184; Cain v. State, 18 Tex. 387. **Va.**—Randall v. Com., 24 Gratt. 644. **W. Va.**—State v. Whitt, 39 W. Va. 468, 19 S. E. 873. **Eng.**—Reg. v. Gray, 9 Cox C. C. 417.

[a] "Indictments for felony must contain the word 'feloniously,' . . . not that it is of any aid or benefit to a defendant, but because it is of long usage, coming down from a remote past, when there was a reason for its use which has long ago ceased." State v. Holder, 153 N. C. 606, 69 S. E. 66.

[b] In State v. Murphy, 17 R. I. 698, 24 Atl. 473, 16 L. R. A. 550, the court says: "We understand the rule of pleading in criminal cases to be, that in the absence of any statutory provision as to what constitutes a felony, or as to the form of the indictment, the word 'feloniously' should be used in all cases where the offense charged was felony at the common law, and that in all other cases said word is not essential; but if used by the pleader it may be rejected as surplusage."

[c] An indictment charging one with aiding and abetting (1) another in an assault with intent to kill is insufficient under these authorities where it fails to charge that the defendant was "feloniously" present, aiding and abetting the felony, alleged to have been committed. State v. Hang Teng, 115 Mo. 389, 22 S. W. 381. (2) Com-

statute to a felony, whereas it was only a misdemeanor at common law;⁴³ otherwise the acts charged will only be a misdemeanor or trespass.⁴⁴ and if no misdemeanor be included in the description of the felony charged, and the word "feloniously" be omitted, the indictment is insufficient for any purpose.⁴⁵ This principle, however, does not obtain where the statute otherwise expressly provides,⁴⁶ as it does in some states.⁴⁷

The authorities seem to be in conflict also as to the necessity of averring that the acts were feloniously done, where the offense is one created by statute, and the word "feloniously" is not used therein,⁴⁸ some holding in such case that the word "feloniously" need not be used if the indictment or information describes the offense in the language of the statute or the statutory form provided,⁴⁹ others adhering

pare *State v. Feleh*, 58 N. H. 1, holding that the word "feloniously" is not necessary in an indictment against one, who was in that state accessory to a felony committed in another state, under a statute providing for punishment in such case the same as if the felony had been committed in that state.

43. *State v. Clayton*, 100 Mo. 516, 13 S. W. 819, 18 Am. St. Rep. 565; *State v. Deffenbacher*, 51 Mo. 26; *State v. Terry*, 30 Mo. 368; *Nevills v. State*, 7 Coldw. (Tenn.) 78.

[a] In *State v. Clayton*, 100 Mo. 516, 13 S. W. 819, 18 Am. St. Rep. 565, the court said: "The making of an assault like the one under discussion is not a new offense created by statute; it was an offense at common law; but was only—a misdemeanor. 1 East P. C. 411. The grade of the offense, however, having been raised to a felony, the common-law rules as to charging felonies must apply, and the act charged like any other felony originating at common law."

[b] But it is not necessary (1) that the word "feloniously" be used where a statute exists providing that indictments for misdemeanors good at common law are good under a statute raising the offense to a felony. *Peck v. State*, 2 Humph. (Tenn.) 78. (2) But see *Wile v. State*, 60 Miss. 260; *Bowler v. State*, 41 Miss. 570, both holding that a statute providing that where any act is criminal, both by statute and at common law, it may be set out in an indictment in either the statutory or common-law form, does not apply in a case where the act charged was a misdemeanor at common law and a felony by statute, in which case it must

be charged to have been done "feloniously," no matter what form of indictment was pursued.

44. *Ind.*—*Sovine v. State*, 85 Ind. 576. *Ky.*—*Kaelin v. Com.*, 84 Ky. 354. *N. C.*—*State v. Roper*, 88 N. C. 656. *Pa.*—*Com. v. Schall*, 12 Pa. Co. Ct. 554.

45. *Sovine v. State*, 85 Ind. 576.

46. *State v. Harris*, 145 N. C. 456, 59 S. E. 115.

47. See the following: *Ala.*—*Butler v. State*, 22 Ala. 43; *Beasley v. State*, 18 Ala. 535, both under statute dispensing with use of word "feloniously" in all indictments for crimes which were misdemeanors at common law, but are made felonies by statute. *Fla.* *Gen. St.*, 1906, §3963; *McCaskill v. State*, 55 Fla. 117, 45 So. 843. *Me.* *Rev. St.*, 1903, ch. 132, §13. *Mass.* *Rev. Laws*, 1902, ch. 218, §33; *Com. v. Sholes*, 13 Allen 554; *Com. v. Jackson*, 15 Gray 187. *Mich.*—*Howell's Ann. St.*, §15,079. *Tex.*—*Penal Code*, art. 447.

48. *Bannon v. United States*, 156 U. S. 464, 15 Sup. Ct. 467, 39 L. ed. 494; *State v. Judd*, 132 Iowa 296, 109 N. W. 892.

49. See the following: *U. S.*—*Bannon v. United States*, 156 U. S. 464, 15 Sup. Ct. 467, 39 L. ed. 494; *United States v. Staats*, 8 How. 41, 12 L. ed. 979; *Wood v. United States*, 204 Fed. 55, 122 C. C. A. 369. *Cal.*—*People v. Garcia*, 25 Cal. 531; *People v. Murray*, 10 Cal. 310; *People v. Olivera*, 7 Cal. 403; *People v. Parsons*, 6 Cal. 487; *People v. Davenport*, 13 Cal. App. 632, 110 Pac. 318. *Colo.*—*Cohen v. People*, 7 Colo. 274, 3 Pac. 385. *Ia.*—*State v. Judd*, 132 Iowa 296, 109 N. W. 892;

to the rule that the word or its equivalent must be used in such case.⁵⁰ It is not necessary to repeat, in connection with each act necessary to constitute the offense charged, that the defendant did it "feloniously."⁵¹ It is sufficient where this word becomes a component part of the subsequent allegations.⁵² Obviously the word "feloniously" need not be used in a charge of a misdemeanor.⁵³ Indeed, its use in such case, renders the pleading fatally defective in some jurisdictions,⁵⁴ though the better rule is to the contrary.⁵⁵ And where unnecessarily alleged, if not descriptive of the identity of what is legally essential to the charge, it may be disregarded.⁵⁶

State v. Griffin, 79 Iowa 568, 44 N. W. 813. **Ky.**—*Howerton v. Com.*, 129 Ky. 482, 112 S. W. 606; *Collier v. Com.*, 22 Ky. L. Rep. 1929, 62 S. W. 4. **La.** *State v. Grandison*, 49 La. Ann. 1012, 22 So. 308; *State v. Benjamin*, 7 La. Ann. 47. **Minn.**—*State v. Garvey*, 11 Minn. 154. **Neb.**—*Richards v. State*, 65 Neb. 808, 91 N. W. 878; *Wagner v. State*, 43 Neb. 1, 61 N. W. 85. **N. M.** *Territory v. Gonzales*, 14 N. M. 31, 37, 89 Pac. 250. **N. C.**—*State v. Harris*, 145 N. C. 456, 59 S. E. 115. **Ore.** *O'Kelly v. Territory*, 1 Ore. 51. **R. I.** *State v. Murphy*, 17 R. I. 698, 24 Atl. 473, 16 L. R. A. 550. **S. C.**—*State v. Allen*, 56 S. C. 495, 35 S. E. 204. **Wash.** *Watts v. Territory*, 1 Wash. Ter. 409.

[a] In Illinois, (1) where the offense defined by statute is entirely new, not being an offense at common law, and the word "feloniously" is not used in the statute, it need not be used in the indictment (*Bolen v. People*, 184 Ill. 338, 56 N. E. 408; *Quigley v. People*, 3 Ill. 301); (2) it is otherwise where the offense was one at common law and the statute merely defines the punishment. *Ervington v. People*, 181 Ill. 408, 54 N. E. 981; *Curtis v. People*, 1 Ill. 256.

50. **Miss.**—*Wile v. State*, 60 Miss. 260. **Mo.**—*State v. McGrath*, 228 Mo. 413, 128 S. W. 966; *State v. Weldon*, 70 Mo. 572; *State v. Deffenbacher*, 51 Mo. 26; *State v. Williams*, 30 Mo. 364; *State v. Davis*, 29 Mo. 391; *State v. Murdock*, 9 Mo. 739. **Eng.**—*Reg. v. Gray*, 9 Cox C. C. 417.

[a] That the act was felonious need not be alleged where a felonious intent is alleged. *Fairlee v. People*, 11 Ill. 1; *Dick v. State*, 10 Okla. Crim. 497, 139 Pac. 322.

51. *Wright v. United States*, 18 Okla. 510, 90 Pac. 732.

52. *Dick v. State*, 10 Okla. Crim. 497, 139 Pac. 322.

53. See the following: *State v. Holder*, 153 N. C. 606, 69 S. E. 66; *Stout v. Com.*, 11 Serg. & R. (Pa.) 177.

[a] Especially is it unnecessary for an indictment charging a misdemeanor in the words of a statute which does not include the word "feloniously" in the description of the offense, to use such word. *State v. Holder*, 153 N. C. 606, 69 S. E. 66. And see *State v. Holland*, 120 La. 429, 45 So. 380, holding that where a statute does not use the word "feloniously" in describing an offense, which was a misdemeanor at common law, the use of the word is not essential in the indictment, though the accused, if convicted, may be, in the discretion of the court, punished as for a felony.

54. **Del.**—*State v. Darrah*, 1 Houst. Crim. Cas. 112. **Md.**—*Black v. State*, 2 Md. 376. **Vt.**—*State v. Wheeler*, 3 Vt. 344.

55. **Ind.**—*State v. Sparks*, 78 Ind. 166. **Mass.**—*Com. v. Philpot*, 130 Mass. 59; *Com. v. Squire*, 1 Mete. 258. **Minn.** *State v. Crummey*, 17 Minn. 72; *State v. Hogard*, 12 Minn. 293. **N. Y.**—*Lohman v. People*, 1 N. Y. 379, 49 Am. Dec. 340; *People v. Wenk*, 71 Mise. 368, 127 N. Y. Supp. 702. **N. C.**—*State v. Edwards*, 90 N. C. 710; *State v. Staton*, 88 N. C. 654; *State v. Watts*, 82 N. C. 656; *State v. Upchurch*, 31 N. C. 454. **Ohio.**—*Hess v. State*, 5 Ohio 5, 22 Am. Dec. 767. **S. C.**—*State v. Wimberly*, 3 McCord 190.

56. *State v. Judd*, 132 Iowa 296, 109 N. W. 892.

[a] If used where unnecessary, it may be rejected as surplusage. *State v. Murphy*, 17 R. I. 698, 24 Atl. 473, 16 L. R. A. 550. And see: **Mass.**—*Com. v. Philpot*, 130 Mass. 59; *Com. v. Squire*,

There is no other word in the English language which is a perfect synonym for the word "feloniously,"⁵⁷ and that can be used to supply its place, where required to be used.⁵⁸ Using the phrase "with intent to commit a felony" has been held equivalent to using the word "feloniously," however.⁵⁹

(IV.) **Unlawfulness.**—When the statute creating an offense makes certain acts criminal when "unlawfully" done, an indictment or information therefor must allege the acts charged were done "unlawfully,"⁶⁰ or use words of equivalent meaning and import,⁶¹ such as

1 Mete. 258. **Minn.**—*State v. Crummev*, 17 Minn. 72. **N. Y.**—*Lohman v. Restell*, 1 N. Y. 379, 49 Am. Dec. 340. **Ohio.** *Hess v. State*, 5 Ohio 5, 22 Am. Dec. 767.

57. *Hocker v. Com.*, 33 Ky. L. Rep. 944, 111 S. W. 676. See *State v. Connors*, 37 Mont. 15, 94 Pac. 199; *State v. Rechnitz*, 20 Mont. 488, 52 Pac. 264.

[a] It is in criminal procedure a "term of art" peculiarly adapted to define one of the constituent elements of a felony, and its presence in every indictment for felony is absolutely essential. *Hocker v. Com.*, 33 Ky. L. Rep. 944, 111 S. W. 676.

58. **Ark.**—*Edwards v. State*, 25 Ark. 444. **Ky.**—*Kaelin v. Com.*, 84 Ky. 354; *Hocker v. Com.*, 33 Ky. L. Rep. 944, 111 S. W. 676. **N. C.**—*State v. Scott*, 72 N. C. 461.

[a] The words felonious and malice are not equivalent or synonymous terms—not of the same legal import. *Kaelin v. Com.*, 84 Ky. 354, 364.

[b] The word "steal" does not import a felonious taking, so as to make the addition of the word "feloniously" superfluous in an indictment for larceny. *State v. Noel*, 125 La. 309, 51 So. 215. See generally the title, "Larceny."

59. *State v. Goffney*, 157 N. C. 624, 73 S. E. 162; *Dillard v. State*, 3 Heisk. (Tenn.) 260.

60. See the following: **Ala.**—*Henry v. State*, 33 Ala. 389. **Del.**—*State v. Boggs*, 4 Penne. 95, 53 Atl. 360. **Ind.** *Greer v. State*, 50 Ind. 267, 19 Am. Rep. 709. **Ky.**—*Moss v. Com.*, 138 Ky. 404, 128 S. W. 296, word need not be used in the accusatory part, however. **Miss.**—*Pitman v. State*, 65 So. 123; *Wittaker v. State*, 45 So. 145; *Jordan v. State*, 87 Miss. 179, 39 So. 895.

[a] A statute dispensing with necessity for averments of "presumptions

of law" does not dispense with the necessity of averring that the killing was unlawful. *Henry v. State*, 33 Ala. 389.

[b] An information charging that the defendant did unlawfully and feloniously commit rape upon a female person under the age of sixteen years by carnally knowing her, giving her name and age, is sufficient, although the word "unlawfully" does not appear in immediate connection with the word "carnally" as it appears in the statute. *State v. Hoskinson*, 78 Kan. 183, 96 Pac. 138.

61. **U. S.**—*Davis v. Utah Ter.*, 151 U. S. 262, 14 Sup. Ct. 328, 38 L. ed. 153. **Ark.**—*Carroll v. State*, 71 Ark. 403, 75 S. W. 471. **Ill.**—*People v. St. Clair*, 244 Ill. 444, 91 N. E. 573. **Ind.** *Franklin v. State*, 108 Ind. 47, 8 N. E. 695; *State v. Maddox*, 85 Ind. 585; *Greer v. State*, 50 Ind. 267, 19 Am. Rep. 709; *Weinzorplin v. State*, 7 Blackf. 186; *Jerry v. State*, 1 Blackf. 395. **Ky.**—*Aikman v. Com.*, 13 Ky. L. Rep. 894, 18 S. W. 937. **Mich.**—*Kopke v. People*, 43 Mich. 41, 4 N. W. 551. **Vt.**—*State v. Vermont Cent. R. Co.*, 27 Vt. 103, 110.

[a] The words "wrongfully and injuriously" are sufficient. *State v. Vermont Central R. Co.*, 27 Vt. 103, 110.

[b] The omission of word "unlawful" from information is not material where it concludes contrary to the form of the statute, and against the peace, as this is an equivalent allegation. *People v. Stricker*, 170 Ill. App. 485; *State v. Tibbetts*, 86 Me. 189, 29 Atl. 979.

[c] In Delaware, it would seem that words of equivalent meaning and import are not sufficient. See *State v. Boggs*, 4 Penne. (Del.) 95, 53 Atl. 360, feloniously.

that the acts charged were "feloniously" done,⁶² or it must show that the injury inflicted was unlawfully done.⁶³ But where the statute creating the offense does not use the word "unlawfully" in defining the offense,⁶⁴ or the statute defining the offense uses such term unnecessarily because it describes a crime existing at common law, and manifestly illegal,⁶⁵ there is no necessity for alleging the acts were done unlawfully. Neither is it necessary to add the term "unlawfully" to the description of the alleged offense where enough is shown to make it manifestly illegal.⁶⁶

If the act charged is not unlawful or was not unlawfully done, an allegation that it is unlawful or was unlawfully done does not render it indictable.⁶⁷ Charging an act as being "unlawfully" done where there is no necessity therefor does not vitiate the indictment.⁶⁸

(V.) **Wrongfulness.**—Though a statute provides that the "wrongfully" doing of a designated act constitutes an offense, it is not necessary in charging the same that that word be used, where it is charged as "feloniously" done.⁶⁹

(VI.) **Wilfulness.**—The word "wilfully" need not be used when it forms no part of the description of the offense,⁷⁰ or where⁷¹ the wilful-

62. **U. S.**—*Davis v. Utah Ter.*, 151 U. S. 262, 14 Sup. Ct. 328, 38 L. ed. 153. **Ark.**—*Carroll v. State*, 71 Ark. 403, 75 S. W. 471. **Ill.**—*Fairlee v. People*, 11 Ill. 1. **Ind.**—*Franklin v. State*, 108 Ind. 47, 8 N. E. 695; *State v. Maddox*, 85 Ind. 585; *Greer v. State*, 50 Ind. 267, 19 Am. Rep. 709; *Weinzorflin v. State*, 7 Blackf. 186. **Ky.**—*Aikman v. Com.*, 13 Ky. L. Rep. 894, 18 S. W. 937. **Mich.**—*Kopke v. People*, 43 Mich. 41, 4 N. W. 551. **N. C.**—*Franklin v. State*, 108 Ind. 47, 8 N. E. 695.

[a] "Felonious" is a word of more force and comprehensive meaning than the word "unlawful" and an act cannot be feloniously done and not be unlawful. *Franklin v. State*, 108 Ind. 47, 8 N. E. 695.

As to necessity for charging that acts constituting the offense were feloniously done, see *supra*, IX, E, 5, c. (1).

63. *State v. Maddox*, 85 Ind. 585.

64. **U. S.**—*United States v. Thompson*, 6 McLean 56, 28 Fed. Cas. No. 16,490. **Ark.**—*State v. Murphy*, 43 Ark. 178. **Idaho.**—*State v. Keller*, 8 Idaho 699, 70 Pac. 1051. **Ill.**—*People v. Stricker*, 258 Ill. 618, 102 N. E. 216; *Ferry v. People*, 14 Ill. 496. **Ind.**—*State v. Maddox*, 85 Ind. 585. **Ia.**—*State v. Capps*, 4 Iowa 502. **Mo.**—*State v. Miller*, 190 Mo. 449, 89 S. W. 377, use of word "feloniously" includes charge of "unlawfulness." **N. H.**—*State v. Concord Railroad*, 59 N. H. 85.

65. *State v. Maddox*, 85 Ind. 585; *State v. Hodges*, 55 Md. 127, 137.

[a] If the act as stated be illegal, it is unnecessary to say it is unlawful. *State v. Robbins*, 66 Me. 324.

66. *State v. Maddox*, 85 Ind. 585.

[a] "When the fact laid in an indictment appears to be unlawful, it is not necessary to allege it to have been unlawfully done, unless it be part of the description of the offence, as defined by statute." *Com. v. Twitchell*, 4 Cush. (Mass.) 74.

[b] If the act charged be illegal, it is superfluous to allege it was unlawful. *McCaskill v. State*, 55 Fla. 117, 45 So. 843.

67. **Fla.**—*McCaskill v. State*, 55 Fla. 117, 45 So. 843. **Ia.**—*State v. Chicago, etc. R. Co.*, 63 Iowa 598, 19 N. W. 299. **Me.**—*State v. Robbins*, 66 Me. 324.

68. *State v. Robbins*, 66 Me. 324, may be rejected as surplusage.

69. *Stark v. State*, 19 Okla. Crim. 177, 135 Pac. 441; *Rasberry v. State*, 4 Okla. Crim. 613, 103 Pac. 865.

[a] An allegation that the acts done were feloniously committed necessarily includes the idea that they were unlawfully done. *Rasberry v. State*, 4 Okla. Crim. 613, 103 Pac. 865.

70. *State v. Tolls*, 139 La. 711, 58 So. 518.

71. *People v. Davenport*, 13 Cal. App. 632, 110 Pac. 318.

ness of the act is implied from the doing thereof. If, however, wilfulness is made by the definition of the offense an essential element thereof, the word "wilfully" should be used,⁷² though even in such case, words of similar import may be resorted to.⁷³

It is not objectionable that the word "wilfully" is omitted from the accusatory or presenting part of the indictment, if it appears in the charging part thereof.⁷⁴

72. See the following: **U. S.**—United States *v. Edwards*, 43 Fed. 67. **Ark.**—Casey *v. State*, 53 Ark. 334, 14 S. W. 90. **Cal.**—People *v. Turner*, 122 Cal. 679, 55 Pac. 685. **Fla.**—Savannah, etc. R. Co. *v. State*, 23 Fla. 579, 3 So. 204. **Ky.**—Com. *v. Taylor*, 96 Ky. 394, 29 S. W. 138. **Me.**—State *v. Hussey*, 60 Me. 410, 11 Am. Rep. 209. **Mo.**—State *v. Day*, 100 Mo. 242, 12 S. W. 365. **N. H.**—State *v. Gove*, 34 N. H. 510. **Tenn.**—Morrow *v. State*, 10 Humph. 120. **Wis.**—State *v. Delue*, 2 Penn. 204, omission of word "wilfully" where part of statutory definition of offense fatal.

73. **Ark.**—Blevins *v. State*, 85 Ark. 195, 107 S. W. 393 (that testimony "was feloniously, falsely and corruptly" given indicates that it was wilfully and intentionally given); Aubrey *v. State*, 62 Ark. 368, 35 S. W. 792, "deliberation and premeditation indicate wilfulness." **Ill.**—Glover *v. People*, 204 Ill. 170, 68 N. E. 464, malicious in an indictment for libel indicates wilfulness. **Ky.**—Flint *v. Com.*, 81 Ky. 186, 23 S. W. 346. **La.**—State *v. McDaniel*, 45 La. Ann. 686, 12 So. 751, "feloniously" instead of "wilfully" sufficient. **Me.**—State *v. Robbins*, 66 Me. 324, sufficient to use "maliciously." **Pa.**—Com. *v. Carson*, 166 Pa. 179, 30 Atl. 985.

[a] But see: **Del.**—State *v. Boggs*, 4 Penne. 95, 53 Atl. 360, wherein the indictment alleged that the defendant "feloniously" broke into a building in the day time, etc., and it was contended that it should have been charged that such act was done "wilfully" and "unlawfully," and the court quashed the indictment. **Ky.**—Com. *v. Taylor*, 93 Ky. 394, 29 S. W. 138, holding that where the statute uses the words "wilfully and knowingly," it was not sufficient to use, "unlawfully and feloniously," the word, "feloniously" not having the legal significance of either the word wilfully or knowingly, or of both. **N. H.**—State *v. Gove*, 34 N. H. 510, holding that where a statute makes

criminal the doing of an act "wilfully and maliciously," it is not sufficient for the indictment to charge that it was done "feloniously and unlawfully," or "feloniously, unlawfully, and wilfully," these terms not being synonymous, equivalent, of the same legal import, or substantially the same as "wilfully and maliciously." **Wis.**—State *v. Delue*, 2 Pinn. 204, holding that under a statute which defines the offense to consist in "wilfully and maliciously killing," etc., it is not sufficient to charge that the killing was "felonious, unlawful, and malicious."

[b] An indictment charging (1) that the killing was "unlawfully, feloniously, of his malice aforethought, with deliberation and premeditation" charges the killing was wilful. *Harding v. State*, 94 Ark. 65, 126 S. W. 90. (2) So also an indictment charging that an assault to have been made "unlawfully and feloniously, with malice aforethought, and after premeditation and deliberation, charges that it was "wilful." *Halley v. State*, 108 Ark. 224, 158 S. W. 121.

[c] The word "recklessly" (1) is not the same as "wilfully," however. *Thurman v. State*, 2 Okla. Crim. 718, 104 Pac. 67, wherein the court said: "The word 'wilfully' when employed in penal statutes is used as a synonymous term with 'intentionally' or 'designedly,' or 'without lawful excuse.' The word 'recklessly' means heedlessly, carelessly, or indifferent to consequences, without contemplating or intending those consequences. As a general rule, there is a wide difference between intentional acts and those results which are the consequences of recklessness or carelessness." (2) Nor is the word "unlawfully," used alone, sufficient where the word "wilfully" is required. *State v. Hussey*, 60 Me. 410, 11 Am. Rep. 206; *Morrow v. State*, 10 Humph. (Tenn.) 120.

74. *Toler v. Com.*, 94 Ky. 529, 23 S. W. 347.

(VII.) **Malice.**—If certain acts are punishable as an offense only when maliciously done, the indictment or information must charge such acts to have been done “maliciously” or with malice.⁷⁵ To charge that the acts were done unlawfully,⁷⁶ or wilfully,⁷⁷ is not sufficient; the word “feloniously” embraces the word “maliciously,” however, and an indictment using the same is sufficient, though omitting the word “maliciously.”⁷⁸ But an act need not be charged to have been maliciously done, when malice is not an element of the offense.⁷⁹

A clerical error in spelling the word “maliciously” in charging that the act was so done will not vitiate the pleading.⁸⁰

d. **Averments as to Time.**—(I.) **In General.**—At common law, it is necessary to lay some definite time in the indictment or information when the offense was committed,⁸¹ by alleging the day, month and

75. See the following: **Ia.**—State *v. Lightfoot*, 107 Iowa 344, 78 N. W. 41. **Minn.**—United States *v. Gideon*, 1 Minn. 292. **Miss.**—Maxwell *v. State*, 68 Miss. 339, 8 So. 546; Sarah *v. State*, 28 Miss. 267, 61 Am. Dec. 544; Jesse *v. State*, 28 Miss. 100. **N. H.**—State *v. Gove*, 34 N. H. 510. **Tenn.**—Boyd *v. State*, 2 Humph. 39. **Wis.**—State *v. Delue*, 2 Pinn. 204, omission of word “maliciously” fatal, where essential element of offense.

[a] This is the rule, whether the offense exists at common law, or be one of statutory creation. Sarah *v. State*, 28 Miss. 267, 61 Am. Dec. 544.

[b] Where a malicious intent is an essential ingredient in the constitution of an offense created by statute, although it is not so made by the express words of the act, an indictment under it will be invalid, unless it contain an averment of the malicious intent. Sarah *v. State*, 28 Miss. 267, 61 Am. Dec. 544.

76. State *v. Lightfoot*, 107 Iowa 344, 78 N. W. 41; State *v. Gove*, 34 N. H. 510.

77. **Ia.**—State *v. Lightfoot*, 107 Iowa 344, 78 N. W. 41. **Ky.**—Herrold *v. Com.*, 9 Ky. L. Rep. 677, 6 S. W. 121. **N. H.**—State *v. Gove*, 34 N. H. 510.

78. Aikman *v. Com.*, 13 Ky. L. Rep. 894, 18 S. W. 937, holding that in an indictment for arson it was sufficient to charge that the offense was done “feloniously and wilfully.” And see Johns *v. State*, 88 Neb. 145, 129 N. W. 247 (holding that an information charging the defendant with wilfully, feloniously, burglariously and feloniously breaking and entering into a slaughter house, with the intent to take, steal,

and carry away certain described personal property, is equivalent to charging the defendant with malice, and the absence of the word “maliciously” did not vitiate it); Whitman *v. State*, 17 Neb. 224, 22 N. W. 459, holding the words “unlawfully, wilfully, purposely and feloniously” sufficient though “maliciously” was omitted. But see State *v. Gove*, 34 N. H. 510, holding that use of “feloniously and unlawfully” or “feloniously, unlawfully and wilfully” insufficient where statute uses words “wilfully and maliciously.”

79. State *v. Tibbetts*, 86 Me. 189, 29 Atl. 979.

80. Johns *v. State*, 88 Neb. 145, 129 N. W. 247, use of “i” for “m” in “maliciously,” making it read “ialiciously” immaterial error.

81. **Ala.**—O’Brien *v. State*, 91 Ala. 25, 8 So. 560; Bibb *v. State*, 83 Ala. 84, 3 So. 711; Roberts *v. State*, 19 Ala. 526; Shelton *v. State*, 1 Stew. & P. 208; State *v. Beckwith*, 1 Stew. 318, 18 Am. Dec. 46. **Fla.**—Thorp *v. Smith*, 64 Fla. 154, 59 So. 493; Morgan *v. State*, 51 Fla. 76, 40 So. 828, 7 Am. & Eng. Ann. Cas. 772; Whatley *v. State*, 46 Fla. 145, 35 So. 89; Morgan *v. State*, 13 Fla. 671. **Ga.**—Jordan *v. State*, 119 Ga. 443, 46 S. E. 679; Tipton *v. State*, 119 Ga. 394, 46 S. E. 456; Adkins *v. State*, 103 Ga. 5, 29 S. E. 432; Bailey *v. State*, 65 Ga. 410; Norris *v. Thompson* (Ga. App.), 83 S. E. 806. **Ill.**—People *v. Weinstein*, 255 Ill. 539, 29 N. E. 589; People *v. Gray*, 251 Ill. 431, 96 N. E. 268. **Ind.**—Clark *v. State*, 34 Ind. 436; Hampton *v. State*, 8 Ind. 336; State *v. Offutt*, 4 Blackf. 355. **Me.**—State *v. Withee*, 87 Me. 402, 32 Atl. 1013; State *v. Beaton*, 79 Me. 314, 9

year in which the offense was committed,⁸² though where the exact time is not material or does not enter into the nature of the offense, the offense may be charged to have been committed on any day previous to the finding of the indictment, within the period for which there could be a prosecution,⁸³ and proof of the commission of the offense

Atl. 728; *State v. Fenlason*, 79 Me. 117, 8 Atl. 459; *State v. Day*, 74 Me. 220. **Mass.**—*Com. v. Maloney*, 112 Mass. 283. **Miss.**—*State v. Glennen*, 93 Miss. 836, 47 So. 550. **Mo.**—*Erwen v. State*, 13 Mo. 307. **N. H.**—*State v. Pratt*, 14 N. H. 456. **N. C.**—*State v. Sexton*, 10 N. C. 184, 14 Am. Dec. 584; *State v. Roach*, 3 N. C. 352, 2 Am. Dec. 626. **Okla.**—*Castleberry v. State*, 10 Okla. Crim. 504, 139 Pac. 132; *Star v. State*, 9 Okla. Crim. 210, 131 Pac. 542. **Pa.** *Com. v. Nailor*, 29 Pa. Super. 271. **Phil. Isl.**—*United States v. Smith*, 3 Phil. Isl. 20; *United States v. De Castro*, 2 Phil. Isl. 616. **S. C.**—*State v. Brown*, 24 S. C. 224. **Tex.**—*Barnes v. State*, 42 Tex. Cr. 297, 59 S. W. 882, 96 Am. St. Rep. 801; *State v. Eubanks*, 41 Tex. 291; *State v. Johnson*, 32 Tex. 96; *State v. Slack*, 30 Tex. 354. **Vt.**—*State v. G. S.*, 1 Tyler 295, 4 Am. Dec. 724. **W. Va.** *State v. Bruce*, 26 W. Va. 153.

[a] **Reason of Rule.**—This was necessary at common law in order to ascertain on what day a forfeiture, if any, occurred. *People v. Kelly*, 6 Cal. 210.

[b] **Illinois.**—The common law rule has not been changed. *People v. Weinstein*, 255 Ill. 530, 99 N. E. 589.

[c] **Averring Date Under Scilicet.** The offense may be alleged to have been committed "heretofore, to wit, on a specified date." *State v. Murphy*, 55 Vt. 547. As to use of *videlicet* generally, see *supra*, IX, C, 3, e.

82. *Morgan v. State*, 51 Fla. 76, 40 So. 828, 7 Am. & Eng. Ann. Cas. 772; *Werner v. State*, 51 Ga. 426.

[a] **Merely to allege (1) the year**, without the day or month is insufficient. *Braddy v. State*, 102 Ga. 568, 27 S. E. 670; *Phillips v. State*, 102 Ga. 591, 27 S. E. 699; *Bailey v. State*, 65 Ga. 410. (2) Such an indictment is subject to special demurrer. *Bailey v. State*, 65 Ga. 410. (3) And a defendant who makes his demand in due time is entitled to have an indictment perfect as to the essential elements of time and place. *Adkins v. State*, 103 Ga. 5, 29 S. E. 432; *Harris v. State*, 58

Ga. 332; *Newsome v. State*, 2 Ga. App. 392, 58 S. E. 672. (4) The same rule would seem to apply to a written accusation preferred against one who violates a municipal ordinance, where the charter of the municipality requires that a written accusation shall be preferred and that the offense must be fully stated. *Norris v. Thomson* (Ga. App.), 83 S. E. 866.

[b] If the day and month are given (1) and the year is omitted, it is insufficient. *Tipton v. State*, 119 Ga. 304, 46 S. E. 436. (2) Hence a charge that an offense was committed on "the 3rd of June instant" is insufficient. *Com. v. Hutton*, 5 Gray (Mass.) 89, 66 Am. Dec. 352.

[c] This rule is not changed by the statute of jeofails. *Morgan v. State*, 51 Fla. 76, 40 So. 828, 7 Am. & Eng. Ann. Cas. 772.

83. **U. S.**—*Hardy v. United States*, 186 U. S. 224, 22 Sup. Ct. 889, 46 L. ed. 1137; *Hume v. United States*, 118 Fed. 689, 55 C. C. A. 407. **Ala.**—*Kelly v. State*, 171 Ala. 44, 55 So. 141; *Bibb v. State*, 83 Ala. 84, 3 So. 711; *McDade v. State*, 20 Ala. 81; *Shelton v. State*, 1 Stew. & P. 208. **Ark.**—*Threadgill v. State*, 99 Ark. 126, 137 S. W. 814. **Cal.** *People v. Anthony*, 20 Cal. App. 586, 129 Pac. 968. **Fla.**—*Thorp v. Smith*, 64 Fla. 154, 59 So. 193; *Alexander v. State*, 40 Fla. 213, 23 So. 536. **Ill.** *People v. Gray*, 251 Ill. 431, 96 N. E. 268; *Kettles v. People*, 221 Ill. 221, 77 N. E. 472; *People v. Rudorf*, 149 Ill. App. 215. **Ind.**—*Boos v. State*, 181 Ind. 562, 105 N. E. 117; *Hoffman v. State*, 176 Ind. 284, 95 N. E. 1002; *Clark v. State*, 34 Ind. 436. **Ia.**—*State v. Anderson*, 140 Iowa 445, 118 N. W. 772. **Ky.**—*McCreary v. Com.*, 158 Ky. 612, 165 S. W. 981; *May v. Com.*, 153 Ky. 141, 154 S. W. 1074; *Bailey v. Com.*, 130 Ky. 301, 113 S. W. 140; *Com. v. Alfred*, 4 Dana 496. **Mich.** *People v. Nichols*, 159 Mich. 355, 124 N. W. 25. **Minn.**—*State ex rel. Rinne v. Gerber*, 111 Minn. 132, 126 N. W. 482. **Miss.**—*Oliver v. State*, 5 How. 14. **N. J.**—*State v. Lyon*, 45 N. J. L. 272.

on any day prior to that laid is proper.⁸⁴ Exceptions to this rule are where a day is averred by way of describing a written instrument, record, or the like, or where time enters into the nature of the offense. In these cases, the allegations and proof must correspond.⁸⁵

Statutes in most of the states now dispense with this particularity of statement by providing that unless time is an essential ingredient of the offense, the indictment shall not be quashed, or deemed invalid for want of an allegation as to the time of the commission of the offense,⁸⁶ or for an imperfect statement of the time,⁸⁷ or dispense with averments as to the exact time of the commission of the offense, unless time is a material element thereof,⁸⁸ it being sufficient under such

N. Y.—*People v. Van Santvoord*, 9 Cow. 655. **Okla.**—*Castleberry v. State*, 10 Okla. Crim. 504, 139 Pac. 132; *Star v. State*, 9 Okla. Crim. 210, 131 Pac. 542. **Pa.**—*Com. v. Nailor*, 29 Pa. Super. Ct. 271, 275; *Com. v. Bennett*, 1 Pitts. 261. **S. D.**—*State v. Sysinger*, 25 S. D. 110, 125 N. W. 879, Ann. Cas. 1912 B, 997. **Tex.**—*Sanders v. State*, 70 Tex. Crim. 209, 156 S. W. 927; *Irby v. State* (Tex. Crim.), 155 S. W. 543. **Va.**—*Mullins v. Com.*, 115 Va. 945, 79 S. E. 324. **Wash.**—*State v. Myrberg*, 56 Wash. 384, 105 Pac. 622.

[a] To allege the commission of an offense within period of limitations for such offense, though no specific date be alleged is sufficient, though the better way is to allege a specific date when such allegation is possible. *State v. Myrberg*, 56 Wash. 384, 105 Pac. 622.

84. U. S.—*Hardy v. United States*, 186 U. S. 224, 22 Sup. Ct. 889, 46 L. ed. 1137; *Ledbetter v. United States*, 170 U. S. 606, 18 Sup. Ct. 774, 42 L. ed. 1162; *Matthews v. United States*, 161 U. S. 500, 16 Sup. Ct. 640, 40 L. ed. 786, *affirming* 68 Fed. 880; *United States v. Aviles*, 222 Fed. 474; *United States v. Howard*, 132 Fed. 325. **Ala.**—*Shelton v. State*, 1 Stew. & P. 208. **Fla.**—*Morgan v. State*, 51 Fla. 76, 40 So. 828, 7 Am. & Eng. Ann. Cas. 772; *Alexander v. State*, 40 Fla. 213, 23 So. 536. **Ga.**—*Bryant v. State*, 97 Ga. 103, 25 S. E. 450; *Cripe v. State*, 4 Ga. App. 832, 62 S. E. 567; *Wheeler v. State*, 4 Ga. App. 325, 61 S. E. 409. **Ill.**—*People v. Weinstein*, 255 Ill. 530, 99 N. E. 589; *Dreyer v. People*, 176 Ill. 590, 52 N. E. 372. **Ind.**—*Clark v. State*, 34 Ind. 436. **N. H.**—*State v. Caverly*, 51 N. H. 446. **Pa.**—*Com. v. Nailor*, 29 Pa. Super. 271. **S. C.**—*State v. Branham*, 13 S. C. 389. **Va.**—*Rhodes v. Com.*, 78 Va. 692.

[a] Ordinarily, upon the trial of a cause the proof need not show the commission of the offense at the time alleged by the indictment. It is only in particular cases that the law so requires. At the trial, the averment of a date means any time within the statute of limitations, and the subsequent reference "then and there" means at any such time and at any place within the county. In determining the sufficiency of the indictment, however, the court is to take the date alleged as the true one. *Dreyer v. People*, 176 Ill. 590, 52 N. E. 372.

85. State v. Caverly, 51 N. H. 446; *Com. v. Nailor*, 29 Pa. Super. 271. See *infra*, IX, E, 5, d, (II).

86. See generally the statutes and the following: **Ind.**—*Boos v. State*, 181 Ind. 562, 105 N. E. 117; *Armstrong v. State*, 145 Ind. 609, 43 N. E. 866; *Fleming v. State*, 136 Ind. 149, 36 N. E. 154; *Myers v. State*, 121 Ind. 15, 22 N. E. 781; *State v. McDonald*, 106 Ind. 233, 6 N. E. 607; *Murphy v. State*, 106 Ind. 96, 5 N. E. 767, 55 Am. Rep. 722; *State v. Sammons*, 95 Ind. 22. **Mo.**—*State v. Fields*, 170 S. W. 1132. **N. J.**—*Ketline v. State*, 59 N. J. L. 468, 36 Atl. 1033. **Wyo.**—*White v. State*, 148 Pac. 342.

See also *infra*, IX, E, 5, d, (VI), (C).

87. Ind.—*Boos v. State*, 181 Ind. 562, 105 N. E. 117; *Shell v. State*, 148 Ind. 50, 47 N. E. 144; *Fleming v. State*, 136 Ind. 149, 36 N. E. 154; *State v. Sammons*, 95 Ind. 22 (on 15th day of March A. D. 1888—); *Emperly v. State*, 13 Ind. App. 393, 41 N. E. 840. **Ia.**—*State v. Perry*, 117 Iowa 463, 91 N. W. 765. **Mo.**—*State v. Steel*, 184 Mo. App. 350, 171 S. W. 10. **Wyo.**—*White v. State*, 148 Pac. 342.

88. See generally the statutes, and the following: **Ala.**—Code, 1907, §7139;

statutes to allege generally that the offense was committed at a time within the period of the statute of limitations and prior to the finding of the indictment, without naming a day certain,⁸⁹ or to allege a day certain, which is prior to the finding of the indictment and within the statute of limitations.⁹⁰ Even without such a statute, however, averments as to the time of the commission of the offense have been held merely formal where time is not of the essence of the offense and errors therein are cured by statutes providing that formal defects, not tending to the prejudice of the defendant shall not vitiate the indictment,⁹¹ and the statement of an imperfect date, or the omission to state a particular date is immaterial under the latter statutes.⁹²

Kelly v. State, 171 Ala. 44, 55 So. 141; *Kimbell v. State*, 165 Ala. 118, 51 So. 16; *Wesson v. State*, 109 Ala. 61, 19 So. 514; *O'Brien v. State*, 91 Ala. 25, 8 So. 560; *Diggs v. State*, 49 Ala. 311. **Ariz.**—*Ortega v. Territory*, 8 Ariz. 37, 68 Pac. 544. **Ark.**—*James v. State*, 110 Ark. 170, 160 S. W. 1090; *Threadgill v. State*, 99 Ark. 126, 137 S. W. 814; *Grayson v. State*, 92 Ark. 413, 123 S. W. 388; *Conrand v. State*, 65 Ark. 559, 47 S. W. 628; *Marquardt v. State*, 52 Ark. 269, 12 S. W. 562. **Cal.**—*Penal Code*, §955; *People v. Shelton*, 68 Cal. 434, 9 Pac. 457; *People v. Kelly*, 6 Cal. 210; *People v. Hill*, 20 Cal. App. 407, 129 Pac. 475. **Ind.**—*Cotner v. State*, 173 Ind. 168, 89 N. E. 847; *Terrell v. State*, 165 Ind. 443, 75 N. E. 884, 112 Am. St. Rep. 244, 2 L. R. A. (N. S.) 251; *Shell v. State*, 148 Ind. 50, 47 N. E. 144; *Armstrong v. State*, 145 Ind. 609, 43 N. E. 866; *Myers v. State*, 121 Ind. 15, 22 N. E. 781. **Mo.**—*State v. Fields*, 170 S. W. 1132; *State v. Hurley*, 242 Mo. 452, 146 S. W. 1154. **Okla.**—*Castleberry v. State*, 10 Okla. Crim. 504, 139 Pac. 132; *Star v. State*, 9 Okla. Crim. 210, 131 Pac. 542. **Ore.**—*State v. Goddard*, 69 Ore. 73, 133 Pac. 90, 138 Pac. 243. **S. D.**—*State v. McDonald*, 16 S. D. 78, 91 N. W. 447. **W. Va.**—*State v. Bruce*, 26 W. Va. 153. **Wyo.**—*White v. State*, 118 Pac. 342.

[a] Where time is not of the essence of the offense, the omission thereof does not render the indictment invalid under such statutes. *State v. Fields* (Mo.), 170 S. W. 1132.

[b] Such statute makes the averment of time necessary when it is an element which affects the guilt or innocence of the party charged, or the grade of the crime, at least within the period before the finding of the in-

dictment when the crime could be prosecuted. *Bibb v. State*, 83 Ala. 84, 3 So. 711.

89. Ala.—*O'Brien v. State*, 91 Ala. 25, 8 So. 560; *Thompson v. State*, 25 Ala. 41. **Ariz.**—*Ortega v. Territory*, 8 Ariz. 37, 68 Pac. 544. **Ark.**—*Threadgill v. State*, 99 Ark. 126, 137 S. W. 814; *Grayson v. State*, 92 Ark. 413, 123 S. W. 388, 19 Am. & Eng. Ann. Cas. 929. **Cal.**—*People v. Kelly*, 6 Cal. 210; *People v. Anthony*, 20 Cal. App. 586, 129 Pac. 968. **Okla.**—*Castleberry v. State*, 10 Okla. Crim. 504, 139 Pac. 132; *Star v. State*, 9 Okla. Crim. 210, 131 Pac. 542.

[a] But see *Clark v. State*, 34 Ind. 436, holding that such statute does not dispense with the necessity of naming a day certain.

[b] **Better Practice.**—"As a matter of good pleading, even where time is not a material ingredient, it is better that an indictment or information should allege a particular day as the time when the offense was committed." *Castleberry v. State*, 10 Okla. Crim. 504, 139 Pac. 132.

90. Ark.—*Threadgill v. State*, 99 Ark. 126, 137 S. W. 814; *Grayson v. State*, 92 Ark. 413, 123 S. W. 388. **Cal.**—*People v. Littlefield*, 5 Cal. 355. **Ga.**—*Hollingsworth v. State*, 7 Ga. App. 16, 65 S. E. 1077; *Johnson v. State*, 7 Ga. App. 48, 66 S. E. 148; *Cripe v. State*, 4 Ga. App. 832, 62 S. E. 567. **Okla.**—*Castleberry v. State*, 10 Okla. Crim. 504, 139 Pac. 132.

91. Hume v. United States, 118 Fed. 689, 55 C. C. A. 407; *United States v. Howard*, 132 Fed. 325.

92. Hardy v. United States, 186 U. S. 224, 22 Sup. Ct. 889, 46 L. ed. 1137; *Peters v. United States*, 176 U. S. 684, 20 Sup. Ct. 1026, 44 L. ed. 638, *affirm-*

(II.) **When Time Must Be Alleged.**—If the time of the commission of the offense is not an element of the offense and there is no statute of limitations against the prosecution of the offense, time is not material and need not be alleged at all.⁹³ But when the time becomes material as constituting an element of the crime,⁹⁴ such as when the acts charged are criminal only when done on a particular day or date,⁹⁵ or a day is averred by way of describing a written instrument or record,⁹⁶ or the time stated in the indictment is to be proved by matter of record, as in perjury,⁹⁷ the date must be accurately alleged.

If certain acts are criminal only when committed within a certain period of the year, the averment of a date within such period is suffi-

ing 94 Fed. 127, 36 C. C. A. 105; *Ledbetter v. United States*, 179 U. S. 606, 18 Sup. Ct. 774, 42 L. ed. 1162; *Matt-hews v. United States*, 161 U. S. 509, 16 Sup. Ct. 640, 40 L. ed. 786; *Hume v. United States*, 118 Fed. 689, 55 C. C. A. 407; *MacDaniel v. United States*, 87 Fed. 324, 30 C. C. A. 670; *United States v. Howard*, 132 Fed. 325; *White v. State (Wyo.)*, 148 Pac. 342.

93. *State v. Hurley*, 242 Mo. 452, 146 S. W. 1154. See *supra*, IX, E, 5, d, (I).

94. See the statutes or the various states and the following: **Fla.**—*Thorp v. Smith*, 64 Fla. 154, 59 So. 193. **Ga.**—*Bryant v. State*, 97 Ga. 103, 25 S. E. 450; *Jackson v. State*, 64 Ga. 344; *Werner v. State*, 51 Ga. 426. **Ind.**—*Effinger v. State*, 47 Ind. 235; *State v. Land*, 42 Ind. 311; *Clark v. State*, 34 Ind. 436. **N. H.**—*State v. Caverly*, 51 N. H. 446.

[a] A marked distinction exists in the matter of pleading dates between those cases where a particular day is of the essence of the offense, as if a statute should punish an offense committed on Sunday because of an appreciation of its sabbatical quality, or some like relation of the day to the offense, and those cases in which the day is relatively of no materiality. *United States v. Howard*, 132 Fed. 325, 335.

[b] In cases where indictments are found for selling intoxicating liquors on Sundays, or on the day state elections are held, time is a material ingredient of the crime charged, and the indictment must charge, and the proof show, that those crimes were committed on Sundays or on election days, as the case may be. *State v. Goddard*, 69 Ore. 73, 133 Pac. 90, 138 Pac. 243. See the title "**Intoxicating Liquors.**"

[c] A defendant cannot make the

precise date charged in the indictment material by giving notice that his defense includes an alibi. *State v. Goddard*, 69 Ore. 73, 133 Pac. 90, 138 Pac. 243.

[d] Where a statute defines "night-time," it is sufficient to allege, generally, that an offense was committed in the night time, without stating the particular hour of the night. *Com. v. Williams*, 2 Cush. (Mass.) 582.

95. *Gilbert v. State*, 81 Ind. 565; *Greene v. State*, 79 Ind. 537; *Ruge v. State*, 62 Ind. 388; *State v. Land*, 42 Ind. 311.

[a] **Sabbath Breaking.**—In order to charge offense of Sabbath breaking, the indictment must show that the offense was committed on some Sabbath. *Marquardt v. State*, 52 Ark. 269, 12 S. W. 562; *Robinson v. State*, 38 Ark. 548.

[b] Though the day of the month be erroneously alleged, an indictment charging the sale of liquor on Sunday is sufficient. *Marquardt v. State*, 52 Ark. 269, 12 S. W. 562; *Hoover v. State*, 56 Md. 584.

96. *Bryant v. State*, 97 Ga. 103, 25 S. E. 450; *Jackson v. State*, 64 Ga. 344; *Werner v. State*, 51 Ga. 426.

[a] When a copy of the record or the other paper containing the oath alleged to be false is set out in *habeas corpus* in the indictment, and the alleged originals are produced, bearing a different date, the variance is held fatal on the ground that the record or paper offered is not identified as the one intended. *State v. Perry*, 117 Iowa 463, 91 N. W. 765.

97. **U. S.**—*United States v. McNeal*, 1 Gall. 387, 26 Fed. Cas. No. 10,700; *United States v. Bowman*, 2 Wash. C. C. 328, 24 Fed. Cas. No. 14,081. **Ia.**—*State*

cient without an express allegation of the commission of the acts within that period.⁹⁸

(III.) **Showing Commission Prior to Finding of Indictment or Filing of Information.**—The time of the commission of the offense must be shown to be prior to the return of the indictment or filing of the information,⁹⁹ though a distinct allegation to this effect is not necessary where the facts alleged show the offense was committed prior thereto,¹ even though the date alleged be the date of the filing of the indictment.²

The statement of a date subsequent to the finding of the indictment does not vitiate the indictment under the modern statutes where the other facts show that it relates to a past transaction and the insertion of the date was a clerical error,³ and especially is this true where it is afterward charged in express terms the offense was committed before the finding of the indictment.⁴

(IV.) **Showing Commission Within Period of Limitations.**⁵—The indictment or information must allege the commission of the offense within

v. Perry, 117 Iowa 463, 91 N. W. 765. **Va.**—*Rhodes v. Com.*, 78 Va. 692.

See generally the title "**Perjury**."

98. *State v. Norton*, 45 Vt. 258.

99. **Cal.**—*People v. Moody*, 69 Cal. 184, 10 Pac. 392. **Fla.**—*Dickson v. State*, 20 Fla. 800. **Ga.**—*Adkins v. State*, 103 Ga. 5, 29 S. E. 432; *Askew v. State*, 3 Ga. App. 79, 59 S. E. 311; *Tharpe v. State*, 2 Ga. App. 649, 58 S. E. 1070. **Ind.**—*Terrell v. State*, 165 Ind. 443, 75 N. E. 884, 112 Am. St. Rep. 244, 2 L. R. A. (N. S.) 251. **Ia.**—*State v. Smith*, 88 Iowa 178, 55 N. W. 198. **Neb.**—*McKay v. State*, 91 Neb. 281, 135 N. W. 1024, Ann. Cas. 1913 B, 1034. **N. C.**—*State v. Woodman*, 10 N. C. 384. **Phil. Isl.**—*United States v. Navarro*, 3 Phil. Isl. 143. **Tex.**—*Warner v. State* (Tex. Crim.), 167 S. W. 1109; *Cowan v. State* (Tex. Crim.), 155 S. W. 214; *Petty v. State*, 60 Tex. Crim. 64, 131 S. W. 215; *Joel v. State*, 28 Tex. 642; *Goddard v. State*, 14 Tex. App. 566; *Williams v. State*, 12 Tex. App. 226.

[a] **An indictment against an accessory** must, in addition to other matter, contain all the averments that would be necessary in an indictment against the principal; and it must therefore allege that the crime of the principal was committed before it was found and presented. *People v. Thrall*, 50 Cal. 415.

1. **Ark.**—*Threadgill v. State*, 99 Ark. 126, 137 S. W. 814; *Grayson v. State*, 92 Ark. 113, 123 S. W. 388. **Cal.**—*People v. Miller*, 137 Cal. 642, 70 Pac. 735;

People v. Lafuente, 6 Cal. 202. **Ky.**—*Gratz v. Com.*, 96 Ky. 162, 28 S. W. 159. **Nev.**—*State v. O'Connor*, 11 Nev. 416. **N. H.**—*State v. Pratt*, 14 N. H. 456.

[a] **Especially under a statute** providing an indictment is not insufficient if it can be understood therefrom that the offense was committed prior to the finding of the indictment. *People v. Squires*, 99 Cal. 327, 33 Pac. 1092.

2. *State v. Pratt*, 14 N. H. 456.

[a] But where the date alleged is the same day as the finding or filing and the facts do not otherwise show which occurred first, there must be a specific allegation that the commission of the offense was prior. But see *Martin v. State*, 72 Tex. Crim. 454, 162 S. W. 1145; *Joel v. State*, 28 Tex. 642, 644; *Kennedy v. State*, 22 Tex. App. 693, 3 S. W. 480; *Williams v. State*, 12 Tex. App. 226; *Gill v. State* (Tex. App.), 20 S. W. 578; *Andrews v. State* (Tex. App.), 14 S. W. 1014.

3. **Ind.**—*State v. Patterson*, 116 Ind. 45, 10 N. E. 289, 18 N. E. 270. **Mo.**—*State v. McDaniel*, 94 Mo. 301, 7 S. W. 634 (wherein infliction of wound caused death one year prior to infliction thereof); *State v. Burnett*, 81 Mo. 119. **N. C.**—*State v. Woodman*, 10 N. C. 384. **Tenn.**—*Stevenson v. State*, 5 Baxt. 681. **Tex.**—*Fields v. State* (Tex. Crim.), 151 S. W. 1051.

4. *Jones v. Com.*, 1 Bush (Ky.) 34, 89 Am. Dec. 604.

5. See generally the title "**Limitation of Actions**."

the statutory period of limitation, if there is a statute applicable to such offense;⁶ but there is no necessity for an express allegation to that effect where the date alleged shows the offense to have been committed within the statutory period.⁷ If the indictment charges two dates, one within and the other beyond the period of limitations, the indictment is bad.⁸ If an exception is relied upon to prevent the bar of the statute of limitations, it must be alleged.⁹

(V.) **Offense Recently Created or Increased.** — Where the prohibitory statute is recent, it is usual to allege expressly that the offense was committed after the making of the statute; but where the statute is ancient, this is not usual, and does not seem to be in any case necessary.¹⁰ If the offense has been created by statute within the period of limitations for that class of offenses,¹¹ or if the grade of the offense has been changed from a misdemeanor to a felony within the period

6. **Ark.**—*James v. State*, 110 Ark. 170, 160 S. W. 1090. **Cal.**—*People v. Miller*, 12 Cal. 291. **Ga.**—*Tipton v. State*, 119 Ga. 304, 46 S. E. 436; *Hollingsworth v. State*, 7 Ga. App. 16, 65 S. E. 1077; *Johnson v. State*, 7 Ga. App. 48, 66 S. E. 148. **Ill.**—*People v. Hallberg*, 259 Ill. 502, 102 N. E. 1005; *Lamkin v. People*, 94 Ill. 501; *People v. Jackson*, 178 Ill. App. 355; *People v. Weiss*, 168 Ill. App. 502. **Ind.**—*Terrill v. State*, 165 Ind. 443, 75 N. E. 884, 112 Am. St. Rep. 244, 2 L. R. A. (N. S.) 251; *State v. Rust*, 8 Blackf. 195. **Ky.**—*Combs v. Com.*, 119 Ky. 836, 84 S. W. 753; *Tatum v. Com.*, 22 Ky. L. Rep. 927, 59 S. W. 32; *Com. v. Taylor Co.*, 19 Ky. L. Rep. 1334, 43 S. W. 399. **Mo.** *State v. Magrath*, 19 Mo. 678. **N. H.** *State v. Ingalls*, 59 N. H. 88; *State v. Havey*, 58 N. H. 377. **Pa.**—*Com. v. Bartilson*, 85 Pa. 482. **Tenn.**—*State v. Shaw*, 113 Tenn. 536, 82 S. W. 480. **Tex.** *Bradford v. State*, 62 Tex. Crim. 424, 138 S. W. 119; *Reed v. State* (Tex. App.), 13 S. W. 865; *Blake v. State*, 3 Tex. App. 149. **W. Va.**—*State v. Bruce*, 26 W. Va. 153.

[a] It sufficiently appears that the offense charged was committed within the statutory period, where it is averred that on the — day of —, in the year 19—, “and within the last two years.” *Mullins v. Com.*, 115 Va. 945, 79 S. E. 324.

7. *Com. v. C. B. Cook Co.*, 102 Ky. 288, 43 S. W. 400; *Stamper v. Com.*, 102 Ky. 33, 42 S. W. 915.

8. *Combs v. Com.*, 119 Ky. 836, 84 S. W. 753.

9. *Hollingsworth v. State*, 7 Ga. App. 16, 65 S. E. 1077; *Lamkin v. Peo-*

ple, 94 Ill. 501; *Garrison v. People*, 87 Ill. 96; *Church v. People*, 10 Ill. App. 222; and generally *supra*, IX, D, 7.

10. *Hodnett v. State*, 66 Miss. 26, 5 So. 518; *State v. Sam*, 13 N. C. 567; *State v. Chandler*, 9 N. C. 439; *State v. Ballard*, 6 N. C. 186.

[a] But clearly, the rule never went farther than to embrace cases arising on statutes, which do in themselves designate a particular day after their passage, after which the act prohibited shall be an offense. It never did extend to statutes making the act criminal immediately after the passage of the statute, or the general period at which all statutes go into operation. *State v. Sam*, 13 N. C. 567.

11. **Ala.**—*Kelly v. State*, 171 Ala. 44, 55 So. 141; *Marks v. State*, 159 Ala. 71, 48 So. 864, 133 Am. St. Rep. 20; *Glenn v. State*, 158 Ala. 44, 48 So. 505; *Dentler v. State*, 112 Ala. 70, 20 So. 592; *Bibb v. State*, 83 Ala. 84, 3 So. 711. **Fla.**—*Thorp v. Smith*, 64 Fla. 154, 59 So. 193, indictment charged acts in July when statute penalizing acts passed in August of same year. **Idaho.** *People v. Williams*, 1 Idaho 85. **Miss.** See *Hodnett v. State*, 66 Miss. 26, 5 So. 518.

[a] Where time is a material element of the offense and the offense is alleged as of a date when there was no statute penalizing the acts, the date specifically alleged must be taken to be the true date when the alleged acts were committed and the prosecution cannot prove commission of the offense at another date. *Thorp v. Smith*, 64 Fla. 154, 59 So. 193.

of limitations for that class of offenses,¹² or the punishment for an offense has been materially changed within such period,¹³ time is an ingredient of the offense and it must be shown that the offense was committed after the change in the law. This may be done by alleging the date of the commission of the offense as of a date subsequent to the enactment of the statute,¹⁴ or by stating that the prohibited acts were committed subsequent to the passage of the law.¹⁵ For the same reason, an indictment charging the commission of the offense within a period beginning at a date anterior to the enactment of the statute and extending beyond the date of its passage must aver the commission of the offense subsequent to the enactment of the statute,¹⁶ though there is authority that an indictment averring the commission of the offense over a period commencing anterior to the enactment of the statute is good without such an averment.¹⁷

(VI.) **How Made.**—(A.) **IN GENERAL.**—Neither the use of the letters, "A. D."¹⁸ nor the omission thereof or of the words "of our Lord" affects the validity of the indictment.¹⁹ The time of the commission

12. *Bibb v. State*, 83 Ala. 84, 3 So. 711; *Harris v. State*, 60 Ala. 50.

[a] "When a statute makes an act punishable from and after a given day, the time of the commission of the act is an essential ingredient of the offense, to the extent that it must be alleged to have been after such day. So if a statute changes the punishment of an existing offence by imposing a severer penalty, with a clause saving from its operation offences already committed, the allegation of time is material. The nature and character of the offence, and the penalty affixed to it depend upon the time when the act charged is committed. If in such a case an indictment alleges the act to have been committed before the passage of the statute enlarging the penalty, the offence charged and the punishment annexed to it are different from the offence and punishment, if the act is committed after such time. They are different offences, and an allegation of one is not sustained by proof of the other. Otherwise the defendant would be exposed to a greater punishment upon a trial than he would be upon a plea of guilty." *Com. v. Maloney*, 112 Mass. 283.

13. *State v. Wise*, 66 N. C. 120.

14. *Byrd v. State* (Tex. Crim.), 151 S. W. 1068.

15. *Kelly v. State*, 171 Ala. 44, 55 So. 141; *Glenn v. State*, 158 Ala. 44, 48 So. 505; *McIntyre v. State*, 55 Ala. 167.

16. Ala.—*Kelly v. State*, 171 Ala. 44,

55 So. 141; *Glenn v. State*, 158 Ala. 44, 48 So. 505. Fla.—*Thorp v. Smith*, 59 Fla. 154, 59 So. 193. Ind.—*Collins v. State*, 58 Ind. 5. Ky.—*Com. v. International Harvester Co.*, 147 Ky. 735, 145 S. W. 400, 131 Ky. 551, 115 S. W. 703, 133 Am. St. Rep. 256; *Com. v. Aultmire*, 22 Ky. L. Rep. 511, 58 S. W. 369.

[a] That the offense is alleged to be continuous between the dates alleged does not cure the defect. *Collins v. State*, 58 Ind. 5.

17. Mass.—*Com. v. Peretz*, 212 Mass. 253, 98 N. E. 1054, Ann. Cas. 1913D, 484. Mont.—*Territory v. Ashby*, 2 Mont. 89, wherein indictment charged married man with living in adultery with a woman other than his wife at a period commencing before enactment of statute. Neb.—*State v. Way*, 5 Neb. 283. Va.—*Nichols & Janes Case*, 7 Gratt. 589.

[a] An indictment alleging illegal selling of intoxicants on a specified day and on divers days and times between that day and the day of finding the indictment is not bad though offenses committed during portion of time was committed under one act and during remainder under another act imposing different penalties. *State v. Pillsbury*, 47 Me. 449.

18. *Com. v. Clark*, 4 Cush. (Mass.) 596.

As to use of abbreviations, see *supra*, IX, C, 2, d.

19. U. S.—*Peters v. United States*, 94 Fed. 127, 36 C. C. A. 105. *Gr.*

of the offense may be stated in Arabic numerals instead of words.²⁰ The attendant facts and conditions which make the act charged an indictable offense must be charged to have existed at the time of the commission of the offense and not at the time of the finding of the indictment.²¹

(B.) ON OR ABOUT A SPECIFIED TIME.—Because of the certainty required at common law an allegation that the offense was committed "on or about" a day named, is by the common law insufficient,²² though upon this proposition there are authorities to the contrary.²³

Under statutes providing that where time is not an ingredient of the offense, that no indictment shall be deemed invalid for stating the time imperfectly,²⁴ or providing that the time need only appear to have been prior to the finding of the indictment and within the statute of limitations,²⁵ or dispensing with averments as to the time of the

Hall v. State, 3 Ga. 18. **Ind.**—Engleman v. State, 2 Ind. 91, 52 Am. Dec. 494. **Ky.**—Com. v. Traylor, 20 Ky. L. Rep. 97, 45 S. W. 356, 450. **Me.** State v. Bartlett, 47 Me. 388, wherein statute defined year. **Mass.**—Com. v. Sullivan, 14 Gray 97; Com. v. Doran, 14 Gray 37. But see Com. v. McLoon, 5 Gray 91, 66 Am. Dec. 354. **Miss.** Smith v. State, 58 Miss. 867. **N. C.** State v. Lane, 26 N. C. 113; State v. Haddock, 9 N. C. 461; State v. Dickens, 2 N. C. 406. **Vt.**—State v. Clark, 44 Vt. 636.

Contra, Whitesides v. People, 1 Ill. 21.

[a] Omission of word "year" is immaterial. State v. Munch, 22 Minn. 67.

20. **Ala.**—Diggs v. State, 49 Ala. 311; State v. Raiford, 7 Port. 101. **Conn.** Rawson v. State, 19 Conn. 292. **Ind.** Hizer v. State, 12 Ind. 330; Hampton v. State, 8 Ind. 336. **La.**—State v. Egan, 10 La. Ann. 698. **N. J.**—Johnson v. State, 26 N. J. L. 313. **N. C.**—State v. Dickens, 2 N. C. 406. **Va.**—Cady v. Com., 10 Gratt. 776; Lazier v. Com., 10 Gratt. 708.

As to use of numerals, see *supra*, IX, C, 2, d.

21. Sikes v. State, 67 Ala. 77.

22. **U. S.**—United States v. Winslow, 3 Sawy. 337, 28 Fed. Cas. No. 16,742; United States v. Crittenden, Hempst. 61, 25 Fed. Cas. No. 14,890. **Fla.**—Morgan v. State, 51 Fla. 76, 40 So. 828, 7 Am. & Eng. Ann. Cas. 772; Morgan v. State, 13 Fla. 671. **Me.**—State v. Baker, 34 Me. 52. **N. M.**—Territory v. Armijo, 7 N. M. 571, 37 Pac. 1117. **Ohio.**—Barnhouse v. State, 31 Ohio St. 39. **Vt.**

State v. O'Keefe, 41 Vt. 691. **Wis.** Mauzaumaunekah v. United States, 1 Pinn. 124.

[a] The reason is that when so alleged it does not clearly appear that the offense is not barred by the statute of limitations and defendant cannot properly prepare his defense. **U. S.** United States v. Winslow, 3 Sawy. 337, 28 Fed. Cas. No. 16,742. **Me.**—State v. Baker, 34 Me. 52. **N. M.**—Terr. v. Armijo, 7 N. M. 571, 37 Pac. 1117.

23. **Ark.**—State v. Hoover, 31 Ark. 676. **Conn.**—State v. Tuller, 34 Conn. 280; Rawson v. State, 19 Conn. 291, words "on or about," surplusage. **Kan.** State v. Harp, 31 Kan. 496, 3 Pac. 432. **La.**—State v. McCarthy, 44 La. Ann. 323, 10 So. 673. **Can.**—Rex v. Hurst, 13 Manitoba 584, 22 Can. L. T. 68.

[a] The phrase "on or about" merely qualifies the particular day of the month, not the month. United States v. Aviles, 222 Fed. 474; United States v. McKinley, 127 Fed. 168, 169.

24. **U. S.**—United States v. Aviles, 222 Fed. 474; United States v. McKinley, 127 Fed. 168. **Neb.**—Rema v. State, 52 Neb. 375, 72 N. W. 474; Brown v. State, 16 Neb. 658, 21 N. W. 454. **Wyo.** Gustavson v. State, 10 Wyo. 300, 68 Pac. 1006.

See *supra*, IX, E, 5, d, (I).

25. Shell v. State, 148 Ind. 50, 47 N. E. 144; Farrell v. State, 45 Ind. 371; Hampton v. State, 8 Ind. 336; State v. New, 36 Ind. App. 521, 76 N. E. 181; State v. Hill, 35 Tex. 348; State v. McMickle, 34 Tex. 676; State v. Elliott, 34 Tex. 148; Morris v. State, 47 Tex. Crim. 420, 83 S. W. 1126. See *supra*, IX, E, 5, d, (I).

commission of an offense,²⁶ the offense may be charged to have been committed "on or about" a specified date,²⁷ the words "or about" being treated as surplusage.²⁸ Such an allegation is not sufficient, however, where time is an essential element of the offense.²⁹

(C.) IMPOSSIBLE, FUTURE OR BLANK DATES.—At common law an indictment or information charging the commission of the offense at a future or impossible date,³⁰ as where the commission of the offense is charged

26. See *supra*, IX, E, 5, d, (I).

27. **U. S.**—United States *v.* McKinley, 127 Fed. 168 (under Oregon statute); United States *v.* Conrad, 59 Fed. 458. **Ark.**—Pruitt *v.* State, 11 S. W. 822; State *v.* Hoover, 31 Ark. 676. **Cal.**—People *v.* Miller, 137 Cal. 642, 70 Pac. 735; People *v.* Littlefield, 5 Cal. 355; People *v.* Sheffield, 9 Cal. App. 130, 98 Pac. 67. **Ind.**—Farrell *v.* State, 45 Ind. 371; Hampton *v.* State, 8 Ind. 336; State *v.* John, 124 Iowa 230, 100 N. W. 193; State *v.* Perry, 117 Iowa 463, 91 N. W. 765; State *v.* Cokely, 4 Iowa 477. **Kan.**—State *v.* Harp, 31 Kan. 496, 3 Pac. 432. **La.**—State *v.* Daniels, 122 La. 261, 47 So. 599. **Mont.**—State *v.* Thompson, 10 Mont. 549, 27 Pac. 349. **Neb.**—Rema *v.* State, 52 Neb. 375, 72 N. W. 474. **S. D.**—State *v.* McDonald, 16 S. D. 78, 91 N. W. 447. **Tex.**—Davis *v.* State (Tex. Crim.), 151 S. W. 313. **Utah.**—State *v.* Woolsey, 19 Utah 486, 57 Pac. 426. **Wash.**—State *v.* Williams, 13 Wash. 335, 43 Pac. 15. **Wyo.**—Gustavson *v.* State, 10 Wyo. 300, 320, 68 Pac. 1006.

[a] Where it is alleged that the defendant committed an offense "on or about" a certain date, the prosecution may show the commission of the offense at any time within the period subsequent to the date when the law creating the offense became effective and within the statute of limitations. People *v.* Hill, 20 Cal. App. 407, 129 Pac. 475.

28. **U. S.**—United States *v.* McKinley, 127 Fed. 168. **Ark.**—State *v.* Hoover, 31 Ark. 676, 677. **Ind.**—Farrell *v.* State, 45 Ind. 371; Hardebeck *v.* State, 10 Ind. 459; Hampton *v.* State, 8 Ind. 336. **Kan.**—State *v.* Harp, 31 Kan. 496, 3 Pac. 432.

29. Ruge *v.* State, 62 Ind. 388; Effinger *v.* State, 47 Ind. 235, 256; State *v.* Land, 42 Ind. 311; Clark *v.* State, 34 Ind. 436.

[a] An indictment for violation of a Sunday law alleging commission of

acts "on or about" a specified date, said date being the first day of the week commonly called Sunday is insufficient. State *v.* Land, 42 Ind. 311. See also Farrell *v.* State, 45 Ind. 371, and the title "Sunday and Holidays."

Contra, Brown *v.* State, 16 Neb. 659, 21 N. W. 454.

30. **Ga.**—McGehee *v.* State, 26 Ala. 154. **Ill.**—People *v.* Weinstein, 255 Ill. 530, 99 N. E. 589; People *v.* Cline, 185 Ill. App. 206 (wherein offense was alleged to have occurred on Feb. 1, A. D. 191); People *v.* Jackson, 178 Ill. App. 355 (wherein offense was alleged on 2nd day of — 191); Spry L. Co. *v.* Hardin, 172 Ill. App. 86 (April 30, 19—); People *v.* Weiss, 168 Ill. App. 502, Aug. 4, 190—. **Ind.**—Murphy *v.* State, 106 Ind. 96, 5 N. E. 767, 55 Am. St. Rep. 722, 107 Ind. 598, 8 N. E. 158. **Ia.**—State *v.* Watters, 5 Iowa 507. **Me.**—State *v.* O'Donnell, 81 Me. 271, 17 Atl. 66. **Miss.**—Serpentine *v.* State, 1 How. 256. **Mo.**—Markley *v.* State, 10 Mo. 291. **N. C.**—State *v.* Sexton, 10 N. C. 184, 14 Am. Dec. 584. **Tenn.**—See State *v.* Shaw, 113 Tenn. 536, 82 S. W. 480. **Tex.**—Joel *v.* State, 28 Tex. 642; Blake *v.* State, 3 Tex. App. 149.

[a] Such an objection is not merely technical, but is substantial and fatal. Spry Lumb. Co. *v.* Hardin, 172 Ill. App. 86; People *v.* Weiss, 168 Ill. App. 502.

[b] Objection available for first time on appeal. Com. *v.* Doyle, 110 Mass. 103. As to objections, see *infra*, XIV.

[b] Illustrations.—(1) Such statements as to the time of commission of the offense as: one thousand, eight thousand, eight hundred and seventy-four (Robles *v.* State, 5 Tex. App. 346), (2) or A. D. one thousand nine and one and anterior to the presentment of this indictment (McCoy *v.* State, 43 Tex. Crim. 606, 68 S. W. 686), (3) or one thousand and thirty three (Serpentine *v.* State, 1 How. [Miss.] 256,

to be subsequent to the date at which the information was found,³¹ or at a date too remote in the past,³² or which lays one and the same offense on different days,³³ or on a day which makes the pleading repugnant to itself,³⁴ is fatally defective. But if the other averments of the indictment or information fix the time of the commission of the offense without reference to the time stated, the latter will be rejected as surplusage, and will not vitiate the indictment.³⁵

Even under the statutes providing that an imperfect statement as to the time of the commission of the offense, or the failure to state any time shall not be ground for quashing or setting aside the indictment, if the indictment charges the commission of the offense at an impossible date,³⁶ a date subsequent to the finding of the indictment or the filing of the complaint or information,³⁷ it is fatally defective

260) render the indictment fatally defective.

31. *Cal.*—*People v. Moody*, 69 Cal. 184, 10 Pac. 392. *Fla.*—*Dickson v. State*, 20 Fla. 800. *Ia.*—*State v. Smith*, 88 Iowa 178, 55 N. W. 198. *Mass.*—*Com. v. Doyle*, 110 Mass. 103. *Mo.*—*Markley v. State*, 10 Mo. 291, rule in Missouri now changed by virtue of express statutory provision. See *infra*, notes 43, 44. *N. H.*—*State v. Ingalls*, 59 N. H. 88; *State v. Pratt*, 14 N. H. 456. *N. C.*—*State v. Sexton*, 10 N. C. 184, 14 Am. Dec. 584. *Pa.*—*Com. v. Nailor*, 29 Pa. Super. 271, 274; *Penna. v. McKee*, Add. 33. *Tex.*—*State v. Davidson*, 36 Tex. 325; *Lee v. State*, 22 Tex. App. 547, 3 S. W. 89; *Goddard v. State*, 14 Tex. App. 566. *Vt.*—*State v. Litch*, 33 Vt. 67.

32. *Me.*—*State v. O'Donnell*, 81 Me. 271, 17 Atl. 66, in indictment found in May, 1881, charging offense May 15, 1807. *Miss.*—*Hodnett v. State*, 66 Miss. 26, 5 So. 518; *Serpentine v. State*, 1 How. 256, charging commission of offense Sept. 30, 1833. *Tex.*—*Blake v. State*, 3 Tex. App. 149, one thousand eight and seventy-five. *Vt.*—*State v. Litch*, 33 Vt. 67.

33. *State v. Pratt*, 14 N. H. 456.

34. *State v. Pratt*, 14 N. H. 456; *State v. Jones*, 8 N. J. L. 307.

[a] Where an indictment charges an offense on the 25th day of August, 1824, in the county of W., and the law creating the county of W. did not pass until the November following, the court will notice the discrepancy and quash the indictment. *State v. Jones*, 8 N. J. L. 307.

35. *State v. Patterson*, 116 Ind. 45,

10 N. E. 289, 18 N. E. 270; *State v. John*, 124 Iowa 230, 100 N. W. 193.

36. *Ark.*—*Hunter v. State*, 93 Ark. 275, 124 S. W. 1028, July 30, A. D. 14—. *Ill.*—*People v. Burgess*, 185 Ill. App. 205, Feb. 1, 191—. *Ind.*—*Boos v. State*, 181 Ind. 562, 105 N. E. 117 (December 14, 19012); *Terrell v. State*, 165 Ind. 443, 75 N. E. 884, 112 Am. St. Rep. 244, 2 L. R. A. (N. S.) 251 (July 12, 18903); *Murphy v. State*, 106 Ind. 96, 5 N. E. 767, 55 Am. Rep. 722 (Aug. 16, 1884); *State v. Windell*, 60 Ind. 300, won certain sum on Sept. 14, 1876 by betting on election held on Nov. 7, 1876. *Tex.*—*McGinsey v. State*, 60 Tex. Crim. 505, 132 S. W. 773 (February 29, 1910); *Stephens v. State*, 51 Tex. Crim. 406, 103 S. W. 904, June 31, 1906.

[a] Charging the commission of the offense on a specified day in the year 18903 does not charge the time imperfectly so as to come within the purview of such statutes. *Terrell v. State*, 165 Ind. 443, 75 N. E. 884, 112 Am. St. Rep. 244, 2 L. R. A. (N. S.) 251.

37. *Cal.*—*People v. Squires*, 99 Cal. 327, 33 Pac. 1092; *People v. Moody*, 69 Cal. 184, 10 Pac. 392; *People v. Larson*, 68 Cal. 19, 8 Pac. 517. *Ga.*—*Adkins v. State*, 103 Ga. 5, 29 S. E. 432. *Ill.*—*People v. Weinstein*, 255 Ill. 539, 99 N. E. 589. *Ind.*—*Terrell v. State*, 165 Ind. 443, 75 N. E. 884, 112 Am. St. Rep. 244, 2 L. R. A. (N. S.) 251 (indictment returned Sept. 12, 1903 charged offense on July 12, 18903); *Trout v. State*, 107 Ind. 578, 8 N. E. 618 (information filed Jan. 16, 1886, charging offense committed Oct. 21, 1886); *Murphy v. State*, 106 Ind. 96, 5 N. E. 767, 55 Am. Rep. 722; *Hutch-*

as the statutes are not applicable to such cases,³⁸ though upon motion in arrest of judgment such defect is not fatal and the error is disregarded under the statutes requiring the court to disregard technical errors not prejudicing the defendant's substantial rights.³⁹

Under the statutes providing that an indictment is good if it can be ascertained therefrom that the offense was committed prior to the finding of the indictment, though it alleges the commission of the offense at a future date, it is good where time is not an ingredient of the offense and its commission is alleged in the past tense,⁴⁰ or it is alleged in terms to have been committed prior to the finding of the indictment.⁴¹ So too, the averment of two dates, one of which is a future date, does

inson v. State, 62 Ind. 556; State v. Noland, 29 Ind. 212. **Ia.**—State v. Smith, 88 Iowa 178, 55 N. W. 198, indictment found Feb., 1891, charging offense committed Dec. 17, 1891. **Mass.** Com. v. Doyle, 110 Mass. 103. **Tenn.** State v. Shaw, 113 Tenn. 536, 82 S. W. 480, indictment found in Jan., 1904, charging offense in Mar. 1, 1904. **Tex.** Warner v. State (Tex. Crim.), 167 S. W. 1109; Petty v. State, 60 Tex. Crim. 64, 131 S. W. 215; Wright v. State (Tex. Crim.), 92 S. W. 256, wherein indictment found January 18, 1905, charged offense as being committed on Nov. 15, 1905. See also Hancy v. State, 52 Tex. Crim. 545, 107 S. W. 858.

[a] Though the offense is alleged to have been committed on a date after the finding of the bill, this cannot avail defendant after verdict. Spencer v. State, 123 Ga. 133, 51 S. E. 294.

[b] If a future date be alleged, the error is not cured by an order amending the record so as to show that the leave to file the information was given at a later date where there was no amendment of the information. People v. Weinstein, 255 Ill. 530, 99 N. E. 589.

[c] "At the trial the date averred means any time within the statute of limitations, but in determining the sufficiency of the indictment the date alleged must be taken as the true one." People v. Weinstein, 255 Ill. 530, 99 N. E. 589.

[d] Where true time of finding of indictment appears by signature and indorsement of foreman, the fact that it appears upon its face to have been found at a term of court prior to the date upon which it is alleged the offense was committed is an irregularity, not invalidating the indictment, nor authorizing its quashal. Kincaid v.

State, 14 Ga. App. 544, 81 S. E. 910. **38. Ind.**—Terrell v. State, 165 Ind. 443, 75 N. E. 884, 112 Am. St. Rep. 244, 2 L. R. A. (N. S.) 251. **Ia.**—State v. Smith, 88 Iowa 178, 55 N. W. 198. **Neb.**—McKay v. State, 90 Neb. 63, 132 N. W. 741, 91 Neb. 281, 135 N. W. 1024, Ann. Cas. 1913B, 1034.

39. Boos v. State, 181 Ind. 562, 105 N. E. 117 (wherein year charged was "19012"); **White v. State** (Wyo.), 148 Pac. 342, wherein year charged was 19013.

40. Ark.—Carothers v. State, 75 Ark. 574, 88 S. W. 585; **Conrand v. State**, 65 Ark. 559, 47 S. W. 628, indictment filed July 14, 1896, charged commission of offense on May 15, 1899. **Cal.** People v. Miller, 137 Cal. 642, 70 Pac. 735. **Ga.**—Conner v. State, 25 Ga. 515, 71 Am. Dec. 184. **Ind.**—State v. Patterson, 116 Ind. 45, 10 N. E. 289, 18 N. E. 270. **Ky.**—Com. v. Roberts, 145 Ky. 290, 140 S. W. 313; **Cornett v. Com.**, 134 Ky. 613, 121 S. W. 424, 21 Ann. Cas. 399; **Vowells v. Com.**, 84 Ky. 52; **Com. v. Miller**, 79 Ky. 451; **Williams v. Com.**, 13 Ky. L. Rep. 893, 18 S. W. 1024. **Ohio.**—State v. Mulford, 12 Ohio Dec. 724. **Tenn.**—Stevenson v. State, 5 Baxt. 681.

[a] **Reason.**—"To accuse one of a crime is to charge that it was committed prior to the accusation. The allegation as to the date of the commission of the offense was a clerical error, apparent on the face of the indictment, and was not calculated to and did not, mislead the defendant." **Conrand v. State**, 65 Ark. 559, 47 S. W. 628.

41. People v. Cuff, 122 Cal. 589, 55 Pac. 407; **People v. Dinsmore**, 102 Cal. 381, 36 Pac. 661.

not make the indictment bad, under statutes providing that the appellate court must disregard technical errors or defects which do not affect the substantial rights of the parties.⁴²

Statutes in some states expressly provide that the indictment shall not be invalid because alleging the commission of the offense at a future,⁴³ or impossible date.⁴⁴

Blank Date.—In the absence of statute, to charge the commission of the offense on a blank day, month and year renders the indictment fatally defective as it does not appear in such case that the offense was committed within the period of limitations.⁴⁵ The same is true where only the year is left blank,⁴⁶ or the day and month are left blank and the year alone is stated, where any part of the year alleged falls beyond the period of the statute of limitations applicable to the offense charged.⁴⁷ But if the month and year are stated and the day alone is left blank; and the day is not of the essence of the offense, the defect is not fatal if the year and month are within the statute of limitations.⁴⁸

Under the modern statutes, however, dispensing with averments as to the time of commission of the offense except where time is an

42. *State v. Brooks*, 85 Iowa 366, 52 N. W. 240 (wherein indictment gave two dates one of which was impossible); *State v. Woodman*, 10 N. C. 384 holding where two dates are alleged for the commission of the offense one of which is a future date, and one a date prior to the finding of the indictment, that the future date may be rejected as surplusage.

[a] **Statement of erroneous date in the caption** does not render indictment invalid, where a date prior to finding of indictment is stated in indictment. **Mass.**—*Com. v. Stone*, 3 Gray 453. **R. I.** *State v. Mowry*, 21 R. I. 376, 43 Atl. 871. **Wis.**—*State v. Emmett*, 23 Wis. 632.

43. *State v. Crawford*, 99 Mo. 74, 12 S. W. 354; *State v. McDaniel*, 94 Mo. 301, 7 S. W. 634; *State v. Burnett*, 81 Mo. 119, 121; *State v. Steel*, 184 Mo. App. 350, 171 S. W. 10.

44. *State v. Crawford*, 99 Mo. 74, 12 S. W. 354; *State v. McDaniel*, 94 Mo. 301, 7 S. W. 634; *State v. Burnett*, 81 Mo. 119, 121; *State v. Steel*, 184 Mo. App. 350, 171 S. W. 10.

45. *Roberts v. State*, 19 Ala. 526; *State v. Beckwith*, 1 Stew. (Ala.) 318, 18 Am. Dec. 46; *Cool v. Com.*, 94 Va. 799, 26 S. E. 411.

46. *State v. Kennedy*, 36 Vt. 563; *State v. G. S.*, 1 Tyler (Vt.) 295, 4 Am.

Dec. 724. See also *People v. Gregory*, 30 Mich. 371.

47. **Ala.**—*State v. Beckwith*, 1 Stew. 318, 18 Am. Dec. 46. **Ga.**—*Braddy v. State*, 102 Ga. 568, 27 S. E. 670. **N. C.** *State v. Roach*, 3 N. C. 352, 2 Am. Dec. 626.

[a] Where the year stated is within the period of limitations, the fact that the day and month are blank does not vitiate the indictment. **Kan.**—*State v. Brooks*, 33 Kan. 708, 7 Pac. 591; *State v. Barnett*, 3 Kan. 244, 250, 87 Am. Dec. 471. **Tenn.**—*State v. Gibbs*, 6 Baxt. 238, *overruling King v. State*, 3 Heisk. 148. **W. Va.**—*State v. Thompson*, 26 W. Va. 149.

48. **U. S.**—*Ledbetter v. United States*, 170 U. S. 606, 18 Sup. Ct. 774, 42 L. ed. 1162 (wherein offense was charged on ——— day of April, 1896); *United States v. Howard*, 132 Fed. 325; *United States v. Conrad*, 59 Fed. 458, wherein offense was charged on ——— day of July A. D. 1891. **Ky.**—*Vowells v. Com.*, 84 Ky. 52; *Jones v. Com.*, 1 Bush 34, 89 Am. Dec. 604. **Mo.**—*State v. Moore*, 203 Mo. 624, 102 S. W. 537. **N. J.**—*Ketline v. State*, 59 N. J. L. 468, 36 Atl. 1033. **Okla.**—*Cecil v. Territory*, 16 Okla. 197, 82 Pac. 654, 8 Am. & Eng. Ann. Cas. 457. **Tenn.**—*Wills v. State*, 3 Hensk. 141. **Tex.**—*State v. Eubanks*, 41 Tex. 291.

essential element of the offense,⁴⁹ or providing that it is sufficient to allege the commission of the offense prior to the time of the finding of the indictment,⁵⁰ the statement of a blank day, year and month,⁵¹ a blank day and month, and stating merely the year,⁵² or a blank year⁵³ does not render the indictment defective.

Amendments to correct such defects are elsewhere treated in this article.⁵⁴

(D.) WHERE SERIES OF ACTS CONSTITUTE THE OFFENSE. — Some offenses require a more extended allegation of the time within which they were committed than merely to state a particular date, as where a series of acts may enter into and constitute the offense.⁵⁵ Statutes sometimes provide in such case for an allegation of the commission of the acts or offense during a given period of time next before the finding of the indictment.⁵⁶ Ordinarily, however, all offenses involving a series of acts or continuous action and which may be continued from day to day, may be charged as committed upon one particular date and on divers other days between such date and another date.⁵⁷ It may charge

49. **Ind.**—Hoffman v. State, 176 Ind. 284, 95 N. E. 1002 (— day of July, 1908); Fleming v. State, 136 Ind. 149, 36 N. E. 154 (on the — day of — 189—); State v. McDonald, 106 Ind. 233, 6 N. E. 607; State v. Sammons, 95 Ind. 22, last two cases holding fact that year left in blank not fatal. **Kan.** State v. Brooks, 33 Kan. 708, 7 Pac. 591, day and month blank. **Ky.**—Tatum v. Com., 22 Ky. L. Rep. 927, 59 S. W. 32 (— day of —, 189—); Paynter v. Com., 21 Ky. L. Rep. 1562, 55 S. W. 687; Louisville, etc., R. Co. v. Com., 92 Ky. 114, 17 S. W. 274, blank day and month. **Mo.**—State v. Hurley, 242 Mo. 452, 146 S. W. 1154 (day blank); State v. Stumbo, 26 Mo. 306, year blank.

50. **Ark.**—Threadgill v. State, 99 Ark. 126, 137 S. W. 814 (— day of — 190—); Grayson v. State, 92 Ark. 413, 123 S. W. 388, 19 Am. & Eng. Ann. Cas. 929 (— day of — 19—); Louisville, etc. R. Co. v. Com., 92 Ky. 114, 17 S. W. 274; Paynter v. Com., 21 Ky. L. Rep. 1562, 55 S. W. 687.

51. **Ark.**—Threadgill v. State, 99 Ark. 126, 137 S. W. 814; Grayson v. State, 92 Ark. 413, 123 S. W. 388, 19 Am. & Eng. Ann. Cas. 929. **Ind.**—Fleming v. State, 136 Ind. 149, 36 N. E. 154. **Ky.**—Tatum v. Com., 22 Ky. L. Rep. 927, 59 S. W. 32.

52. Louisville, etc. R. Co. v. Com., 92 Ky. 114, 17 S. W. 274; Paynter v. Com., 21 Ky. L. Rep. 1562, 55 S. W. 687.

53. State v. McDonald, 106 Ind. 233,

6 N. E. 607; State v. Sammons, 95 Ind. 22; State v. Stumbo, 26 Mo. 306.

54. See *infra*, XII.

55. Com. v. Gardner, 7 Gray (Mass.) 494.

56. Mass. Rev. Laws, 1902, ch. 218, §32; Com. v. Peretz, 212 Mass. 253, 98 N. E. 1054, Ann. Cas. 1913D, 484, holding charge that offense was committed "during the three months next preceding the finding of this indictment" a proper mode of averment though the acts charged were not an offense at all times during that period.

57. **Conn.**—State v. Bosworth, 54 Conn. 1, 4 Atl. 248. **Ia.**—Our House No. 2 v. State, 4 Greene 172, unlawful sale of liquors. **Ky.**—South v. Com., 79 Ky. 493. **Me.**—State v. Cofren, 48 Me. 364. **Mass.**—Com. v. Chisholm, 103 Mass. 213; Com. v. Donnelly, 14 Gray 86, note; Com. v. Kingman, 14 Gray 85; Com. v. Langley, 14 Gray 21; Com. v. Snow, 14 Gray 20; Com. v. Keefe, 9 Gray 290; Com. v. Adams, 4 Gray 27; Com. v. Wood, 4 Gray 11; Com. v. Elwell, 1 Gray 463; Com. v. Tower, 8 Mete. 527; Com. v. Odlin, 23 Pick. 275; Com. v. Pray, 13 Pick. 359. **Neb.** State v. Way, 5 Neb. 283. **N. Y.**—People v. Adams, 17 Wend. 475. **N. D.** State v. Brown, 14 N. D. 529, 104 N. W. 1112.

[a] In an indictment for lewd and lascivious cohabitation where the offense is charged a day prior to the day when the statute went into effect, but as continuing to a day after the com-

the offense as having been committed by a series of acts done on different days named in the indictment, charging them to have been committed on a specified day named and divers other days between that day and some other day particularly named,⁵⁸ or as committed upon a particular day named, and divers days between that day and the finding of the indictment,⁵⁹ but such period of time must be clearly and definitely stated,⁶⁰ though if a particular date be alleged and the continuando be improperly alleged the indictment is not bad, as the continuando may be rejected as surplusage.⁶¹ However, the indictment must allege a particular day on which the offense was committed even if it be set out with a continuando,⁶² unless the act cannot be logically and correctly described as having been done on some particular day or upon some continuous days.⁶³

When a continuing offense is alleged to have been on a certain day and divers days and times between that and another day specified, the proof must be confined to the acts done within that time.⁶⁴

mencement of the act, the indictment is good. *Nichols & Janes' Case*, 7 Gratt. (Va.) 589.

58. *Com. v. Gardner*, 7 Gray (Mass.) 494.

59. *Me.*—*State v. Cofren*, 48 Me. 364. *Mass.*—*Com. v. McKenney*, 14 Gray 1; *Com. v. Langley*, 14 Gray 21; *Com. v. Gardner*, 7 Gray 494; *Com. v. Adams*, 4 Gray 27; *Com. v. Wood*, 4 Gray 11. *N. Y.*—*People v. Adams*, 17 Wend. 475. *N. D.*—*State v. Brown*, 14 N. D. 529, 104 N. W. 1112.

[a] The time of the finding of the indictment is taken to be the first day of the term of the court, where there is nothing on the record showing when the indictment was found. *Com. v. Wood*, 4 Gray (Mass.) 11, 15.

[b] If, in such case, the period named embraced a time when two different statutes were in force, the indictment is not bad as the averment "on divers other days," etc., may be rejected as surplusage. *State v. Dorr*, 82 Me. 212, 19 Atl. 171; *State v. Pillsbury*, 47 Me. 449.

60. To charge the commission of the offense on a particular day named and "on divers days since" is not sufficient except as to the day named. *Com. v. Gardner*, 7 Gray (Mass.) 494.

[a] To charge the commission on a specified day and on divers days and times between that day and "the day of the finding and presentment and filing of the indictment" is too indefinite as the day of finding and presentment is not necessarily, or by reasonable indictment, identical with the day of the

filing of the indictment. *Com. v. Adams*, 4 Gray (Mass.) 27.

61. *U. S.*—*United States v. La Coste*, 2 Mason 129, 26 Fed. Cas. No. 15,548. *Ga.*—*Cook v. State*, 11 Ga. 53, 56 Am. Dec. 410. *Mass.*—*Com. v. Gardner*, 7 Gray 494; *Com. v. Bryden*, 9 Mete. 137; *Com. v. Pray*, 13 Pick. 359. *N. H.*—*State v. Nichols*, 58 N. H. 41. *N. Y.*—*People v. Adams*, 17 Wend. 475. *Pa.*—*Com. v. Dingman*, 26 Pa. Super. 615. *Vt.*—*State v. Munger*, 15 Vt. 290. *Eng.*—*Rex v. Dixon*, 10 Mod. 335.

62. *State v. O'Donnell*, 81 Me. 271, 17 Atl. 66; *State v. Small*, 80 Me. 452, 14 Atl. 942; *State v. Beaton*, 79 Me. 314, 9 Atl. 728; *Wells v. Com.*, 12 Gray (Mass.) 326.

[a] To state the commission of an offense on sundry and divers days and times between the twenty-third day of September, A. D., 1885, and the thirtieth day of September, 1885, is insufficient. *State v. Beaton*, 79 Me. 314, 9 Atl. 728.

63. *State v. Auburn*, 86 Me. 276, 29 Atl. 1075.

[a] An indictment for neglect to open a highway within a specified period, need not allege the commission of the offense on a particular day, but may allege continuous neglect for the time within which the law required the opening of said highway. *State v. Auburn*, 86 Me. 276, 29 Atl. 1075.

64. *State v. Cofren*, 48 Me. 364; *Com. v. Gardner*, 7 Gray (Mass.) 494; *Com. v. Adams*, 4 Gray (Mass.) 27; *Com. v. Briggs*, 11 Mete. (Mass.) 573.

(VII.) **Reference as to Time.**—The time of the commission of the offense may be set forth by reference to a time previously stated,⁶⁵ such as by reference to the time set forth in a previous count,⁶⁶ and it is proper even to refer to the caption to supply the day and year.⁶⁷ If the time has been set forth in a prior part of the indictment it is generally sufficient to refer to it afterward by the words "then and there."⁶⁸

e. **Averments as to Place.**—(I.) **Necessity for Generally.**—Unless a statute dispenses with the necessity of alleging the place where the offense was committed, as it does in some states,⁶⁹ or provides that if the indictment contains no statement of the place where the offense was committed, it shall be considered as having been committed within the jurisdiction of the court,⁷⁰ the indictment must show affirmatively that the offense was committed within the jurisdiction of the court by alleging the place of commission.⁷¹ This is required in order to give

65. **Ind.**—State *v.* Schultz, 57 Ind. 19; State *v.* Paine, 1 Ind. 163. **Mass.**—Com. *v.* Crawford, 9 Gray 128. **N. Y.** Gill *v.* People, 3 Hun 187.

[a] **Omission of year** cannot be supplied by reference to date of verification. Com. *v.* Hutton, 5 Gray (Mass.) 89, 66 Am. Dec. 352.

66. Wills *v.* State, 8 Mo. 52; Morgan *v.* State, 31 Tex. Crim. 1, 18 S. W. 647.

67. **Ind.**—State *v.* Paine, 1 Ind. 163. **N. C.**—State *v.* Haddock, 9 N. C. 461. **Pa.**—Jacobs *v.* Com., 5 Serg. & R. 315.

Contra, State *v.* Hopkins, 7 Blackf. (Ind.) 494.

68. **U. S.**—United States *v.* Potter, 56 Fed. 83. **Ind.**—State *v.* Schultz, 57 Ind. 19. **Mass.**—Com. *v.* Robertson, 162 Mass. 90, 38 N. E. 25. **S. C.**—State *v.* Stewart, 26 S. C. 125, 1 S. E. 468. **Tex.** Caldwell *v.* State, 28 Tex. App. 566, 14 S. W. 122. **Vt.**—State *v.* Ferry, 61 Vt. 624, 18 Atl. 451.

See *infra*, IX, E, 5, e, (V).

69. **Ala.**—Kimbell *v.* State, 165 Ala. 118, 51 So. 16; Caldwell *v.* State, 146 Ala. 141, 41 So. 473 (where bigamous cohabitation occurred need not be alleged under such statute); Toole *v.* State, 89 Ala. 131, 8 So. 95; Sparks *v.* State, 59 Ala. 82. **Ga.**—Norris *v.* Thomson (Ga. App.), 83 S. E. 866. **La.**—State *v.* Ackerman, 51 La. Ann. 1213, 26 So. 80; State *v.* Wilson, 11 La. Ann. 163. **Mass.**—Com. *v.* Rogers, 181 Mass. 184, 63 N. E. 421. **Tenn.**—State *v.* Quartemus, 3 Heisk. 65; State *v.* Donaldson, 3 Heisk. 48; Williams *v.* State, 3 Heisk. 37; Wickham *v.* State, 7 Coldw. 525.

[a] Proof after argument begun is sufficient. Pond *v.* State, 55 Ala. 196.

[b] Some statutes, however, provide that the omission of the venue in the body of the indictment shall not vitiate it where it can be ascertained from the margin thereof that the offense was committed within the jurisdiction of the court. **Md.**—Wedge *v.* State, 12 Md. 232. **Mich.**—People *v.* Schultz, 85 Mich. 114, 48 N. W. 293. **Ohio.**—Stahl *v.* State, 11 Ohio C. C. 23, 5 Ohio C. D. 29.

70. Brassfield *v.* State, 55 Ark. 556, 18 S. W. 1040.

71. **Ariz.**—Territory *v.* Do, 1 Ariz. 507, 25 Pac. 472. **Cal.**—People *v.* Weber, 133 Cal. 623, 66 Pac. 38; People *v.* Wong Wang, 92 Cal. 277, 28 Pac. 270; People *v.* Craig, 59 Cal. 370; People *v.* O'Neil, 48 Cal. 257. **Fla.**—Connor *v.* State, 29 Fla. 455, 10 So. 891, 30 Am. St. Rep. 126. **Ga.**—Conley *v.* State, 83 Ga. 496, 10 S. E. 123; Norris *v.* Thomson (Ga. App.), 83 S. E. 866; Johnson *v.* State, 1 Ga. App. 195, 58 S. E. 265. **Ill.**—People *v.* Goodwin, 263 Ill. 99, 104 N. E. 1018. **Ind.**—Ford *v.* State, 7 Ind. App. 567, 35 N. E. 34. **Ia.**—State *v.* Rankin, 150 Iowa 701, 130 N. W. 732. **Kan.**—State *v.* Hinkle, 27 Kan. 308; Territory *v.* Freeman, 1 Kan. 491. **Ky.**—Com. *v.* Tobin, 140 Ky. 261, 130 S. W. 1116; Kennedy *v.* Com., 3 Bibb 490. **Miss.**—State *v.* Glennen, 93 Miss. 836, 47 So. 550. **Mo.**—State *v.* Walker, 14 Mo. 398. **Neb.**—Gaweka *v.* State, 94 Neb. 53, 142 N. W. 287; McCoy *v.* State, 22 Neb. 418, 35 N. W. 202. **N. H.**—State *v.* Cotton, 24 N. H. 143. **N. J.**—Halsey *v.* State, 4 N. J.

the prisoner the proper information in this respect,⁷² to show that the court assuming to try him has jurisdiction of such offenses committed in the place alleged,⁷³ and in order that the judgment rendered upon the indictment may be pleaded in bar to any second indictment for the same offense.⁷⁴

Statutes dispensing with such allegations have been upheld as a proper exercise of legislative power.⁷⁵ Even though unnecessary by statute, if the venue of the offense is alleged, the indictment is not defective.⁷⁶

Unless the residence of the defendant be an element of the offense, in which case it must be alleged,⁷⁷ it is immaterial as to fixing the venue and need not be alleged.⁷⁸

As to offenses committed upon the high seas⁷⁹ the indictment need

L. 324. **N. Y.**—*Crichton v. People*, 6 Park. Crim. 363. **Ohio**.—*Knight v. State*, 54 Ohio St. 365, 42 N. E. 995. **Phil. Isl.** *United States v. Destrito*, 23 Phil. Isl. 28; *United States v. De Castro*, 2 Phil. Isl. 616. **Tex.**—*Mohan v. State*, 42 Tex. Crim. 410, 60 S. W. 552; *State v. Eubanks*, 41 Tex. 291; *Field v. State*, 34 Tex. 39; *Vance v. State*, 32 Tex. 396; *Searcy v. State*, 4 Tex. 450. **W. Va.** *State v. Hobbs*, 37 W. Va. 812, 17 S. E. 380. **Can.**—*Campbell v. Walsh*, 40 N. Bruns. 186.

[a] Use of "at" instead of "in." To charge the commission of an offense "at" a certain county sufficiently charges the commission thereof "in" the designated county. **Ark.**—*Graham v. State*, 1 Ark. 171. **Cal.**—*People v. Lafuente*, 6 Cal. 202. **La.**—*State v. Nolan*, 8 Rob. 513. **Tex.**—*Augustine v. State*, 20 Tex. 450.

[b] An information charging the burglary of a railroad car, "said car and train, at the time aforesaid, being in the prosecution of its trip, and said Solano county, at said time, being a county through which said train passed in the course of its trip," does not allege that the offense occurred in Solano county or in the jurisdiction of the court. *People v. Webber*, 133 Cal. 623, 66 Pac. 38.

[c] There is no necessity for allegations as to place as to those descriptive or definitive portions of the indictment, whose office it is to so qualify or limit the object acted upon as to show it to be the proper subject of complaint, unless time or place is an element necessary to constitute it a proper subject, and the existence of this element would

be susceptible of question if not averred. *State v. Cook*, 38 Vt. 437.

[d] An indictment for conspiracy need only allege some overt act within the jurisdiction of the court. *Brown v. Elliott*, 225 U. S. 392, 401, 32 Sup. Ct. 812, 56 L. ed. 1136; *United States v. Aviles*, 222 Fed. 474. See generally the title "Conspiracy."

[e] It is as essential to an information that a proper venue be laid, as to a declaration or an indictment. *People v. Higgins*, 15 Ill. 110.

72. *State v. Wentworth*, 24 N. H. 196, 221.

73. **Ariz.**—*Territory v. Do*, 1 Ariz. 507, 25 Pac. 472. **Me.**—*State v. Landry*, 85 Me. 95, 25 Atl. 993; *State v. Bushey*, 84 Me. 459, 29 Atl. 940. **N. H.**—*State v. Wentworth*, 37 N. H. 196, 221; *State v. Cotton*, 24 N. H. 143.

74. *State v. Wentworth*, 37 N. H. 196, 221; *State v. Cotton*, 24 N. H. 143.

75. *Walker v. State*, 150 Ala. 87, 43 So. 188; *Coleman v. State*, 150 Ala. 64, 43 So. 715; *Jones v. State*, 136 Ala. 118, 34 So. 236; *Elam v. State*, 25 Ala. 53; *Noles v. State*, 24 Ala. 672; *State v. Quartemus*, 3 Heisk. (Tenn.) 65.

As to power of legislature generally to dispense with requirements of indictment, see *supra*, IX, A.

76. *Davis v. State*, 2 Ala. App. 200, 56 So. 844.

77. *Gourley v. State*, 8 Okla. Crim. 598, 129 Pac. 684, which was a prosecution for refusing to work upon township roads.

78. *Studstill v. State*, 7 Ga. 2, as the residence of defendant is immaterial as to fixing the venue.

79. *St. Clair v. United States*, 154

not show upon what part of the high seas the offense charged was committed.

(II.) **Manner of Alleging Place of Commission.**—(A.) **IN GENERAL.** The indictment must be certain to a reasonable extent as to the venue.⁸⁰ Notwithstanding a defective allegation of venue, under some statutes it is sufficient if it appears therefrom that the offense was committed within the territorial jurisdiction of the court.⁸¹ If a statute prescribes a form of alleging venue, it is sufficient to follow such statutory form,⁸² and an immaterial variance therefrom will not vitiate the indictment.⁸³ To aver the commission of the crime within the jurisdiction of the court is not sufficient.⁸⁴

An indictment or information uncertain,⁸⁵ or repugnant as to the county or other jurisdictional locality, of the commission of the offense, is bad.⁸⁶ If two places be previously named and afterwards a material

U. S. 134, 14 Sup. Ct. 1002, 38 L. ed. 936; *United States v. Gilbert*, 2 Sumn. 19, 86, 25 Fed. Cas. No. 15,204.

[a] "The reason of the common law for laying the venue so particularly in offenses on land does not in any manner apply to the offense on the high seas; for no jury ever did or could come from the visne or visinage on the high seas to try the cause; and no summons could issue for such a purpose." *St. Clair v. United States*, 154 U. S. 134, 14 Sup. Ct. 1002, 38 L. ed. 936.

[b] An averment that the offense was committed on the high seas within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular state, is sufficient to give jurisdiction to the federal courts. *St. Clair v. United States*, 154 U. S. 134, 14 Sup. Ct. 1002, 38 L. ed. 936; *United States v. Gilbert*, 2 Sumn. 19, 86, 25 Fed. Cas. No. 15,204.

80. *Philadelphia, etc. R. Co. v. State*, 20 Md. 157. See generally the title "**Venue.**"

[a] An indictment for killing of deer, in violation of law, alleging the place of killing to be "at a Gore, north of numbers two and three in range six, in said county of Franklin," is good. *State v. Libby*, 78 Me. 546, 7 Atl. 394.

[b] An information alleging that defendant, on the twenty-first day of March, "and before the filing of this information at the county and state aforesaid, did willfully and unlawfully," etc., is not insufficient because of the lack of a comma after the word "information." *People v. Kennedy*, 22 Cal. App. 29, 133 Pac. 25.

[c] The words, "in Swainboro, Georgia," used in a criminal accusation, are apt words to convey the meaning that the acts alleged occurred within the territorial limits of the municipal corporation bearing that name. *Mason v. State*, 1 Ga. App. 534, 58 S. E. 139.

81. **Ind.**—*State v. Schreiber*, 98 Ind. 184; *Long v. State*, 56 Ind. 133. **Ia.** *State v. Jacobs*, 75 Iowa 247, 39 N. W. 293. **Nev.**—*State v. Buralli*, 27 Nev. 41, 71 Pac. 532. **N. Y.**—*People v. Horton*, 62 Hun 610, 17 N. Y. Supp. 1. **Okla.**—*Flohr v. Territory*, 14 Okla. 477, 78 Pac. 565.

82. *State v. Winstrand*, 37 Iowa 110.

As to necessity of following statutory forms generally, see *supra*, IX, B.

83. *State v. Lillard*, 59 Iowa 479, 13 N. W. 637, wherein the use of the word "aforesaid" instead of "as aforesaid" following the repetition of the word county was held not material.

84. *State v. Carlson*, 39 Ore. 16, 62 Pac. 1616, 1119; *Early v. Com.*, 93 Va. 765, 24 S. E. 936.

85. If an indictment allege that an offense was committed either within the town of E. or the town of H. in the county of Penobscot, without indicating more specifically the particular spot, there would be an uncertainty, which is fatal. But if it allege that the acts constituting the offense were done on the Penobscot river, on a particular part of it, within the county, it is sufficiently certain. *State v. Roberts*, 26 Me. 263.

86. **Fla.**—*Connor v. State*, 29 Fla. 455, 482, 10 So. 891, 30 Am. St. Rep.

fact is only laid "then and there" the indictment is bad for uncertainty.⁸⁷

(B.) **AVERMENTS AS TO COUNTY.**—Except in the federal courts where the jurisdiction depends upon the district and state, and not upon the county,⁸⁸ an indictment must allege the commission of the offense within the county,⁸⁹ or parish,⁹⁰ without alleging the township,⁹¹ or the particular place within the county where the offense was committed.⁹²

If the court has general jurisdiction over the entire county, it is sufficient to allege its commission generally within the county,⁹³ but if the court has jurisdiction over a portion of the county only, a general averment as to its commission within the county is insufficient.⁹⁴ The failure to allege the name of the county in which the offense was committed is not material, if the offense is alleged to have been committed within a designated city or town, where the court takes judicial notice of the county in which such town is located,⁹⁵ but it is not necessary

126. **N. J.**—*State v. Jones*, 8 N. J. L. 397. **Tex.**—*Cain v. State*, 18 Tex. 391.

87. **Fla.**—*O'Connor v. State*, 29 Fla. 455, 10 So. 891, 30 Am. St. Rep. 120. **Me.**—*State v. Jackson*, 39 Me. 291; *State v. Roberts*, 26 Me. 263. **Mo.**—*State v. McCracken*, 20 Mo. 411. **Tex.**—*Cain v. State*, 18 Tex. 391.

See also *Bell v. Com.*, 8 Gratt. (Va.) 609.

88. *Considine v. United States*, 112 Fed. 342, 50 C. C. A. 272; *United States v. Wilson*, Baldw. 78, 28 Fed. Cas. No. 16,730.

89. **Fla.**—*McKinnie v. State*, 44 Fla. 143, 32 So. 786; *Robinson v. State*, 20 Fla. 804; *Cook v. State*, 29 Fla. 802. **Ga.**—*Conley v. State*, 83 Ga. 497, 10 S. E. 123; *Studstill v. State*, 7 Ga. 2. **Ind.**—*State v. Booke*, 83 Ind. 171. **Kan.**—*State v. Hinkle*, 27 Kan. 308. **N. Y.**—*Guston v. People*, 61 Barb. 35, 4 Laus. 487.

[a] This is what gives the court jurisdiction. *Studstill v. State*, 7 Ga. 2.

[b] To charge the commission of the offense in the "Second judicial district, Territory of Kansas," where it comprised several counties, is insufficient. *Territory v. Freeman*, 1 Kan. 491.

[c] **In England** (1) formerly it was necessary to allege both the county and the parish (*State v. Nolan*, 8 Rob. [La.] 513; *Reg. v. Beeghies*, C. & M. 543, 41 E. C. L. 236), (2) but as the jurors now come from the body of the county, there is no necessity for an al-

legation as to the parish. *Reg. v. Gompertz*, 9 Jur. 401, 14 L. J. M. C. 118.

90. *State v. Nolan*, 8 Rob. (La.) 513.

91. *State v. Warner*, 4 Ind. 604.

92. *State v. Warner*, 4 Ind. 604.

93. **Ariz.**—*Sharp v. Territory*, 13 Ariz. 416, 114 Pac. 974. **Ga.**—*Hall v. State*, 120 Ga. 142, 47 S. E. 519; *Conley v. State*, 83 Ga. 496, 10 S. E. 123; *Wingard v. State*, 13 Ga. 396; *Pines v. State* (16 Ga. App.), 83 S. E. 198; *Hall v. State*, 8 Ga. App. 747, 70 S. E. 211. **Ind.**—*State v. Schreiber*, 98 Ind. 184, in Bartholomew county, Indiana. **La.**—*State v. Nolan*, 8 Rob. 513. **Minn.**—*O'Connell v. State*, 6 Minn. 279. **Miss.**—*Handy v. State*, 63 Miss. 207, 56 Am. Rep. 805. **N. Y.**—*Wood v. People*, 1 Hun 381; *People v. Buddensieck*, 4 N. Y. Crim. 230, affirmed, 103 N. Y. 487, 9 N. E. 44, 57 Am. Rep. 766. **Ore.**—*State v. Carlson*, 39 Ore. 19, 62 Pac. 1016, 1119. **S. C.**—*State v. Moore*, 24 S. C. 150, 58 Am. Rep. 241. **S. D.**—*State v. Donaldson*, 12 S. D. 259, 81 N. W. 299. **Tex.**—*Razor v. State*, 57 Tex. Crim. 10, 121 S. W. 512; *Williams v. State*, 33 Tex. 345; *State v. Odum*, 11 Tex. 12; *Drummond v. Republic*, 2 Tex. 153. **Wash.**—*State v. Johnson*, 82 Wash. 317, 144 Pac. 57.

94. **Cal.**—*People v. Wong Wang*, 92 Cal. 277, 28 Pac. 270; *People v. Ab Vog*, 28 Pac. 272. **Ill.**—*People v. Strassheim*, 228 Ill. 581, 81 N. E. 1129. **Tenn.**—*McBride v. State*, 10 Humph. 615.

95. **Conn.**—*State v. Powers*, 25 Conn. 48. **Ill.**—*People v. Bennett*, 185 Ill.

that the town should be stated, if the place mentioned is equally specific.²⁸ If the place be an unincorporated place, publicly or commonly known by name, the venue is sufficiently alleged by alleging its commission at such place within a named county,²⁹ even though the place has not been recognized by that name in any statute of the state.³⁰

Organization of New County or Attachment of One County to Another for Judicial Purposes.—Upon the organization of a new county covering the locality where the crime was committed, after the commission of the offense the venue of the offense is properly laid in the new county³¹ without specifically stating that when the offense was committed the territory belonged to another county.¹ Where a county has been attached by statute to another county for judicial purposes, the indictment should allege the commission of the offense in the county where committed, and not in the county in which triable.²

Offense Begun in One County, Completed in Another.—If the offense consists of several acts and some of the acts are done in one jurisdiction and other acts completing the offense in another jurisdiction, an indictment therefor should lay the venue according to the facts of the case,³ but statutes sometimes provide that where an offense commences in one county and terminates in another the person offending may be prosecuted in either county,⁴ or provide that where property is stolen

App. 216. Ky.—*Jusey v. Com.*, 8 Ky. L. Rep. 548.

[a] But courts do not always notice the county in which a particular city or town is located. 7 ENCY. OF EV. 1013.

92. Me.—*State v. Simpson*, 91 Me. 83, 22 Atl. 224; *State v. Jackson*, 39 Me. 291; *State v. Roberts*, 26 Me. 263. Mass.—*Com. v. Springfield*, 7 Mass. 9. N. Y.—*People v. Breard*, 7 Cow. 423; *Vanderwerker v. People*, 5 Wend. 530.

97. *State v. Wagner*, 91 Me. 178, wherein place was described as "at an island called 'Roundly Neck,' a place within the county of York."

98. *State v. Wagner*, 91 Me. 178.

99. Ark.—*McElroy v. State*, 13 Ark. 709. Ga.—*Jordan v. State*, 22 Ga. 245. Me.—*State v. Jackson*, 39 Me. 291.

[a]. But see *State v. Jones*, 8 N. J. L. 327, holding an indictment charging offense in new county prior to creation of new county would be quashed for irregularity.

[b]. Where a new county is established, by an act of assembly, out of part of an old one and the act provides that crimes committed in that territory which is now the new county, shall be tried in the superior court of the old county, there is no requirement or suggestion it to have been com-

mitted in these two counties, severally, in different counts of the indictment. *State v. Johnson*, 50 N. C. 221.

1. *McElroy v. State*, 13 Ark. 708.

2. *Gonzales v. State* (Tex. Crim.), 175 S. W. 766; *Chivario v. State*, 15 Tex. App. 339. See *Miles v. State*, 23 Tex. App. 419, 5 S. W. 250.

3. *Connor v. State*, 29 Fla. 455, 10 So. 891, 32 Am. St. Rep. 126 (wherein false pretenses were made in one county and property obtained in other); *State v. Ellison*, 49 W. Va. 79, 28 S. E. 574.

[a] Since an accessory before the fact can only be prosecuted in the county where the principal offense occurred, an indictment of an accessory before the fact must allege the venue of the accessory act. *State v. Ellison*, 49 W. Va. 79, 28 S. E. 574.

[b] If burglary is committed in one county and the property is taken into another, and it is sought to prosecute for the burglary in the state to which the property is taken under a statute as stated in the text, the facts of the case must be alleged. *Haskins v. People*, 16 N. Y. 214.

4. Such a statute cannot be invoked unless the indictment or information shows a consummation of the offense within the state. *Connor v. State*, 29

in one county and taken into another county, an indictment therefor may be brought in either county.⁶

(C.) **AVERMENTS AS TO STATE.**—The indictment, information or affidavit must indicate the state in which the alleged offense was committed,⁶ but if the commission of the offense be alleged to be within a specified county,⁷ or city within the state, it is sufficient without alleging the name of the state,⁸ and especially is this so where the name of the state is indicated by the caption, or margin,⁹ or other parts of the indictment.¹⁰ If the state has been mentioned in the introductory portion of the indictment, it is sufficient to allege the commission of the offense in the state aforesaid.¹¹

(D.) **PARTICULAR LOCALITY WITHIN CITY OR COUNTY.**—If the offense is alleged to have been committed in a certain county and state, there is no necessity for a more particular allegation of locality, where place is not an essential element of the offense,¹² but if the criminality of an

Fla. 455, 484, 10 So. 801, 30 Am. St. Rep. 126.

5. See the titles "Burglary;" "Larceny;" and *People v. Mellon*, 40 Cal. 648; *State v. Brown*, 8 Nov. 208.

[a] Under such statutes (1) an indictment need not allege the facts as to the taking in one county and the carrying into another county, but may allege the commission of the offense in the county into which the thief took the property (Cal.—*People v. Mellon*, 40 Cal. 648. Ind.—*Hurt v. State*, 26 Ind. 106. Nev.—*State v. Brown*, 8 Nev. 208. N. Y.—*Haskins v. People*, 16 N. Y. 244), (2) or the taking may be alleged as having occurred in one county and carried into another. *Hurt v. State*, 26 Ind. 106; *State v. Brown*, 8 Nev. 208. (3) The indictment in such case must show the original taking was felonious. *State v. Brown*, 8 Nev. 208.

6. *State v. Beebe*, 83 Ind. 171.

7. Cal.—*People v. Sheldon*, 68 Cal. 434, 9 Pac. 457; *People v. Lafuente*, 6 Cal. 222. Mass.—*Com. v. Bernay*, 10 Cush. 489; *Com. v. Quin*, 5 Gray 478. N. H.—*State v. Westworth*, 37 N. H. 198, 221; *State v. Cutliss*, 34 N. H. 161. N. C.—*State v. Lane*, 26 N. C. 313. Ohio.—*Post v. State*, 19 Ohio 88, 415. Pa.—*Com. v. Clifton*, 28 Pa. Super. 573. Tex.—*Davis v. State* (Tex. Crim.), 151 S. W. 313; *State v. Jordan*, 12 Tex. 203; *Satterwhite v. State*, 6 Tex. App. 609.

[a] This is true, though the name of state is omitted in the margin. *Com. v. Quin*, 5 Gray (Mass.) 478.

[2] To charge the commission of the offense in a specified county, naming

state, is sufficient without use of word "state." *State v. Schreiber*, 38 Ind. 184.

8. *People v. Bennett*, 185 Ill. App. 316, wherein offense was charged to have been committed in "Chicago."

9. N. H.—*State v. Westworth*, 37 N. H. 198, 221. N. C.—*State v. Lane*, 26 N. C. 113. Ohio.—*Post v. State*, 19 Ohio St. 415. Tex.—*State v. Jordan*, 12 Tex. 203.

10. *Com. v. Quin*, 5 Gray (Mass.) 478 (wherein violation of state statute by title and date was alleged); *Post v. State*, 19 Ohio St. 415, wherein indictment concluded against peace and dignity of state of Ohio.

11. *Hesse v. State*, 8 Ind. App. 488, 36 N. E. 54.

12. Ariz.—*Sharp v. Territory*, 13 Ariz. 418, 134 Pac. 974. Ga.—*Hall v. State*, 120 Ga. 142, 47 S. E. 519; *Wingard v. State*, 12 Ga. 296; *Pines v. State* (Ga. App.), 83 S. E. 198; *Burkas v. State*, 7 Ga. App. 39, 65 S. E. 1091; *Johnson v. State*, 1 Ga. App. 196, 38 S. E. 265. Ind.—*State v. Brooks*, 171 Ind. 726, 85 N. E. 975; *State v. Bridge-water*, 171 Ind. 1, 85 N. E. 715; *State v. New*, 165 Ind. 571, 76 N. E. 409. Kan.—*State v. Oswald*, 59 Kan. 508, 53 Pac. 925. Mo.—*State v. McDonough*, 232 Mo. 219, 134 S. W. 545; *State v. Newman*, 162 Mo. App. 144, 137 S. W. 763. B. D.—*State v. Johnson*, 24 S. D. 206, 124 N. W. 847. Va.—*Morgan v. Com.*, 90 Va. 80, 21 S. E. 826; *Montgomery v. Com.*, 33 Gratt. 807, 36 Am. Rep. 797; *Leath v. Com.*, 22 Gratt. 873. Tex.—*Davis v. State* (Tex. Crim.), 151 S. W. 313; *Rasor v. State*, 51 Tex. Crim.

act depends upon the place where it is committed, the allegation of place is material and forms an essential element of the offense and must be described with sufficient certainty to enable the defendant to prepare his defense.¹³

If the location of the building or outhouse is material the usual manner of alleging the location thereof is to refer to the building in connection with a place already described as being "there situate,"¹⁴ but the omission thereof is not fatal to the indictment.¹⁵ If the place is material, the place alleged in the venue, taken in connection with the allegation that the defendant then and there did the act sufficiently designates the locality of the building. It is equivalent to an allegation that the buildings were situated at the venue alleged.¹⁶

(E.) **NEGATING JURISDICTION OF FEDERAL COURTS OR STATE COURT.** Since the jurisdiction of the federal courts within a state is an exceptional one, an indictment in a state court need not negative the fact that the alleged crime might have been committed in that part of the county in which the courts of the United States have exclusive jurisdiction.¹⁷ If the jurisdiction of the federal court depends upon the fact that the offense was committed out of the jurisdiction of any state of the United States, such fact must be alleged.¹⁸

(III.) Offenses Committed Near Boundary Lines.—Under statutes in some states if the offense was committed within a given distance of the

10, 121 S. W. 512. **Wash.**—*State v. Johnson*, 82 Wash. 347, 144 Pac. 57.

[a] Under statutes making visiting any gambling house an offense, the place need not be described particularly. *State v. Bridgewater*, 171 Ind. 1, 85 N. E. 715.

[b] Particular location within county where larceny occurred need not be stated. *State v. Odum*, 11 Tex. 12.

[c] Presentment for playing cards "at or near" a designated place is too uncertain. *Bishop v. Com.*, 13 Gratt. (Va.) 785.

[d] Particular oyster preserves from which oysters were taken at prohibited times need not be described other than by the county in which situated. *State v. Johnson*, 82 Wash. 347, 144 Pac. 57.

13. **Ga.**—*Burkes v. State*, 7 Ga. App. 39, 65 S. E. 1091; *Johnson v. State*, 1 Ga. App. 195, 58 S. E. 265. **Ind.**—*State v. Bridgewater*, 171 Ind. 1, 85 N. E. 715. **Mo.**—*State v. Hogan*, 31 Mo. 340. **N. H.**—*State v. Cotton*, 24 N. H. 143. **Tenn.**—*State v. Sneed*, 16 Lea 450, 1 S. W. 282. **Vt.**—*State v. Nixon*, 18 Vt. 70, 46 Am. Dec. 135.

[a] The street numbers of the houses of ill-fame and gaming houses may be designated in the indictment

by Arabic numerals and not written out in words at length. *State v. Castle*, 75 N. J. L. 187, 66 Atl. 1059.

[b] "In case the particular gambling house frequented is, by the statute defining it, made an essential element of the offense, or in a case in which the court is requested to abate, by its judgment, a public nuisance constituted by the acts of which the State complains, or in some proceeding to be taken against the place or house, then it is necessary that the indictment or affidavit designate, describe or point out such place or house with reasonable certainty." *State v. Bridgewater*, 171 Ind. 1, 85 N. E. 715.

14. *Rex v. Napper*, 1 Moody C. C. (Eng.) 44.

15. *Com. v. Crowther*, 117 Mass. 116.

16. **Cal.**—*People v. Wooley*, 44 Cal. 494. **Mass.**—*Com. v. Crowther*, 117 Mass. 116; *Com. v. Lamb*, 1 Gray 493. **R. I.**—*State v. Hopkins*, 5 R. I. 53.

17. **Cal.**—*People v. Collins*, 105 Cal. 504, 39 Pac. 16. **Mont.**—*State v. Tully*, 31 Mont. 365, 78 Pac. 760; *State v. Spotted Hawk*, 22 Mont. 33, 55 Pac. 1026. **Ore.**—*State v. Carlson*, 39 Ore. 19, 62 Pac. 1016, 1119.

18. *United States v. Jackalow*, 1

boundary line of any two counties, an indictment therefor may allege the offense to have been committed in either.¹⁹ An indictment found in one county need not negative a prosecution in the other.²⁰

(IV.) **Offenses Committed on Trains or Vessels.**—Statutes sometimes provide that where an offense is committed in the state upon board any vessel the offense may be charged to have been committed in any county through which the vessel passes,²¹ but such extraterritorial jurisdiction is specified in its character and the facts which give jurisdiction must be alleged.²²

(V.) **Repeating Time and Place.**—**Necessity for.**—While at common law an indictment for a capital offense must connect every material fact which is issuable and triable with the venue,²³ the strictness of this

Black (U. S.) 484, 17 L. ed. 225; United States v. Anderson, 17 Blatchf. 238, 24 Fed. Cas. No. 14,448.

19. See the statutes of the various states and the following cases: **Ia.** State v. Daily, 113 Iowa 362, 85 N. W. 629; State v. Niers, 87 Iowa 723, 54 N. W. 1076; State v. Pugsley, 75 Iowa 742, 38 N. W. 498. **Minn.**—State v. Robinson, 14 Minn. 447. **N. Y.**—People v. Davis, 56 N. Y. 95. **Tex.**—Hoffman v. State (Tex. Crim.), 42 S. W. 309; Chivarrio v. State, 15 Tex. App. 330; Willis v. State, 10 Tex. App. 493.

[a] An averment that the crime was committed in Iowa county, or in Keokuk county, within five hundred yards of the south line of Iowa county, "as nearly as the grand jury knew and could state," does not show that the offense was committed in Iowa or Keokuk county. It may have been in either, but, if in Keokuk county, it does not sufficiently appear that it was within five hundred yards of the south line of Iowa county. State v. Daily, 113 Iowa 362, 85 N. W. 629.

[b] There is no necessity for alleging that the crime was committed within the specified distance of the boundary line. State v. Daily, 113 Iowa 362, 85 N. W. 629.

20. State v. Niers, 87 Iowa 723, 54 N. W. 1076.

21. People v. Dougherty, 7 Cal. 395; State v. Timmens, 4 Minn. 325.

[a] Where several counts of the indictment charged the venue in a certain county and another count charges the offense as having been committed upon a moving railway train which in the course of its voyage passed through the designated county, the more particular description in such count is not

inconsistent with the other counts. State v. Beauleigh, 92 Mo. 490, 4 S. W. 666.

22. People v. Dougherty, 7 Cal. 395.

23. **Ala.**—Roberts v. State, 19 Ala. 526. **Ind.**—State v. Williams, 4 Ind. 234, 58 Am. Dec. 627. **Ia.**—State v. Rankin, 150 Iowa 701, 130 N. W. 732. **La.**—State v. Kennedy, 8 Rob. 590. **Mass.**—Turns v. Com., 6 Mete. 224. **Mo.** State v. Welkin, 14 Mo. 398; Lester v. State, 9 Mo. 666. **N. J.**—State v. Dayton, 23 N. J. L. 49, 53 Am. Dec. 270. **N. Y.**—Crichton v. People, 1 Keyes 341, 6 Park. Crim. 363. **Vt.**—State v. Bacon, 7 Vt. 219. **Eng.**—Rex v. Haynes, 4 M. & S. 214, 105 Eng. Reprint 814; Rex v. Holland, 5 T. R. 607, 101 Eng. Reprint 340.

[a] Such is the precision required in this respect that any uncertainty in the averment of time and place will vitiate the indictment. State v. Kennedy, 8 Rob. (La.) 590.

[b] **Equivalent Expressions.**—(1) The use of such words as "instantly" in connection with an indictment for murder (State v. Lakey, 65 Mo. 217; State v. Sides, 64 Mo. 383; Lester v. State, 9 Mo. 666), (2) or immediately (Rex v. Francis, 2 East P. C. [Eng.] 708, 2 Str. 1015) is not the equivalent of "then and there."

[c] This rule does not apply to those descriptive or definite portions of the indictment, (1) whose office is to so qualify or limit the object acted upon as to show it to be the proper subject of complaint. State v. Cook, 38 Vt. 437. (2) Nor does the rule, where time and place are once alleged, require the laying of a venue as to averments merely stating a conclusion of law (State v. Willis, 78 Me. 70, 2 Atl.

rule does not apply to indictments for inferior offenses,²⁴ and if time and place be added to the first act alleged in an indictment for a misdemeanor, it is considered to refer equally to all the ensuing acts though not connected by words of reference.²⁵ And in any case if the language employed in connection with the subsequent acts shows that the time and place previously stated is the only time and place which could possibly be referred to, this is all that is required.²⁶

Statutes in some states now provide that when the venue has once been laid the indictment shall not be quashed for want of an allegation as to the place of a material fact.²⁷ The repetition of time and place and the reference to it in connection with the acts charged²⁸ are gen-

848), (3) or to those merely stating the effect of the acts done. *State v. Bailey*, 21 Mo. 484; *State v. Freeman*, 21 Mo. 481.

[d] Where the indictment alleges an assault at a specified place within the county upon another with a large block of wood whereby said person was maimed, wounded and disfigured, it is sufficient without alleging a venue to the maiming and wounding. *State v. Bailey*, 21 Mo. 484.

24. **La.**—*State v. Kennedy*, 8 Rob. 590, 600. **Me.**—*State v. Willis*, 78 Me. 70, 2 Atl. 848. **Mass.**—*Com. v. Langley*, 14 Gray 21; *Com. v. Sullivan*, 6 Gray 477; *Com. v. Bugbee*, 4 Gray 206; *Com. v. Barker*, 12 Cush. 186. **R. I.** *State v. Doyle*, 15 R. I. 527, 9 Atl. 900.

[a] Omission of phrase "then and there" is not ground for reversal. *People v. Dressen*, 158 Ill. App. 139.

[b] An indictment for a conspiracy to cheat need only lay the venue and time as to the conspiracy. *Clary v. Com.*, 4 Pa. 210.

25. **Mass.**—*Com. v. Doherty*, 10 Cush. 52; *Com. v. Tully*, 4 Mete. 357. **Pa.** *Stout v. Com.*, 11 Serg. & R. 177. **Eng.** *King v. Phillips*, 6 East 464, 102 Eng. Reprint 1365.

26. **Ill.**—*People v. Miller*, 264 Ill. 148, 106 N. E. 191; *Bobel v. People*, 173 Ill. 19, 50 N. E. 322, 64 Am. St. Rep. 64. **La.**—*State v. Capers*, 6 La. Ann. 267. **Me.**—*State v. Neddo*, 92 Me. 71, 42 Atl. 253. **Mass.**—*Turns v. Com.*, 6 Mete. 224. **N. J.**—*State v. Dayton*, 23 N. J. L. 49, 53 Am. Dec. 270.

[a] An indictment charging defendant on a certain day in a certain county did, in a certain room, keep a slot machine is sufficient as to time and place though "there and then" are not used before "keep." The allegations

of time and place are adverbial clauses modifying the verb "did keep." Time and place are distinctly alleged of the verb "keep" for there is no other word in the indictment which they can modify. *Bobel v. People*, 173 Ill. 19, 50 N. E. 322, 64 Am. St. Rep. 64.

[b] An indictment charging that defendant, a practicing physician, in a certain county on a certain day, did certain acts sufficiently lays the time and place. *State v. Watts*, 43 W. Va. 182, 27 S. E. 302.

[c] Where the time and place of the assault, stroke and death are alleged, an averment that certain defendants were present at the time aiding and abetting is sufficient. *State v. Taylor*, 21 Mo. 477.

[d] But the omission of "then and there" in connection with the value of the timber taken from certain land is not fatal where it is alleged the timber was taken on a specified day and was worth ten dollars. Such statement means it was worth ten dollars when it was removed. *State v. Blackwell*, 3 Ind. 529.

27. **Ga.**—*Thomas v. State*, 71 Ga. 44. **Ind.**—*Turpin v. State*, 80 Ind. 148; *Thayer v. State*, 11 Ind. 287. **N. C.** See *State v. Harris*, 106 N. C. 682, 11 S. E. 377. **Ohio.**—*Knight v. State*, 54 Ohio St. 365, 43 N. E. 995, reversing 11 Ohio C. C. 25, 5 Ohio C. D. 29; *Fouts v. State*, 8 Ohio St. 98, 118; *Kain v. State*, 8 Ohio St. 306.

[a] Such provision dispenses with repetition of "there and then" in connection with material facts. *Turpin v. State*, 80 Ind. 148.

28. *Bobel v. People*, 173 Ill. 19, 27, 50 N. E. 322, 64 Am. St. Rep. 64; *State v. Cook*, 38 Vt. 437.

erally dispensed with where a statutory offense is charged in words of the statute creating and defining it.

When time and place have once been named with certainty, it is sufficient to refer to them afterwards by the words "then and there,"³⁰ or the words "said,"³¹ or "aforesaid."³² This rule applies where several counts are set forth in the indictment, and if time and place are sufficiently set forth in one count, they need not be repeated in the other counts, but may be referred to by appropriate words,³² such as "then and there."³³

The use of the copulative conjunction "and" without the repetition of the time and place to a material ingredient of the offense is insuffi-

29. **Ill.**—*Palmer v. People*, 138 Ill. 356, 28 N. E. 130, 32 Am. St. Rep. 146. **Ind.**—*Furnace v. State*, 153 Ind. 93, 54 N. E. 441; *State v. Schultz*, 57 Ind. 19. **Ia.**—*State v. Rankin*, 150 Iowa 701, 130 N. W. 732. **La.**—*State v. Kennedy*, 8 Rob. 590. **Mo.**—*State v. Steely*, 65 Mo. 218, 27 Am. Rep. 271; *Lester v. State*, 9 Mo. 666. **N. H.**—*State v. Cotton*, 24 N. H. 143. **N. M.**—*State v. Klasner*, 145 Pac. 679. **Ohio.**—*Knight v. State*, 54 Ohio St. 365, 377, 43 N. E. 995, *reversing* 11 Ohio C. C. 23, 5 Ohio Cir. Dec. 29. **Tex.**—*Jones v. State*, 72 Tex. Crim. 496, 162 S. W. 1142; *Walker v. State* (Tex. Crim.), 151 S. W. 318; *De Los Santos v. State* (Tex. Crim.), 146 S. W. 919; *Moreno v. State*, 71 Tex. Crim. 460, 143 S. W. 156; *Campbell v. State*, 43 Tex. Crim. 602, 68 S. W. 513; *State v. Slack*, 30 Tex. 355; *Baker v. State*, 25 Tex. App. 1, 8 S. W. 23, 8 Am. St. Rep. 427.

[a] The words "then and there" (1) are relative; they refer to the previous averment, and that being an averment of a single act done, the word "then" refers to the precise time of the act done. *Com. v. Goldstein*, 114 Mass. 272; *Com. v. Butterick*, 100 Mass. 12; *Edwards v. Com.*, 19 Pick. 124. See also *Furnace v. State*, 153 Ind. 93, 54 N. E. 441; *State v. Klasner* (N. M.), 145 Pac. 679. (2) But where the antecedent averment fixes no precise time, and alleges no precise, single, definite act, the word "then," used afterwards, fixes no one definite time. *Edwards v. Com.*, 19 Pick. (Mass.) 124.

[b] The words "then and there" need not follow each other, but it is sufficient where conjunctively used though the words then and there are employed separately in the same sentence. *State v. Thibodaux*, 49 La. Ann. 15, 21 So. 127.

30. *State v. Baker*, 50 Me. 45; *Moss v. State*, 47 Tex. Crim. 459, 83 S. W. 829.

31. **Cal.**—*People v. Baker*, 100 Cal. 188, 34 Pac. 649, 38 Am. St. Rep. 276. **Mo.**—*State v. Vincent*, 91 Mo. 662, 4 S. W. 430. **S. C.**—*State v. Coleman*, 8 S. C. 237. **S. D.**—*State v. Taylor*, 7 S. D. 533, 64 N. W. 548.

32. *State v. Alsop*, 4 Ind. 141, *aforesaid*.

[a] Where the time and place are stated in the first count, another count stating that the defendant on the day and date and in the county aforesaid, the time and venue are sufficiently stated without the use of the words then and there. *Manovitch v. State*, 50 Tex. Crim. 260, 96 S. W. 1.

[b] Where the place of the offense is sufficiently alleged in the first count of an indictment, charging only one offense, it is not fatal that the place of the offense is not also charged in the second count. *Hollin v. Com.*, 163 Ky. 392, 173 S. W. 1106.

33. *Evans v. State*, 24 Ohio St. 208; *Stahl v. State*, 11 Ohio C. C. 23, 5 Ohio C. D. 29, *reversed* on other grounds in 54 Ohio St. 365, 43 N. E. 995.

[a] If it be necessary that the acts charged should be committed at one and the same time the indictment must allege that the acts were done then and there and not merely repeat the time and place. *Rex v. Williams*, 1 Leach C. C. (Eng.) 529. See also *State v. Hurley*, 71 Me. 354; *Com. v. Goldstein*, 114 Mass. 272; *Com. v. Butterick*, 100 Mass. 12; *Edwards v. Com.*, 19 Pick. (Mass.) 124.

[b] But an indictment averring that defendant had on a specified day a certain number of counterfeit bills in his possession and that he did "then and

cient at common law,³⁴ though under the modern statutes dispensing with the strictness of pleading existing at common law the use of the word "and" without the words "then and there" has been held sufficient to extend the original allegations of time and place.³⁵ But when two distinct times and places have been mentioned, and reference is afterwards made to time and place, by the words "then and there," the allegation is uncertain and defective,³⁶ and the same is true where the words of reference are "in the county aforesaid."³⁷ But notwithstanding the previous mention of places,³⁸ or two different times,³⁹ the indictment is not uncertain where it is apparent from the context that such words refer to only one of these places or times.

(VI.) **Reference to Margin, Commencement, etc.** — Although the caption is not strictly a part of the pleading, it may be looked to in order to ascertain the venue.⁴⁰ Thus when the name of the state and county

there willingly aid and assist in rendering current, etc.," is fatally defective where the statute requires that they must be in his possession "at the same time," as this only means on the same day; it should aver he had them in his possession at the same time. *Edwards v. Com.*, 19 Pick. (Mass.) 124.

34. *State v. Kennedy*, 8 Rob. (La.) 590, 600.

35. *Smith v. State*, 36 Tex. Crim. 442, 37 S. W. 743 (wherein the indictment charged the breaking and entering with the intent to commit theft by the conjunction "and" instead of then and there); *Harris v. State*, 2 Tex. App. 102.

36. **Fla.**—*Connor v. State*, 29 Fla. 455, 10 So. 891, 30 Am. St. Rep. 126. **Me.**—*State v. Jackson*, 39 Me. 291. **Mass.**—*Com. v. Wheeler*, 162 Mass. 429, 38 N. E. 1115. **Mo.**—*State v. McCracken*, 20 Mo. 411; *Jane v. State*, 3 Mo. 61; *State v. Hardwick*, 2 Mo. 226. **Tex.** *Cain v. State*, 18 Tex. 391. **Va.**—*Bell v. Com.*, 8 Gratt. 600. **Eng.**—*King v. Moor Critchell*, 2 East 66, 102 Eng. Reprint 293; *Reg. v. Rhodes*, 2 Ld. Raym. 886, 92 Eng. Reprint 92; *Reg. v. Gunn*, 11 Mod. 66, 88 Eng. Reprint 891; *Rex v. Kilderby*, 1 Saunders 308, 85 Eng. Reprint 424.

[a] When one of the places previously mentioned has reference only to the residence of a person named therein, it is unexceptional. *State v. Jackson*, 39 Me. 291.

[b] An information charging the crime of obtaining property under false pretenses is uncertain as to the venue, or jurisdictional locality of the offense, where, having previously named

two or more places, it simply uses the word "there" (in the expression "then and there") in charging the obtaining of the property; and it is consequently insufficient and should be quashed. *Connor v. State*, 29 Fla. 455, 10 So. 891, 30 Am. St. Rep. 126.

37. *State v. McCracken*, 20 Mo. 411; *Wingfield's Case*, Cro. Eliz. 739, 78 Eng. Reprint 971.

38. **Me.**—*State v. Jackson*, 39 Me. 291, wherein one place was merely descriptive of residence of defendant. **Mass.**—*Jeffries v. Com.*, 12 Allen 145. **Pa.**—*Com. v. Williams*, 149 Pa. 54, 24 Atl. 158, wherein in a specified county before a judge of another county, specially presiding, defendant was alleged to have committed perjury.

[a] The use of the name of a certain city in connection with the description of a bank whose certificate of deposit was embezzled does not render the indictment ambiguous as to venue where the words then and there and the words said and aforesaid are used. *People v. O'Brian*, 8 Cal. App. 641, 97 Pac. 679.

39. *Woodside v. State*, 2 How. (Miss.) 655; *State v. Ferry*, 61 Vt. 624, 18 Atl. 451, wherein one date was the date of a writ set forth in haec verba in indictment.

40. **Ark.**—*Helt v. State*, 52 Ark. 279, 12 S. W. 566; *State v. Hunn*, 34 Ark. 321; *Thetstone v. State*, 32 Ark. 179. **Cal.**—*People v. Thompson*, 7 Cal. App. 616, 95 Pac. 386. **D. C.**—*United States v. Schneider*, 21 D. C. 381. **Ill.**—*People v. Miller*, 264 Ill. 148, 106 N. E. 191; *Hanrahan v. People*, 91 Ill. 142. **Ind.** *Rivers v. State*, 144 Ind. 16, 42 N. E.

are stated in the caption,⁴¹ the commencement⁴² or margin of the indictment,⁴³ it is sufficient thereafter to refer in the body of the indictment to the venue in the margin, caption or commencement by such words as "then" and "there" and "in the county aforesaid."⁴⁴ And by statute in some states, if the proper venue is stated in the caption or margin, it need not be set out in the body of the indictment.⁴⁵

f. *Charging Statutory Offenses.*—(I.) *In General.*—It is well settled that an indictment or information charging a purely statutory offense must be framed upon the statute defining that offense,⁴⁶ which fact must appear upon the face of the pleading itself.⁴⁷

While in charging a purely statutory offense, it is only necessary to

1021; *Anderson v. State*, 104 Ind. 467, 4 N. E. 63, 5 N. E. 711. **Ky.**—*Martin v. Com.*, 145 Ky. 752, 141 S. W. 54. **Mass.**—*Com. v. Edwards*, 4 Gray 1. **Mo.**—*State v. Fields*, 170 S. W. 1132. **N. C.**—*State v. Bell*, 25 N. C. 506. **Pa.** *Com. v. Clinton*, 38 Pa. Super. 573. **Tenn.**—*State v. Shull*, 3 Head 42. **Va.** *Wright v. Com.*, 82 Va. 183. **Wyo.** *McGinnis v. State*, 17 Wyo. 106, 96 Pac. 525.

That caption may aid indictment, see *supra*, VIII, A. 3.

[a] Where the name of the county is in the caption, an indictment charging the commission of the offense "in the county and state aforesaid" sufficiently charges venue. *State v. Hunn*, 34 Ark. 321. And see *Winegardner v. State*, 181 Ind. 525, 104 N. E. 969.

[b] Though caption gives the state and court, but omits the county, and the indictment alleges the commission of the offense "in the county aforesaid," the allegation is sufficient where from the preceding matter it can be understood what county is referred to. *Eaves v. State*, 113 Ga. 749, 39 S. E. 318.

[c] **County Blank.**—The averment in the information or indictment that the crime was committed in "said county of _____" should and may reasonably be construed to refer to the county mentioned in the caption as the name or title of the court, and, so construing it, the venue is sufficiently established in the accusatory pleading to invest the court with jurisdiction of the offense and of the person of the accused. *People v. Thompson*, 7 Cal. App. 616, 95 Pac. 386.

41. **Cal.**—*People v. Baker*, 100 Cal. 188, 34 Pac. 649, 38 Am. St. Rep. 276. **Ga.**—*Thomas v. State*, 71 Ga. 44. See also *Eaves v. State*, 113 Ga. 749, 39

S. E. 318. **Ind.**—*Rivers v. State*, 144 Ind. 16, 42 N. E. 1021; *Anderson v. State*, 104 Ind. 467, 4 N. E. 63, 5 N. E. 711; *Long v. State*, 56 Ind. 133. **Kan.** *State v. Pauly*, 3 Kan. 384; *State v. Muntz*, 3 Kan. 383. **Mo.**—*State v. Fields*, 170 S. W. 1132. **N. Y.**—*People v. Kings County L. Foundry*, 209 N. Y. 207, 102 N. E. 598, *reversing* 156 App. Div. 912, 141 N. Y. Supp. 1138. **Tex.** *Strickland v. State*, 7 Tex. App. 34. **Va.** *Wright v. Com.*, 82 Va. 183.

42. **Ind.**—*State v. Schultz*, 57 Ind. 19; *State v. Walls*, 54 Ind. 407; *State v. Williams*, 4 Ind. 234, 58 Am. Dec. 627; *Haase v. State*, 8 Ind. App. 488, 36 N. E. 54. **Ia.**—*State v. Rankin*, 150 Iowa 701, 130 N. W. 732. **Tex.**—*Abellero v. State*, 46 Tex. Crim. 457, 80 S. W. 1014; *Vick v. State* (Tex. Crim.), 69 S. W. 156.

43. *Harrahan v. State*, 91 Ill. 142; *State v. Slocum*, 8 Blackf. (Ind.) 315.

44. *State v. Wentworth*, 37 N. H. 196, 221; *Moss v. State*, 47 Tex. Crim. 459, 83 S. W. 829; *Leach v. State*, 46 Tex. Crim. 507, 81 S. W. 733.

45. *State v. Wood* (La.), 67 So. 542; *State v. Askins*, 33 La. Ann. 1253; *State v. Wilson*, 11 La. Ann. 163; *State v. Fields* (Mo.), 170 S. W. 1132; *State v. Long*, 209 Mo. 366, 377, 108 S. W. 35; *State v. Hunt*, 190 Mo. 253, 88 S. W. 719; *State v. Beaulaigh*, 92 Mo. 490, 4 S. W. 666.

46. **Ala.**—*La Vaul v. State*, 40 Ala. 44. **Ark.**—*Farrell v. State*, 111 Ark. 180, 163 S. W. 768. **Ill.**—*Johnson v. People*, 113 Ill. 99.

And see *infra*, IX, E, 5, f, (III), (A).

47. *Johnson v. People*, 113 Ill. 99.

[a] That it shall so appear, the pleader must either charge the offense in the language of the act, or specifically set forth the acts constituting

plead those acts which the statute declares shall constitute the offense,⁴⁸ the pleading must allege each and every one of the statutory ingredients of the offense,⁴⁹ and in such a manner as to bring the accused precisely within the provisions of the statute.⁵⁰ If any essential

the same. *Johnson v. People*, 113 Ill. 99. As to use of language of statute, see *infra*, IX, E, 5, f, (111).

48. *May v. United States*, 199 Fed. 42, 117 C. C. A. 420; *Armour Packing Co. v. United States*, 153 Fed. 1, 82 C. C. A. 135, 14 L. R. A. (N. S.) 400, *affirmed*, 209 U. S. 56, 28 Sup. Ct. 428, 52 L. ed. 681; *United States v. Maxey*, 200 Fed. 997, 1002.

49. See the following: **Ala.**—*Skains v. State*, 21 Ala. 218; *Pettibone v. State*, 19 Ala. 586; *Eubanks v. State*, 17 Ala. 181, alleging keeping of ten pin alley without license where statute prohibited engaging in business or employment of keeping, etc. **Conn.**—*Crandall v. State*, 10 Conn. 369; *Morse v. State*, 6 Conn. 13. **Ga.**—*Herring v. State*, 114 Ga. 96, 39 S. E. 866; *Conyers v. State*, 50 Ga. 103, 15 Am. Rep. 686; *Mathews v. State* (Ga. App.), 85 S. E. 284; *Youmans v. State*, 7 Ga. App. 101, 66 S. E. 383. **Ill.**—*People v. Trumbley*, 252 Ill. 29, 96 N. E. 573. **La.**—*State v. Doremus*, 137 La. —, 68 So. 605; *State v. Thibodeaux*, 136 La. 935, 67 So. 973; *State v. Stiles*, 5 La. Ann. 324. **Me.**—*State v. Casey*, 45 Me. 435; *State v. McKenzie*, 42 Me. 392. **Md.**—*Davis v. State*, 39 Md. 355, 372. **Miss.**—*Lewis v. State*, 49 Miss. 354; *Williams v. State*, 42 Miss. 328; *Scott v. State*, 31 Miss. 473. **Mo.**—*State v. Shortell*, 174 Mo. App. 153, 156 S. W. 988. **N. Y.**—*People v. Williams*, 92 Hun 354, 36 N. Y. Supp. 511; *People v. Webster*, 17 Misc. 410, 40 N. Y. Supp. 1135. **Okla.**—*Stout v. Territory*, 2 Okla. Crim. 500, 103 Pac. 375. **S. C.**—*State v. Turner*, 82 S. C. 278, 64 S. E. 424. **Tenn.**—*Wilson v. State*, 103 Tenn. 87, 52 S. W. 869; *Jones v. State*, 16 Lea 466; *Hall v. State*, 3 Coldw. 125; *Fletcher v. State*, 6 Humph. 249, 256; *Peek v. State*, 2 Humph. 78, 85. **Tex.**—*Cooper v. State* (Tex. Crim.), 154 S. W. 989; *Rice v. State*, 37 Tex. Crim. 36, 38 S. W. 801; *Earl v. State*, 33 Tex. Crim. 570, 28 S. W. 469; *Banks v. State*, 28 Tex. 644; *Henderson v. State*, 14 Tex. 503; *Bush v. Republic*, 1 Tex. 455; *Wardner v. State*, 29 Tex. App. 534, 16 S. W. 338, "every ingredient of a statutory of-

fense necessary to be proved by the state must be alleged in the indictment or information." **Va.**—*Boynton v. Com.*, 114 Va. 841, 76 S. E. 945; *Boyd v. Com.*, 77 Va. 52. **Can.**—*Queen v. Weir*, 3 Can. Cr. Cas. 102, every ingredient of an offense created by statute must be set out.

[a] "It is a general rule that the allegations of fact made in the body of an indictment, in order to constitute an offense, must show that the accused did all of those acts which the statute prescribed shall be a crime if done." *Herring v. State*, 114 Ga. 96, 39 S. E. 866; *Mathews v. State* (Ga. App.), 85 S. E. 284.

That circumstances mentioned in the statute as making up the offense shall not be supplied by the general conclusion "contra formam statuti," see *supra*, IX, D.

That nothing can be taken by intentment in charging an offense in indictment generally, see *supra*, IX, C, 1.

50. **U. S.**—*Ledbetter v. United States*, 170 U. S. 606, 18 Sup. Ct. 774, 42 L. ed. 1162; *Moore v. United States*, 160 U. S. 268, 16 Sup. Ct. 294, 40 L. ed. 422; *Frisbie v. United States*, 157 U. S. 160, 166, 15 Sup. Ct. 586, 39 L. ed. 657; *United States v. Staats*, 8 How. 41, 12 L. ed. 979. **Ala.**—*Sparrenberger v. State*, 53 Ala. 481, 25 Am. Rep. 643. **Ark.**—*State v. Chicago, etc. R. Co.*, 110 Ark. 367, 161 S. W. 1066; *Haupt v. State*, 100 Ark. 409, 140 S. W. 294, Ann. Cas. 1913C, 690; *Parker v. State*, 98 Ark. 575, 137 S. W. 253. **Conn.**—*Crandall v. State*, 10 Conn. 369; *Hopkins v. Plainfield*, 7 Conn. 288; *Morse v. State*, 6 Conn. 13. **Fla.**—*Thomas v. State*, 58 Fla. 120, 50 So. 954; *Mills v. State*, 58 Fla. 74, 51 So. 278; *Snowden v. State*, 17 Fla. 386. **Ill.**—*People v. Jackson*, 181 Ill. App. 713; *Long v. People*, 109 Ill. App. 197. **Ind.**—*State v. Wright*, 52 Ind. 307; *Adell v. State*, 34 Ind. 543; *Bates v. State*, 31 Ind. 72; *Weinzorpfli v. State*, 7 Blackf. 186. **Ia.**—*State v. Allen*, 32 Iowa 491. **Kan.**—*State v. Decker*, 52 Kan. 193, 34 Pac. 780, want of permission to remove buildings from mort-

element of the crime is omitted,⁵¹ or if the indictment may be true, and still the accused may not be guilty of the offense described in the statute,⁵² it is not valid. But if the offense as declared by statute is essentially the same as the common law description thereof, an indictment following either the statute or the common-law form is sufficient.⁵³ When challenged, however, the indictment must be sufficient, according to the one or the other standard.⁵⁴

If the crime charged existed at common law, and is denounced by name only by statute, then the indictment must contain averments covering the common-law ingredients.⁵⁵ And the same is true where the statute merely prescribes the punishment for a common-law offense without making any change in the nature or character of the offense itself.⁵⁶

If the indictment or information proper charges an offense under some existing law, it is sufficient, though the prosecuting officer may

gaged property. **Me.**—*State v. Casey*, 45 Me. 435; *State v. McKenzie*, 42 Me. 392. **Md.**—*Kearney v. State*, 48 Md. 16; *Davis v. State*, 39 Md. 355, 372; *State v. Elborn*, 27 Md. 483. **Miss.** *Lewis v. State*, 49 Miss. 354; *Williams v. State*, 42 Miss. 328; *Scott v. State*, 31 Miss. 473. **Mo.**—*State v. Gabriel*, 88 Mo. 631; *State v. Shortell*, 174 Mo. App. 153, 156 S. W. 988; *State v. Markus*, 171 Mo. App. 38, 153 S. W. 488; *State v. Renkard*, 150 Mo. App. 570, 131 S. W. 168. **N. Y.**—*Eckhardt v. People*, 83 N. Y. 462, 38 Am. Rep. 462; *People v. Silver*, 158 App. Div. 217, 143 N. Y. Supp. 43; *People v. Williams*, 92 Hun 354, 36 N. Y. Supp. 511; *People v. Webster*, 17 Misc. 410, 40 N. Y. Supp. 1135; *People v. Allen*, 5 Denio 76; *People v. Taylor*, 3 Denio 93. **Pa.**—*Com. v. Hill*, 2 Pears. 432. **Tenn.** *State v. Willis*, 130 Tenn. 412, 170 S. W. 1032; *Wilson v. State*, 103 Tenn. 87, 52 S. W. 869. **Va.**—*Wiseman v. Com.*, 83 S. E. 1052; *Boynton v. Com.*, 114 Va. 841, 76 S. E. 945; *Boyd v. Com.*, 77 Va. 52.

51. **La.**—*State v. Thibodeaux*, 136 La. 935, 67 So. 973. **Okla.**—*Stout v. Territory*, 2 Okla. Crim. 500, 103 Pac. 375. **Tex.**—*Henderson v. State*, 14 Tex. 503, 510; *Bush v. Republic*, 1 Tex. 455.

52. *Wiseman v. Com. (Va.)*, 83 S. E. 1052; *Boynton v. Com.*, 114 Va. 841, 76 S. E. 945; *Boyd v. Com.*, 77 Va. 52.

53. See the following: **Ark.**—*Wolfe v. State*, 107 Ark. 33, 153 S. W. 1102; *Shotwell v. State*, 43 Ark. 345; *Roberts v. State*, 21 Ark. 183. **Ga.**—*Howe v. State*, 10 Ga. App. 215, 73 S. E. 46.

Ind.—*Fuller v. State*, 1 Blackf. 63. **Miss.**—*Nichols v. State*, 46 Miss. 284, proper to adopt either course. **N. Y.** *People v. Darragh*, 141 App. Div. 408, 126 N. Y. Supp. 522. **Ohio.**—*Suteliffe v. State*, 18 Ohio 469, 51 Am. Dec. 459. **Tex.**—*Farrell v. State*, 64 Tex. Crim. 200, 141 S. W. 535; *Evans v. State*, 25 Tex. Supp. 303; *Jennings v. State*, 7 Tex. App. 350.

[a] It is unnecessary to mingle both forms. *Nichols v. State*, 46 Miss. 284.

That an indictment for a common-law offense, good at common law, is still good under statutes providing forms for indictments, see *supra*, IX, B, note 76.

[b] **Common-Law Offense.**—An indictment which fails to allege facts showing that a statute has been violated cannot be upheld as charging a violation of common law in states where there are no common-law offenses. *People v. Knapp*, 206 N. Y. 373, 99 N. E. 841, Ann. Cas. 1914B, 243, *affirming* 147 App. Div. 436, 132 N. Y. Supp. 747.

54. *Nichols v. State*, 46 Miss. 284.

55. *Hodgson v. Vermont*, 168 U. S. 262, 270, 18 Sup. Ct. 80, 42 L. ed. 461; *Ackley v. United States*, 200 Fed. 217, 117 C. C. A. 403.

[a] While an indictment charging the offense in the words by which the statute creates and describes it is ordinarily sufficient, this rule does not apply to complaints upon those statutes which merely describe an offense by its common-law name. *State v. Cook*, 38 Vt. 437.

56. **U. S.**—*United States v. Crosby*, 1 Hughes 448, 25 Fed. Cas. No. 14,893.

have supposed that the offense charged was covered by a different statute, or section thereof,⁵⁷ or may elect to prosecute under another statute under which the indictment is not good.⁵⁸ The mere fact that the facts charged as constituting a crime might have been punished under another statute than that under which the prosecution is brought does not make it obligatory upon the prosecution to charge under one statute rather than another.⁵⁹

(II.) **Reference to Statute.** — An indictment for an offense created by a public statute need not state specifically, by particular reference thereto, the statute violated by the acts alleged to be a crime,⁶⁰ it being sufficient to charge the offense against the form of the statute.⁶¹ Where there are several sections of the statute under which the accused is prosecuted, the same uniformity in the rule does not exist, however; in some states, it is not even necessary to allege the particular section under which the charge is made,⁶² it being enough to allege facts plainly showing that an offense has been committed.⁶³ Under other authorities, however, the indictment or information should show the particular

Ala.—*State v. Briley*, 8 Port. 472; *State v. Stedman*, 7 Port. 495. **La.**—*State v. Flint*, 33 La. Ann. 1288. **Md.**—*State v. Hodges*, 55 Md. 127, 138.

[a] "If the circumstances which constituted the crime, or increased the punishment, were not set out in the indictment, the accused would not be informed of the offense with which he was charged, or of the penalty to which he was liable. These reasons do not apply to a statute, neither creating an offense nor enhancing its penalties, but dividing a common-law offense into degrees and diminishing the punishment." *Davis v. State*, 39 Md. 355, 373.

57. *Williams v. United States*, 168 U. S. 382, 18 Sup. Ct. 92, 42 L. ed. 509; *Rogers v. United States*, 180 Fed. 54, 103 C. C. A. 408; *United States v. Sandefuhr*, 145 Fed. 49; *State v. Vandenburg*, 159 Mo. 230, 60 S. W. 79.

58. Where an indictment is good under one statute the fact that the prosecuting attorney elects to prosecute under another statute under which the indictment is not good will not authorize the court to sustain a demurrer to the indictment. *Com. v. Carter*, 14 Ky. L. Rep. 301.

59. *People v. Campbell*, 127 Cal. 278, 59 Pac. 598.

60. **U. S.**—*United States v. Wood*, 168 Fed. 438; *United States v. Battle*, 154 Fed. 540; *United States v. Goodwin*, 20 Fed. 237. **Cal.**—*In re Mansfield*, 106 Cal. 400, 39 Pac. 775. **Ga.**

Crabb v. State, 88 Ga. 584, 15 S. E. 455. **Ind.**—*Donovan v. State*, 170 Ind. 123, 83 N. E. 744. **Ia.**—*State v. Allen*, 32 Iowa 248. **Kan.**—*State v. Stickler*, 90 Kan. 783, 136 Pac. 329. **Ky.**—*Powers v. Com.*, 90 Ky. 167, 13 S. W. 450. **Md.**—*Rawlings v. State*, 2 Md. 201. **Mass.**—*Com. v. Donovan*, 170 Mass. 228, 49 N. E. 104; *Com. v. Hoyer*, 11 Gray 462. **N. J.**—*Mayer v. State*, 64 N. J. L. 323, 45 Atl. 624. **N. Y.**—*People v. Dwyer*, 160 App. Div. 542, 145 N. Y. Supp. 748; *People v. Reed*, 47 Barb. 235. **N. C.**—*State v. Wallace*, 94 N. C. 827. **Pa.**—*Com. v. Nichols*, 38 Pa. Super. 504. **R. I.**—*State v. Flanagan*, 25 R. I. 369, 55 Atl. 876. **S. C.**—*Butler v. State*, 3 McCord 383.

[a] **May be better and safer practice** in some cases. *Com. v. Nichols*, 38 Pa. Super. 504.

61. *Crabb v. State*, 88 Ga. 584, 15 S. E. 455; *State v. Allen*, 32 Iowa 248. As to conclusion against statute, see *supra*, VIII, A, 6, c; VIII, B, 6.

[a] **Nor is this rule changed by reason of amendments to the statute, relating to the punishment and proceedings for its enforcement, made after the date of committing the offense.** *State v. Revelts*, 74 Iowa 499, 38 N. W. 377.

62. *State v. Stickler*, 90 Kan. 783, 136 Pac. 329; *State v. Flanagan*, 25 R. I. 369, 55 Atl. 876.

63. *State v. Stickler*, 90 Kan. 783, 136 Pac. 329; *State v. Flanagan*, 25 R. I. 369, 55 Atl. 876.

provision of the statute relied upon by the prosecution as constituting the offense which the defendant is accused of violating.⁶⁴

A private statute, as distinguished from a public statute, must be pleaded in the indictment or information, if it constitutes an essential element of the offense sought to be charged.⁶⁵

No statement of the time of the passage of the statute is necessary in referring to it.⁶⁶

How Made.—Where a reference is necessary, as in case of a private statute, it is sufficient if the statute is set forth by chapter and date and its material provisions incorporated therein.⁶⁷ It is properly described as an "act of the legislature" of the state of venue, without alleging its enactment by the technical designation of that body.⁶⁸

Whenever a reference to a designated section of a statute is made, it must be understood as referring to a section then in force.⁶⁹ But the omission of the indictment to refer to the latest revision of the statutes cannot be regarded as a failure to charge defendant with the commission of an offense against a known law.⁷⁰

Effect of Mistakes in Making.—Though there be a misrecital of a public statute, not necessary to have been recited or referred to, if the indictment concludes "contrary to the form of the statute in such case made and provided," without referring to the recited statute, the recital may be rejected as surplusage.⁷¹ It is otherwise if the statute is re-

64. Cal.—*People v. Martin*, 52 Cal. 201. N. H.—*State v. Leavitt*, 63 N. H. 381; *State v. Messenger*, 58 N. H. 348; *State v. Sherburne*, 58 N. H. 159; *State v. Adams*, 51 N. H. 568. Pa.—*Com. v. Fox*, 10 Phila. 204, 31 Leg. Int. 84.

See also *People v. Jones*, 49 Mich. 591, 14 N. W. 573.

65. Ala.—*Carson v. State*, 69 Ala. 235. Md.—*Rawlings v. State*, 2 Md. 201. Mo.—*State ex rel. Kelly v. Kirby*, 260 Mo. 120, 168 S. W. 746. N. C.—*State v. Heaton*, 77 N. C. 505; *State v. Cobb*, 18 N. C. 115.

And see 1 Chitty Crim. Law 281.

66. *Com. v. Keefe*, 7 Gray (Mass.) 332; *People v. Reed*, 47 Barb. (N. Y.) 235.

67. *State v. Heaton*, 77 N. C. 505.

[a] A reference simply to "Senate Bill, numbered 61," is too indefinite, however. *Smith v. State*, 5 Okla. Crim. 708, 115 Pac. 611.

68. *Block v. State*, 66 Ala. 493, act was properly described as an "act of the legislature of Alabama," without alleging its enactment by the "General Assembly," which is merely the technical designation of that body in the state constitution.

69. *Oshe v. State*, 37 Ohio St. 494, 501.

70. *State v. Wright*, 161 Mo. App. 597, 144 S. W. 175, holding that the printed Session Acts and prior revisions of the statutes are still official and authentic repositories of the statutory law and reference to them in the description of a statute still in force is a sufficient pleading.

71. Md.—*Rawlings v. State*, 2 Md. 201. Mass.—See *Com. v. Burke*, 15 Gray 408. N. J.—*Mayer v. State*, 64 N. J. L. 323, 45 Atl. 624. S. C.—*State v. Butler*, 3 McCord 383.

See 1 Chitty Crim. Law 281.

See also *State v. Dewey*, 55 Vt. 550.

[a] But see *United States v. Goodwin*, 20 Fed. 237, wherein the court said: "In *Butler v. State*, 3 McCord 383, it was held that an indictment need not recite the statute on which it is founded; but if an indictment professes to do so, a material variance will be fatal; or, if the statute does not support the verdict, it must fail. If there had been no allegations in the indictment as to the law, the indictment might have been sustained; but as these allegations make it quite evident that the finding of the grand jury was upon a law which had been repealed, I think that judgment must be arrested."

ferred to in the conclusion as the "said statute."⁷² Since a statement of the time when the statute was passed need not ordinarily be made,⁷³ a mere clerical error in a statement as to the date thereof will not vitiate an indictment or information where facts sufficient to constitute an offense are set forth therein,⁷⁴ especially where it is obvious that the defendant could not be prejudiced thereby.⁷⁵ It is otherwise, however, in case the facts constituting the offense are not set forth except by reference to the statute.⁷⁶

(III.) **Following Language of Statute.**—(A.) **MUST EXACT WORDS BE FOLLOWED.**—Not only is it generally sufficient to charge a statutory offense in the language of the statute defining the same,⁷⁷ or in language substantially the same or equivalent thereto,⁷⁸ but it is necessary that it be so charged.⁷⁹ The more appropriate and safer practice, of course, is to use the words of the statute, rather than to undertake to substitute others of equivalent meaning.⁸⁰

As to necessity for conclusion *contra statuti*, see *supra*, VIII, A, 6, c; VIII, B, 6.

72. *Rawlings v. State*, 2 Md. 201; 1 Chitty Crim. Law 281.

73. See *supra*, p. 441.

74. **Mass.**—See *Com. v. Washburn*, 128 Mass. 421. **N. Y.**—*People v. Reed*, 47 Barb. 235; *People v. Walbridge*, 6 Cow. 512. **Pa.**—*Com. v. Bessemer*, etc. R. Co., 36 Pa. Super. 540. **Tenn.**—*Harris v. State*, 3 Lea 324.

75. *Harris v. State*, 3 Lea (Tenn.) 324.

76. *Com. v. Washburn*, 128 Mass. 421, mistake in stating year of passage of statute.

77. See *infra*, IX, E, 5, f, (III), (B).

78. See *infra*, this section.

79. See the following: **U. S.**—*Dewees' Case*, Chase 531, 7 Fed. Cas. No. 3,848. **Ala.**—*Skains v. State*, 21 Ala. 218; *Ramey v. State*, 9 Ala. App. 51, 64 So. 168. **Fla.**—*Thomas v. State*, 58 Fla. 120, 50 So. 954. **Ill.**—*People v. Jones*, 149 Ill. App. 65. **Ind.**—*Winegardner v. State*, 181 Ind. 525, 104 N. E. 969. **Ia.**—*State v. Corwin*, 151 Iowa 420, 131 N. W. 659; *State v. Seamons*, 1 Greene 418. **Ky.**—*Letcher County v. Wisconsin Steel Co.*, 145 Ky. 323, 140 S. W. 305; *Com. v. Drewry*, 126 Ky. 183, 103 S. W. 266, indictment for statutory offense must use words of statute or words having same meaning. **La.** *State ex rel. Satcho v. Judge of Crim. Dist.*, 49 La. Ann. 231, 21 So. 690; *State v. Charles*, 18 La. Ann. 720; *State v. Butman*, 15 La. Ann. 166; *State v. Hood*, 6 La. Ann. 179. **Md.**—*Kearney v. State*,

48 Md. 16; *State v. Elborn*, 27 Md. 483. **Mo.**—*State v. Knost*, 207 Mo. 18, 105 S. W. 616; *State v. Rosenblatt*, 185 Mo. 114, 83 S. W. 975; *State v. Cobb*, 113 Mo. App. 156, 87 S. W. 551. **Nev.** *People v. Logan*, 1 Nev. 110. **N. Y.** *People v. Rouss*, 63 Misc. 135, 118 N. Y. Supp. 433. **N. C.**—*State v. Goffney*, 157 N. C. 624, 73 S. E. 162; *State v. Rose*, 90 N. C. 712. **Ohio.**—*Kain v. State*, 8 Ohio St. 307, 312; *Hirn v. State*, 1 Ohio St. 15; *Vanvalkenburg v. State*, 11 Ohio 405; *Hess v. State*, 5 Ohio 1, 13; *Ditzler v. State*, 4 Ohio C. C. 551. **Okla.** *Mason v. State*, 2 Okla. Crim. 583, 103 Pac. 369. **S. C.**—*State v. Coleman*, 17 S. C. 473, terms of statute must be closely followed. **Tex.**—*Byrd v. State*, 72 Tex. Crim. 242, 162 S. W. 360; *State v. Crist*, 32 Tex. 99; *Bush v. Republic*, 1 Tex. 455; *Warder v. State*, 29 Tex. App. 534, 16 S. W. 338 (statutory definition must be followed at least substantially); *Bailey v. State*, 18 Tex. App. 426; *Tynes v. State*, 17 Tex. App. 123; *Jones v. State*, 12 Tex. App. 424. **Va.** *Boyenton v. Com.*, 114 Va. 841, 76 S. E. 945. **W. Va.**—*State v. Riffe*, 10 W. Va. 794.

[a] If the words of the statute are not employed, other words clearly equivalent must be used, so as to bring the offense charged within the provision and limitations of the statute defining or creating it. *State v. Riffe*, 10 W. Va. 794.

[b] Inversion of words is not material. *State v. Briggs* (R. I.), 86 Atl. 316. As to clerical errors or omissions generally, see *supra*, IX, C, 2, e.

80. **Ala.**—*Holly v. State*, 54 Ala. 238.

There is authority, indeed, though principally under the earlier cases, to the effect that the exact words of the statute must be pursued in charging such an offense.⁸¹ But the rule is now well settled, by express provision of statute in some states, that words used in a statute to define an offense need not be strictly pursued; but other words substantially the same, of like import, or equivalent thereto, may be used,⁸² unless the words used are the technical words which con-

D. C.—*Moses v. United States*, 16 App. Cas. 428. **Me.**—*State v. Caralluzzi*, 92 Atl. 937; *State v. Robbins*, 66 Me. 324. **Ohio.**—*Hagar v. State*, 35 Ohio St. 268. **Tenn.**—*Vaughn v. State*, 3 Coldw. 102; *Hall v. State*, 3 Coldw. 125; *Harrison v. State*, 2 Coldw. 232; *Peck v. State*, 2 Humph. 78, 85. **Tex.**—*Cannedy v. State*, 58 Tex. Crim. 184, 125 S. W. 31; *Cravey v. State*, 36 Tex. Crim. 90, 35 S. W. 658, 61 Am. St. Rep. 833; *Smith v. State*, 34 Tex. 612; *State v. Powell*, 28 Tex. 626; *Juanaqui v. State*, 28 Tex. 625; *State v. Moreland*, 27 Tex. 726; *Barthelow v. State*, 26 Tex. 175; *Francis v. State*, 21 Tex. 280; *Henderson v. State*, 14 Tex. 503, 510; *State v. Williams*, 14 Tex. 98. **Utah.**—*State v. Delvecchio*, 25 Utah 18, 69 Pac. 58. **W. Va.** *State v. Riffe*, 10 W. Va. 794, "simplest, safest, and most correct mode of drafting an indictment."

[a] "A distinction is to be drawn between charges which are violations of purely statutory offenses and those cases which were penalized under the common law. Naturally, where the offense is statutory, the language of the accusation must follow more closely the language of the statute, and be restricted by it more, than where the charge relates to a common-law offense, in which the details must necessarily be amplified in order to cover the definition of the common law offense." *Youmans v. State*, 7 Ga. App. 101, 113, 60 S. E. 383.

81. **Ala.**—*State v. Brown*, 4 Port. 410. For present rule in Alabama, see the next succeeding note. **Ky.**—*Com. v. Turner*, 8 Bush 1. **S. C.**—*State v. Cheatwood*, 2 Hill 459. **Tex.**—*Bush v. Republic*, 1 Tex. 455. For present Texas rule, see the next succeeding note. **Vt.**—*State v. Walworth*, 58 Vt. 502, 3 Atl. 543. **Va.**—*Howel v. Com.*, 5 Gratt. 604.

See also *State v. Coleman*, 17 S. C. 473, holding that "care must be taken to follow the terms of the statute closely."

[a] In Mississippi, there were several early authorities to effect that indictment "must pursue the precise and technical language employed in the statute in the definition or description of the offense." *Lewis v. State*, 49 Miss. 354; *Williams v. State*, 42 Miss. 323; *Scott v. State*, 31 Miss. 473. These cases were said to be "quite distinguishable" in *Jones v. State*, 51 Miss. 718, 724, 24 Am. Rep. 658, wherein it was said that "it is only necessary to observe that it is the substance, not the shadow, which should inspire the administration of justice." And see the next succeeding note for cases illustrative of present rule.

82. See the following: **U. S.**—*Dunbar v. United States*, 156 U. S. 185, 15 Sup. Ct. 325, 39 L. ed. 390; *Davis v. Utah Territory*, 151 U. S. 262, 14 Sup. Ct. 328, 38 L. ed. 153; *Cannon v. United States*, 116 U. S. 55, 76, 6 Sup. Ct. 278, 29 L. ed. 561; *United States v. Staats*, 8 How. 41, 12 L. ed. 979; *United States v. Nunnemacher*, 27 Fed. Cas. No. 15,903. **Ala.**—Code, 1907, §7136 (other words conveying same meaning may be used); *Fitzpatrick v. State*, 169 Ala. 1, 53 So. 1021; *Thomas v. State*, 156 Ala. 166, 47 So. 257; *Giles v. State*, 88 Ala. 230, 7 So. 271; *Davis v. State*, 68 Ala. 58, 65, 44 Am. Rep. 128; *Smith v. State*, 63 Ala. 55; *Sparrenberger v. State*, 53 Ala. 481, 25 Am. Rep. 613; *Ward v. State*, 22 Ala. 16; *Shains v. State*, 21 Ala. 218; *Ramey v. State*, 9 Ala. App. 51, 64 So. 168; *Gleason v. State*, 6 Ala. App. 49, 60 So. 518; *Richmond v. State*, 4 Ala. App. 139, 58 So. 973. **Ark.**—*Kirby's Dig.*, §2341; *Kreider v. State*, 103 Ark. 438, 147 S. W. 449; *Petty v. State*, 102 Ark. 170, 143 S. W. 1067; *Parker v. State*, 98 Ark. 575, 137 S. W. 253; *Blevins v. State*, 85 Ark. 195, 107 S. W. 393; *Sherill v. State*, 84 Ark. 470, 106 S. W. 997; *Richardson v. State*, 77 Ark. 321, 91 S. W. 758; *Cannon v. State*, 60 Ark. 564, 31 S. W. 150, 32 S. W. 128. **Cal.**—*Penal Code*, §958; *People v. Patterson*, 102

Cal. 239, 36 Pac. 436; *People v. Russell*, 81 Cal. 616, 23 Pac. 418; *People v. Girr*, 53 Cal. 629; *People v. Potter*, 35 Cal. 110; *People v. Maguire*, 26 Cal. 635; *People v. Allison*, 25 Cal. App. 716. 145 Pac. 539; *People v. Heivner*, 13 Cal. App. 768, 114 Pac. 411. **Colo.**—*Stoltz v. People*, 148 Pac. 865. **Fla.**—*Gen. St.*, 1906, §2961; *Johnson v. State*, 58 Fla. 68, 50 So. 529; *Schley v. State*, 48 Fla. 53, 37 So. 518; *Jackson v. State*, 26 Fla. 510, 7 So. 862; *Roberts v. State*, 26 Fla. 360, 7 So. 861; *Humphreys v. State*, 17 Fla. 381. **Hawaii.**—*King v. Nahakuali*, 3 Hawaii 472. **Idaho.**—*Rev. Codes*, 1907, §7685; *United States v. Mays*, 1 Idaho 763. **Ill.**—*People v. Carr*, 255 Ill. 203, 99 N. E. 357, Ann. Cas. 1913D, 864, 41 L. R. A. (N. S.) 1209; *People v. St. Clair*, 244 Ill. 444, 91 N. E. 573; *Kizer v. People*, 211 Ill. 407, 71 N. E. 1035; *Glover v. People*, 204 Ill. 170, 68 N. E. 464; *Seacord v. People*, 121 Ill. 623, 13 N. E. 194; *People v. Bennett*, 185 Ill. App. 316. **Ind.**—*Burns' Ann. St.*, 1914, §2045; *Eley v. State*, 108 N. E. 516; *Allen v. State*, 107 N. E. 471; *Winegardner v. State*, 181 Ind. 525, 104 N. E. 969; *Skelton v. State*, 173 Ind. 462, 89 N. E. 860, 90 N. E. 897; *Malone v. State*, 179 Ind. 184, 100 N. E. 567; *Hamilton v. State*, 142 Ind. 276, 41 N. E. 588; *State v. Williams*, 139 Ind. 43, 38 N. E. 339, 47 Am. St. Rep. 255; *Lavelle v. State*, 136 Ind. 233, 36 N. E. 135; *State v. Sarlls*, 135 Ind. 195, 34 N. E. 1129; *Nichols v. State*, 127 Ind. 406, 26 N. E. 839; *Dolan v. State*, 122 Ind. 141, 23 N. E. 761; *Trout v. State*, 111 Ind. 499, 12 N. E. 1005; *Franklin v. State*, 108 Ind. 47, 8 N. E. 695; *Hennings v. State*, 106 Ind. 386, 6 N. E. 803, 7 N. E. 4, 55 Am. Rep. 756; *State v. Anderson*, 103 Ind. 170, 2 N. E. 332. **Ia.**—*Code*, 1897, §5288; *State v. Gibbons*, 142 Iowa 96, 120 N. W. 474; *State v. Rohn*, 140 Iowa 640, 119 N. W. 88; *State v. Allen*, 32 Iowa 491. **Kan.**—*Gen. St.*, 1905, §5996; *State v. McGaffin*, 36 Kan. 315, 13 Pac. 560; *State v. Hart*, 33 Kan. 218, 6 Pac. 288; *State v. White*, 14 Kan. 538; *State v. Barnett*, 3 Kan. 244, 250, 87 Am. Dec. 471. **Ky.**—*MeKey v. Com.*, 145 Ky. 450, 140 S. W. 658; *Louisville & N. R. Co. v. Com.*, 144 Ky. 525, 139 S. W. 756; *Bennett v. Com.*, 133 Ky. 452, 118 S. W. 332; *Flint v. Com.*, 23 S. W. 346; *Johnson v. Com.*, 94 Ky. 341, 22 S. W. 335; *Ray v. Com.*, 12 Bush 397; *Com. v. Scroggin*, 22 Ky. L. Rep. 1338, 60 S. W. 528 (language of statute or words of similar import may be used); *Com. v. Hurt*, 10 Ky. L. Rep. 773. **La.**—*State v. Crudup*, 136 La. 555, 67 So. 364; *State v. Max*, 129 La. 546, 56 So. 503; *State v. Pellerin*, 118 La. 547, 43 So. 159; *State v. Hayes*, 105 La. 352, 29 So. 937; *State v. Washington*, 41 La. Ann. 778, 6 So. 633; *State v. Brown*, 41 La. Ann. 345, 6 So. 541. **Me.**—*State v. Caralluzzi*, 92 Atl. 937; *State v. Robbins*, 66 Me. 324. **Mass.**—*Com. v. Dill*, 159 Mass. 61, 34 N. E. 84; *Com. v. Parker*, 117 Mass. 112. **Minn.**—*Rev. Laws*, 1905, §5304. **Miss.**—*Rich-burger v. State*, 90 Miss. 806, 44 So. 772; *State v. Tucker*, 102 Miss. 517, 59 So. 826; *Woods v. State*, 67 Miss. 575, 7 So. 495; *Jones v. State*, 51 Miss. 718, 24 Am. Rep. 658; *Kline v. State*, 44 Miss. 317. **Mo.**—*State v. Brown*, 115 Mo. 409, 22 S. W. 367; *State v. Terry*, 106 Mo. 209, 17 S. W. 288; *State v. Ware*, 62 Mo. 597; *State v. Taylor*, 167 Mo. App. 104, 150 S. W. 1126; *State v. Brisco*, 166 Mo. App. 516, 148 S. W. 984. **Mont.**—*Rev. Codes*, 1907, §9155; *State v. Tudor*, 47 Mont. 185, 131 Pac. 632; *State v. Morrison*, 46 Mont. 84, 125 Pac. 649; *State v. Green*, 15 Mont. 424, 39 Pac. 322. **Neb.**—*Smith v. State*, 72 Neb. 345, 100 N. W. 806; *Hodgkins v. State*, 36 Neb. 160, 54 N. W. 86. **Nev.**—*Rev. Laws*, 1912, §7058; *State v. McKiernan*, 17 Nev. 224, 30 Pac. 831. **N. H.**—*State v. Gove*, 34 N. H. 510. **N. J.**—*State v. Caporale*, 85 N. J. L. 495, 89 Atl. 1034; *State v. Hickman*, 8 N. J. L. 299. **N. Y.**—*Code Crim. Proc.*, §283; *People v. Lowndes*, 130 N. Y. 455, 29 N. E. 751; *Eckhardt v. People*, 83 N. Y. 462, 38 Am. Rep. 462; *Tully v. People*, 67 N. Y. 15; *People v. Enoch*, 13 Wend. 159, 27 Am. Dec. 197; *People v. Gregg*, 59 Hun 107, 13 N. Y. Supp. 114; *People v. Rouss*, 63 Misc. 135, 118 N. Y. Supp. 433. **N. C.**—*State v. Varner*, 115 N. C. 744, 20 S. E. 518; *State v. Stubbs*, 108 N. C. 774, 13 S. E. 90; *State v. Drake*, 64 N. C. 589. **N. D.**—*Rev. Codes*, 1905, §9855. **Ohio.**—*Poage v. State*, 3 Ohio St. 229; *Sharp v. State*, 19 Ohio 379; *Sutcliffe v. State*, 18 Ohio 469, 51 Am. Dec. 459. **Okla.**—*Comp. Laws*, 1909, §6703; *Castleberry v. State*, 10 Okla. Crim. 504, 139 Pac. 132, alleging female was of "previous chaste character, instead of words of statute of "previous chaste and virtuous character"; *Stark v. State*, 10 Okla. Crim. 177, 135 Pac. 441 (precise words of statute need not be used); *Thurman v.*

State, 2 Okla. Crim. 718, 104 Pac. 67; *Raspberry v. State*, 4 Okla. Crim. 613, 103 Pac. 865; *Reed v. Territory*, 1 Okla. Crim. 481, 98 Pac. 583, 129 Am. St. Rep. 861; *Smith v. Territory*, 11 Okla. 656, 69 Pac. 803. **Ore.**—*Lord's Laws*, §1447; *State v. Chapin*, 144 Pac. 1187; *State v. Parr*, 54 Ore. 316, 103 Pac. 434. **Pa.** *Com. v. Stewart*, 2 Pa. Dist. 43; *Com. v. Hill*, 2 Pearson 432, under early Pennsylvania statute. **R. I.**—*State v. Smith*, 29 R. I. 513, 526, 72 Atl. 710; *State v. Flanagan*, 25 R. I. 369, 55 Atl. 876. **S. C.**—*State v. Hallback*, 40 S. C. 298, 18 S. E. 919; *Butler v. State*, 3 McCord 383; *State v. Vill*, 2 Brev. 262. **S. D.**—*Code Crim. Proc.*, §228; *State v. Fosburgh*, 32 S. D. 370, 143 N. W. 279. See *State v. McPherson*, 30 S. D. 547, 139 N. W. 368; *State v. Pirkey*, 22 S. D. 550, 118 N. W. 1042. **Tenn.**—*State v. Smith*, 119 Tenn. 521, 105 S. W. 68; *State v. Tarver*, 11 Lea 658; *Young v. State*, 10 Lea 165; *Wedge v. State*, 7 Lea 687; *State v. Swafford*, 3 Lea 162; *Jones v. State*, 3 Heisk. 445; *Budd v. State*, 3 Humph. 483, 39 Am. Dec. 189; *State v. Pearce*, Peck 65. **Tex.**—*Baskins v. State* (Tex. Crim.), 171 S. W. 723; *Ex parte Cowden* (Tex. Crim.), 168 S. W. 539; *Byrd v. State*, 72 Tex. Crim. 242, 162 S. W. 360; *Ferrell v. State* (Tex. Crim.), 152 S. W. 901, (under Code Crim. Proc. art. 460); *Robinson v. State* (Tex. Crim.), 149 S. W. 186; *Singh v. State* (Tex. Crim.), 146 S. W. 891; *Fowler v. State*, 38 Tex. 559; *Mathews v. State*, 36 Tex. 675; *State v. Powell*, 28 Tex. 626; *State v. Moreland*, 27 Tex. 726; *State v. Ake*, 9 Tex. 322; *McGaffey v. State*, 4 Tex. 156; *Drummond v. Republic*, 2 Tex. 156; *Thompson v. State*, 16 Tex. App. 74; *Jones v. State*, 12 Tex. App. 424; *Antle v. State*, 6 Tex. App. 202; *Sansbury v. State*, 4 Tex. App. 99; *Caldwell v. State*, 2 Tex. App. 53. **Utah.**—*Comp. Laws*, 1907, §4740; *State v. Delvecchio*, 25 Utah 18, 69 Pac. 58; *People v. Colton*, 2 Utah 457. **Va.**—*Dull v. Com.*, 25 Gratt. 965; *Com. v. Young*, 15 Gratt. 664. **Wash.**—*Rem. & Ball. Ann. Codes & St.*, §2064; *State v. Williams*, 73 Wash. 678, 132 Pac. 415 (words of similar import sufficient); *State v. Ferrato*, 72 Wash. 112, 129 Pac. 898; *State v. Seifert*, 65 Wash. 596, 118 Pac. 746. **W. Va.**—*State v. Riffe*, 10 W. Va. 794. **Wis.**—*St.*, 1898, §4669; *Davis v. State*, 134 Wis. 632, 115 N. W. 150; *State v.*

Mueller, 85 Wis. 203, 55 N. W. 165. **Can.**—*Queen v. Weir*, 3 Can. Cr. Cas. 102, words of equivalent import sufficient.

[a] "Every indictment or information is sufficient and good in law which charges the crime substantially in the language of the statute, subject only to those provisions of the national and state constitutions designed for the protection of life, liberty, and property." *Stoltz v. People* (Colo.), 148 Pac. 865.

[b] The pleader is at liberty to use any form of expression, provided only that he thereby fully and accurately describes the offense; and the entire indictment is to be considered in determining whether the offense is fully stated. *Dunbar v. United States*, 156 U. S. 185, 15 Sup. Ct. 325, 39 L. ed. 390.

[c] It is enough to charge in substance the offense created by the statute. *Queen v. Weir*, 3 Can. Cr. Cas. 102.

[d] But no word which is narrower than that used in the statute, or which has not its full signification, will suffice. *Sparrenberger v. State*, 53 Ala. 481, 25 Am. Rep. 643, holding word shop "not equivalent to store."

[e] **Dangerous Practice.**—While "equivalent words may be used in lieu of the statutory description of the offense, yet it is dangerous as tending not only to material inaccuracy in substance, but also to irregularity in matters of form." *State v. Riffe*, 10 W. Va. 794.

[f] The following have been held to be equivalent words or phrases: (1) embezzle and fraudulently convert to his own use (*Teston v. State*, 50 Fla. 137, 142, 39 So. 787), (2) "house" and "store-room," in indictment for gaming, under statute making it offense to game in any "house" (*McGaffey v. State*, 4 Tex. 156), (3) by "nature of" employment and "by reason of" employment (*Strobhar v. State*, 55 Fla. 167, 47 So. 4), (4) "notes of the bank" and "bank-notes" (*State v. Vanderlip*, 4 La. Ann. 444), (5) "currency of the United States" and "United States currency" (*Dull v. Com.*, 25 Gratt. (Va.) 965), (6) "portion" and "part" (*Holly v. State*, 54 Ala. 238), (7) "store" and "shop" (*State v. Moore*, 38 La. Ann. 66; *State v. Smith*, 5

stitute the specific offense,⁸³ or are descriptive of the nature of the offense sought to be charged.⁸⁴ Especially may other words be used, where they are stronger or more extensive in meaning, and inclusive of those used in the statute.⁸⁵ All the words used in the statute need

La. Ann. 340. *Contra*, Sparrenberger v. State, 53 Ala. 481, 25 Am. Rep. 643), (8) "with malice aforethought" and "with a premeditated design," State v. Seifert, 65 Wash. 596, 118 Pac. 746. (9) The use of the word "get" in place of the word "obtain" in the accusatory or presenting part of an indictment for obtaining money under false pretenses is immaterial (Hale v. Com., 151 Ky. 639, 152 S. W. 773), (10) as is the use of phrases, "according to" the laws instead of "under" the law, in prosecution for sale of liquor without license. Skelton v. State, 173 Ind. 462, 89 N. E. 860, 90 N. E. 897.

[g] The use of the word "unlawfully" implies "without authority of law." Fla.—Schley v. State, 48 Fla. 53, 37 So. 518. La.—State v. Holland, 120 La. 429, 45 So. 380. Okla.—Fooshee v. State, 3 Okla. Crim. 666, 108 Pac. 554.

[h] The following have been held not equivalent: (1) the words "with an attempt" and "with an intent" (State v. Marshall, 14 Ala. 411; State v. Martin, 14 N. C. 329), (2) "parent" and "father" (Lantzner v. State, 19 Tex. App. 320), (3) "furnish" and "convey" (Francis v. State, 21 Tex. 280), (4) "use and benefit" and "value" (Jones v. State, 12 Tex. App. 424), (5) "willingly" and "wittingly." Hamilton v. State, 54 Miss. 499.

83. Ark.—State v. Eldridge, 12 Ark. 608. Conn.—State v. Nichols, 8 Conn. 490. Tenn.—Chick v. State, 7 Humph. 101. Tex.—Drummond v. Republic, 2 Tex. 156. Va.—Dall v. Com., 25 Gratt. 96, such as "feloniously" etc.

As to necessity for use of technical terms and words, see *supra*, IX, C, 2, c; IX, I, 5, c.

84. Ala.—State v. Stedman, 7 Port. 405. Mich.—People v. Kent, 1 Doug. 42. Eng.—*How v. Pemberton*, 2 Burr. 1033, 97 Eng. Reprint 693.

85. Ala.—Richmond v. State, 4 Ala. App. 160, 58 So. 973. Conn.—State v. Wells, 31 Conn. 210. Ill.—Glover v. People, 304 Ill. 170, 68 N. E. 464. Ia.—State v. Rohs, 140 Iowa 640, 119 N. W.

88, "violently" instead of "forcibly" in rape. La.—State v. Pellerin, 118 La. 547, 43 So. 159; State v. Brown, 41 La. Ann. 345, 6 So. 541, wherein the word "wantonly" was used instead of "willfully." Me.—State v. Lynch, 88 Me. 195, 33 Atl. 978; State v. Robbins, 66 Me. 324. N. J.—State v. Caporale, 85 N. J. L. 495, 89 Atl. 1034, wherein word "defraud" was used for word "prejudice" in indictment based on statute making it offense to procure burning of building "with intent to prejudice any corporation that has underwritten any policy of insurance thereon." N. Y. Tully v. People, 67 N. Y. 15; People v. Enoch, 13 Wend. 159, 27 Am. Dec. 197. Tenn.—State v. Smith, 119 Tenn. 521, 105 S. W. 68. Tex.—*Ex parte* Cowden (Tex. Crim.), 168 S. W. 539 (wherein the word "willful" was used instead of "knowingly"); Robinson v. State (Tex. Crim.), 149 S. W. 186; State v. Wupperman, 13 Tex. 33. Utah.—State v. Williamson, 22 Utah 248, 62 Pac. 1022, 83 Am. St. Rep. 780.

[a] Illustrations.—(1) Thus, the words "unlawfully," "willfully," "fraudulently," and "feloniously" in an indictment include the word "wrongfully" (State v. Pellerin, 118 La. 547, 43 So. 159); (2) "unlawfully, willfully, purposely and feloniously" includes "maliciously" (Whitman v. State, 17 Neb. 224, 22 N. W. 459), (3) "feloniously" includes "willfully" (State v. McDaniel, 45 La. Ann. 686, 12 So. 751. Compare *supra*, IX, E, 5, c), (4) "deadly" includes "dangerous" (State v. Lynch, 88 Me. 195, 33 Atl. 978), (5) "destroy" includes "disable" (Tully v. People, 67 N. Y. 15), (6) and the word "property" includes "corporeal personal property." Sausbury v. State, 4 Tex. App. 99.

[b] A charge in an indictment for perjury that the testimony was "feloniously, falsely and corruptly" given necessarily implies that it was wilfully or intentionally given. Blevins v. State, 85 Ark. 195, 197 S. W. 393.

[c] So, if the word "knowingly" be in the statute, and the word "advisedly" be substituted for it, or the word

not in all cases be used in an indictment.⁸⁶ Nor, on the other hand, are superfluous words, beyond what the statute requires, objectionable.⁸⁷

(B.) SUFFICIENCY OF FOLLOWING LANGUAGE OF STATUTE ALONE.—(1.) *In General.*—The broad general rule, as usually stated,⁸⁸ is that an indictment or information for a statutory offense, charging the same in

“willfully” in the statute, and “maliciously” in the indictment, the words “advisedly” and “maliciously” not being in the statutes respectively, the indictment would be sufficient. *State v. Robbins*, 66 Me. 324, *aff’d* 1 Whart. Am. Crim. Law, §376; *Rex v. Fuller*, 1 Bos. & Pul. (Eng.) 180.

86. *Thompson v. Com.*, 5 Ky. L. Rep. 610; *People v. Gregg*, 59 Hun 107, 13 N. Y. Supp. 114.

[a] If some ingredient of the offense be plainly in an ellipsis, such must be omitted in the indictment. *Bell v. State*, 10 Ark. 536.

[b] The omission of words not constituting any part of the description or definition of the offense is not erroneous. *Dye v. Com.*, 7 Gratt. (Va.) 662. And see generally, as to effect of omission of words, *supra*, IX, C, 2, f.

87. *People v. Paul*, 167 Ill. App. 557 (which was an information for pandering, and was in the language of the statute, with the words, “persuade and encourage” added and the name of the female interpolated, the court held that “interpolating the name of the person charged to have been procured as an inmate for a house of prostitution, did not operate to change the character of the offense named in the statute”); *State v. Cheatwood*, 2 Hill (S. C.) 459, wherein the words of the statute were exactly pursued, with the exception that instead of the words “willfully, deliberately and maliciously did murder,” the indictment charges that the prisoner “willfully, deliberately and maliciously, did kill and murder.”

As to effect of surplusage, see generally *infra*, IX, J, 3.

88. **U. S.**—*Ledbetter v. United States*, 170 U. S. 696, 612, 18 Sup. Ct. 774, 42 L. ed. 1163; *Potter v. United States*, 155 U. S. 438, 15 Sup. Ct. 144, 39 L. ed. 214; *White v. United States*, 153 U. S. 308, 14 Sup. Ct. 924, 38 L. ed. 725; *United States v. Simmons*, 99 U. S. 269, 13 L. ed. 819; *United States v. Reese*, 92 U. S. 214, 232, 23 L. ed. 563; *United States v. Briggs* “*Nearea*,”

19 How. 92, 15 L. ed. 531; *United States v. Gooding*, 12 Wheat. 460, 6 L. ed. 693; *The Palmyra*, 12 Wheat. 1, 14, 6 L. ed. 531; *United States v. Staats*, 8 How. 41, 12 L. ed. 979; *Ackley v. United States*, 209 Fed. 217, 118 C. C. A. 403; *United States v. Baltimore*, etc. R. Co., 153 Fed. 997, 1008; *United States v. Ballard*, 118 Fed. 757; *United States v. Henry*, 3 Ben. 29, 26 Fed. Cas. No. 15,350. **Ala.**—*Kimbell v. State*, 165 Ala. 118, 51 So. 16; *Traylor v. State*, 160 Ala. 142, 14 So. 634; *Wilson v. State*, 61 Ala. 151; *Lodano v. State*, 25 Ala. 64; *Eubanks v. State*, 17 Ala. 181; *Ramey v. State*, 9 Ala. App. 51, 64 So. 168; *Sellers v. State*, 7 Ala. App. 78, 61 So. 485; *Jordan v. State*, 5 Ala. App. 229, 59 So. 719. **Ariz.**—*Cluff v. State*, 142 Pac. 644; *Atkin v. Territory*, 13 Ariz. 26, 108 Pac. 225; *Dutton v. Territory*, 13 Ariz. 7, 108 Pac. 224; *Hinds v. Territory*, 8 Ariz. 372, 76 Pac. 469. **Ark.**—*Holland v. State*, 111 Ark. 214, 163 S. W. 781; *Farrell v. State*, 111 Ark. 180, 163 S. W. 768; *Wolfe v. State*, 107 Ark. 33, 153 S. W. 1192; *Kreider v. State*, 103 Ark. 438, 147 S. W. 449; *Petty v. State*, 102 Ark. 170, 143 S. W. 1067; *Haupt v. State*, 100 Ark. 409, 140 S. W. 294, Ann. Cas. 1913D, 699; *Pearce v. State*, 97 Ark. 5, 132 S. W. 986; *Callwell v. State*, 73 Ark. 139, 83 S. W. 929, 108 Am. St. Rep. 28; *State v. Calbreath*, 71 Ark. 80, 71 S. W. 254. **Cal.** *People v. Witt*, 148 Pac. 928; *People v. Glass*, 158 Cal. 670, 112 Pac. 281; *People v. Finley*, 153 Cal. 59, 94 Pac. 248; *People v. Forbes*, 141 Cal. 581, 76 Pac. 179; *People v. Gordon*, 133 Cal. 328, 65 Pac. 746, 85 Am. St. Rep. 174; *People v. King*, 125 Cal. 369, 58 Pac. 49; *People v. Knowlton*, 122 Cal. 557, 55 Pac. 141; *People v. Hunt*, 120 Cal. 281, 52 Pac. 608; *People v. Page*, 116 Cal. 386, 48 Pac. 326; *People v. De Martini*, 25 Cal. App. 2, 142 Pac. 898; *People v. Bayard*, 24 Cal. App. 609, 142 Pac. 610; *Gibbs & Co. v. Justice's Court*, 34 Cal. App. 778, 140 Pac. 49; *People v. Ryan*, 16 Cal. App. 69, 143 Pac. 887. **Colo.** *Ryan v. People*, 29 Colo. 96, 114 Pac.

- 306, *Ann. Cas.* 1912B, 1232; *Schneider v. People*, 30 *Colo.* 493, 71 *Pac.* 369; *Cohen v. State*, 7 *Colo.* 274, 3 *Pac.* 385.
- Conn.**—*State v. McGee*, 81 *Conn.* 696, 72 *Atl.* 141; *State v. Carpenter*, 60 *Conn.* 97, 22 *Atl.* 497; *State v. Cady*, 47 *Conn.* 44; *State v. Bierce*, 27 *Conn.* 318, 320.
- Del.**—*State v. Donovan*, 90 *Atl.* 220.
- Fla.**—*Thomas v. State*, 58 *Fla.* 120, 50 *So.* 954. **Ga.**—*Glover v. State*, 126 *Ga.* 591, 55 *S. E.* 592 (under §254, *Code*, 1910); *Bazemore v. State*, 121 *Ga.* 619, 49 *S. E.* 701; *Johnson v. State*, 90 *Ga.* 441, 16 *S. E.* 92; *Youmans v. State*, 7 *Ga. App.* 101, 113, 66 *S. E.* 383; *Stoner v. State*, 5 *Ga. App.* 716, 63 *S. E.* 602; *Soell v. State*, 4 *Ga. App.* 337, 61 *S. E.* 514. **Idaho.**—*State v. O'Neil*, 24 *Idaho* 582, 135 *Pac.* 60; *State v. Brill*, 21 *Idaho* 269, 121 *Pac.* 79; *State v. Keller*, 8 *Idaho* 699, 70 *Pac.* 1051; *People v. Butler*, 1 *Idaho* 231. **Ill.**—*People v. Covitz*, 262 *Ill.* 514, 520, 104 *N. E.* 887 (by statute); *People v. Trumbley*, 252 *Ill.* 29, 96 *N. E.* 573; *People v. Schreiber*, 250 *Ill.* 345, 95 *N. E.* 189; *People v. Cotton*, 250 *Ill.* 338, 95 *N. E.* 283; *Glover v. People*, 204 *Ill.* 170, 68 *N. E.* 464; *People v. Mansfield*, 181 *Ill. App.* 710; *People v. Levin*, 181 *Ill. App.* 429; *People v. Darr*, 179 *Ill. App.* 130. **Ind.**—*Anderson v. State*, 181 *Ind.* 502, 104 *N. E.* 974; *Winegardner v. State*, 181 *Ind.* 525, 104 *N. E.* 969; *Anderson v. State*, 181 *Ind.* 502, 104 *N. E.* 974; *State v. Glosser*, 179 *Ind.* 230, 99 *N. E.* 1057; *Pittsburgh, etc. R. Co. v. State*, 178 *Ind.* 498, 39 *N. E.* 801; *Regadanz v. State*, 171 *Ind.* 387, 86 *N. E.* 449; *State v. Beach*, 147 *Ind.* 74, 43 *N. E.* 949, 46 *N. E.* 145, 36 *L. R. A.* 179. **Ia.**—*State v. Kendig*, 133 *Iowa* 164, 110 *N. W.* 463; *State v. Beebe*, 115 *Iowa* 128, 88 *N. W.* 378; *State v. Grant*, 86 *Iowa* 216, 53 *N. W.* 120; *State v. Smith*, 46 *Iowa* 670. **Kan.**—*State v. Briggs*, 145 *Pac.* 866; *State v. Bois*, 83 *Kan.* 273, 111 *Pac.* 189; *State v. Seely*, 65 *Kan.* 185, 69 *Pac.* 163; *State v. McGaffin*, 36 *Kan.* 315, 13 *Pac.* 580; *State v. Beverlin*, 30 *Kan.* 611, 2 *Pac.* 630; *State v. Foster*, 30 *Kan.* 305, 2 *Pac.* 628. **Ky.**—*Carroll v. Com.*, 191 *Ky.* 599, 175 *S. W.* 1043; *Lincolnton Hotel Co. v. Com.*, 149 *Ky.* 443, 149 *S. W.* 942; *Com. v. International Harvester Co.*, 147 *Ky.* 578, 144 *S. W.* 1008; *Com. v. Grinstead*, 198 *Ky.* 50, 55 *S. W.* 790, 57 *S. W.* 471; *Knoxville Nursery Co. v. Com.*, 108 *Ky.* 6, 55 *S. W.* 691; *Com. v. Champagne & O. R. Co.*, 101 *Ky.* 139, 40 *S. W.* 250; *Com. v. diff. r. Com.*, 86 *Ky.* 196, 5 *S. W.* 486; *Com. v. Cook*, 13 *B. Mon.* 149; *Com. v. Tanner*, 5 *Bush* 316. **La.**—*State v. Schwartz*, 137 *La.* —, 68 *So.* 608; *State v. Crudupt*, 136 *La.* 555, 67 *So.* 364; *State v. Lawson*, 136 *La.* 172, 66 *So.* 769; *State v. Tullos*, 135 *La.* 640, 65 *So.* 870; *State v. Alexander*, 113 *La.* 747, 37 *So.* 711; *State v. Sonier*, 107 *La.* 794, 32 *So.* 175. **Me.**—*Moulton v. Seully*, 111 *Me.* 428, 89 *Atl.* 944; *State v. Doran*, 99 *Me.* 329, 59 *Atl.* 440, 105 *Am. St. Rep.* 278; *State v. Snowman*, 94 *Me.* 99, 46 *Atl.* 815, 80 *Am. St. Rep.* 380, 50 *L. R. A.* 544; *State v. Robbins*, 66 *Me.* 324. **Md.**—*State v. Edwards*, 124 *Md.* 592, 92 *Atl.* 1057; *State v. Jenkins*, 124 *Md.* 376, 92 *Atl.* 773; *Curry v. State*, 117 *Md.* 587, 83 *Atl.* 1030; *State v. Camper*, 91 *Md.* 672, 47 *Atl.* 1027; *Stevens v. State*, 89 *Md.* 669, 43 *Atl.* 929; *Dickhaut v. State*, 80 *Md.* 451, 464, 37 *Atl.* 21, 60 *Am. St. Rep.* 332, 36 *L. R. A.* 765; *Mincher v. State*, 66 *Md.* 227, 7 *Atl.* 451; *State v. Hodges*, 55 *Md.* 127, 138; *Cearfoss v. State*, 42 *Md.* 403; *Parkinson v. State*, 14 *Md.* 184, 74 *Am. Dec.* 522. **Mass.**—*Allen v. State*, 107 *N. E.* 471; *Com. v. Cornell*, 213 *Mass.* 135, 99 *N. E.* 973; *Com. v. Dewhirst*, 190 *Mass.* 293, 76 *N. E.* 252; *Com. v. Brown*, 141 *Mass.* 78, 6 *N. E.* 377; *Com. v. Malloy*, 119 *Mass.* 347; *Com. v. Barrett*, 108 *Mass.* 302; *Com. v. Raymond*, 97 *Mass.* 567. **Mich.**—*People v. Driessen*, 178 *Mich.* 118, 114 *N. W.* 526; *People v. Smith*, 177 *Mich.* 358, 143 *N. W.* 12; *People v. Kennedy*, 176 *Mich.* 384, 142 *N. W.* 771; *People v. Kennedy*, 105 *Mich.* 75, 62 *N. W.* 1020; *Rice v. People*, 15 *Mich.* 9; *People v. Kent*, 1 *Doughl.* 42. **Minn.**—*State v. Mayo*, 118 *Minn.* 336, 136 *N. W.* 849; *State v. Abrisch*, 41 *Minn.* 41, 42 *N. W.* 543; *State v. Johnson*, 37 *Minn.* 493, 35 *N. W.* 373; *State v. Heck*, 23 *Minn.* 549. **Miss.**—*Sullivan v. State*, 67 *Miss.* 346, 7 *So.* 275; *Riley v. State*, 43 *Miss.* 397; *Sarah v. State*, 28 *Miss.* 267, 61 *Am. Dec.* 544. **Mo.**—*State v. Johns*, 259 *Mo.* 361, 168 *S. W.* 587; *State v. Perrigin*, 258 *Mo.* 232, 167 *S. W.* 573; *State v. Becker*, 248 *Mo.* 555, 151 *S. W.* 769; *State v. Hilton*, 248 *Mo.* 522, 151 *S. W.* 729; *State v. Swearingin*, 234 *Mo.* 549, 137 *S. W.* 880; *State v. MacLay*, 180 *Mo. App.* 727, 163 *S. W.* 544; *State v. Leaver*, 171 *Mo. App.* 371, 157 *S. W.* 841; *State v. Taylor*, 167 *Mo. App.* 104, 150 *S. W.* 1126; *State v. Young*, 163 *Mo. App.* 88, 146 *S. W.* 70. **Neb.**—*Goff v. State*, 89 *Neb.* 287, 131 *N. W.* 213; *Cord-*

son v. State, 77 Neb. 416, 109 N. W. 764; Peterson v. State, 61 Neb. 879, 90 N. W. 964; Chapman v. State, 61 Neb. 888, 86 N. W. 907; Leisenberg v. State, 60 Neb. 628, 84 N. W. 6; Wagner v. State, 43 Neb. 1, 61 N. W. 85; State ex rel. Bryant v. Lاپور, 26 Neb. 757, 42 N. W. 762. Nev.—State v. Switzer, 145 Pac. 925; State v. King, 35 Nev. 153, 126 Pac. 880; State v. Raymond, 24 Nev. 128, 117 Pac. 17. N. H.—State v. Piper, 73 N. H. 276, 60 Atl. 742; State v. Keneston, 59 N. H. 36; State v. Beckman, 57 N. H. 174; State v. Kennison, 55 N. H. 242; State v. Abbott, 31 N. H. 434. N. J.—State v. Hatfield (N. J. L.), 93 Atl. 677; State v. Capociale, 85 N. J. L. 425, 89 Atl. 1034; Rossette v. State, 51 N. J. L. 502, 18 Atl. 354; State v. Halsted, 39 N. J. L. 402. N. M.—State v. Probert, 140 Pac. 1108; State v. Alva, 18 N. M. 143, 124 Pac. 209. N. Y. People v. West, 106 N. Y. 293, 12 N. E. 610, 60 Am. Rep. 452; Phelps v. People, 72 N. Y. 334; People v. Higbie, 66 Barb. 131; People v. Cavanagh, 157 App. Div. 224, 141 N. Y. Supp. 812; People v. Flaherty, 79 Hun 48, 29 N. Y. Supp. 641; People v. Welster, 17 Misc. 410, 46 N. Y. Supp. 1135. N. C.—State v. Corbin, 157 N. C. 619, 72 S. E. 1071; State v. Howe, 100 N. C. 449, 5 S. E. 671; State v. Sloan, 67 N. C. 357; State v. Harper, 64 N. C. 129; State v. Stanton, 25 N. C. 424. N. D.—State v. Halon, 21 N. D. 133, 129 N. W. 234; State v. Clinie, 12 N. D. 23, 94 N. W. 574. Ohio.—Ellars v. State, 25 Ohio St. 285; State v. Shumann, 8 Ohio Dec. (Reprint) 373. Okla.—Williams v. State (Okla. Crim.), 142 Pac. 1181; Lightle v. State, 5 Okla. Crim. 259, 114 Pac. 275; State v. Feedback, 3 Okla. Crim. 568, 107 Pac. 442; De Graff v. State, 2 Okla. Crim. 512, 103 Pac. 538. Ore.—State v. Brown, 64 Ore. 473, 120 Pac. 285; State v. Runyon, 62 Ore. 246, 124 Pac. 259; State v. Miller, 54 Ore. 381, 103 Pac. 519; State v. Atwood, 54 Ore. 326, 102 Pac. 295, 104 Pac. 105, 21 Ann. Cas. 516; State v. Thompson, 28 Ore. 296, 42 Pac. 1602; State v. Light, 17 Ore. 278, 21 Pac. 132; State v. Carr, 6 Ore. 124. Pa.—Com. v. Kleckner, 45 Pa. Super. Ct. 179; Com. v. Beatty, 16 Pa. Super. 5. S. C.—State v. Paul, 88 S. C. 403, 76 S. E. 1037; State v. Davis, 88 S. C. 333, 76 S. E. 811; State v. Thomas, 3 Strickh. 509; State v. Williams, 2 Strickh. 474. Tenn. Harrison v. State, 2 Goldw. 225; State

v. Swafford, 3 Lea 162 (robbery); State v. Odum, 2 Lea 220; State v. Hartman, 8 East. 384. Tex.—Hatch v. State (Tex. Crim.), 174 S. W. 1052; Rutherford v. State (Tex. Crim.), 174 S. W. 1050; Clark v. State (Tex. Crim.), 174 S. W. 354; Burrus v. State (Tex. Crim.), 172 S. W. 981; Jones v. State (Tex. Crim.), 162 S. W. 1142; Byrd v. State, 72 Tex. Crim. 242, 162 S. W. 369; Partridge v. State (Tex. Crim.), 158 S. W. 549; Polk v. State (Tex. Crim.), 154 S. W. 988; Singh v. State (Tex. Crim.), 146 S. W. 801; Longley v. State, 42 Tex. 429; McFain v. State, 41 Tex. 385; Portwood v. State, 29 Tex. 47, 24 Am. Dec. 278; State v. Campbell, 29 Tex. 44, 24 Am. Dec. 251; Henderson v. State, 14 Tex. 303, 510, language of statute sufficient where it affords a complete definition of the offense. Utah.—State v. MacMillan, 145 Pac. 823; State v. Swan, 31 Utah 336, 88 Pac. 12; State v. Williamson, 22 Utah 248, 62 Pac. 1022, 83 Am. St. Rep. 780. Vt.—State v. Daley, 41 Vt. 564; State v. Cook, 38 Vt. 437. Va. White v. Com., 107 Va. 901, 59 S. E. 1101. Wash.—State v. Dodd, 147 Pac. 9; State v. Jakobowski, 77 Wash. 78, 137 Pac. 448; State v. Williams, 73 Wash. 678, 132 Pac. 415; State v. Ferraro, 72 Wash. 112, 129 Pac. 598; State v. Baker, 69 Wash. 582, 125 Pac. 1010; State v. Littooy, 52 Wash. 87, 100 Pac. 370; State v. Bogardus, 36 Wash. 297, 78 Pac. 942. W. Va.—State v. Massie, 72 W. Va. 444, 78 S. E. 382, 47 L. R. A. (N. S.) 679; State v. Rife, 16 W. Va. 794. Wyo.—Koppala v. State, 15 Wyo. 308, 89 Pac. 570, 93 Pac. 622 (especially after verdict) Edelhoff v. State, 5 Wyo. 12, 36 Pac. 627. Can.—Rex v. Cross, 43 Nova Scotia 320.

[a] "In indictments for purely statutory offenses it is sometimes sufficient to charge the offense by using only the words of the statute. This may be done where the language of the statute is so specific as to give notice of the act made unlawful, and so exclusive as to prevent its application to any other acts than those made unlawful." Sullivan v. State, 67 Mass. 345, 7 So. 275.

[b] Thus indictments following the language of the statute (1) for disturbing religious worship (State v. Menard, 12 Ark. 150), (2) or for "indecent exhibition of the person" (State v. Hade, 20 Ark. 150), (3) or charging the "crime against nature" (Hammel

the language of the statute, is sufficient; especially is this true, where the words used have a well recognized or technical meaning.⁸⁹ But this general rule is not an absolute and unqualified one;⁹⁰ whether or not it is sufficient to follow the words of the statute depending to some extent upon the manner in which the offense is stated in the statute.⁹¹ Such pleading is sufficient where, and only where, the words of themselves fully, directly and expressly, without any uncertainty or ambiguity, set forth all the elements constituting the offense intended to be punished;⁹² and the fact that the statute in the question read in the

man *v. People*, 168 Ill. 172, 48 N. E. 364), (4) or for presuming to solemnize a marriage contrary to law (*Pearce v. State*, 27 Ark. 5, 132 S. W. 986), (5) or charging the offense of aiding a prisoner to escape (*People v. Murray*, 57 Mich. 396, 24 N. W. 118) have been held sufficient.

[c] It is sufficient to follow the words of a statute making it an offense for "whoever being a male person, frequents or visits a gambling house or houses." *State v. Bridgewater*, 171 Ind. 1, 85 N. E. 715.

As to sufficiency of indictments or information charging particular offenses in language of statute, see the particular titles.

[d] **Misdemeanors.**—The rule is especially true when the offense charged is a misdemeanor. **U. S.**—*United States v. Sterling Salt Co.*, 200 Fed. 593; *United States v. Irvine*, 156 Fed. 376. **Ark.** *Glass v. State*, 45 Ark. 173; *State v. Snyder*, 41 Ark. 226; *State v. Witt*, 39 Ark. 216; *State v. Moser*, 33 Ark. 140. **Ind. Terr.**—*Stancliff v. United States*, 5 Ind. Terr. 480, 82 S. W. 882. **Mo.**—*State v. Ferguson*, 29 Mo. 416. **N. H.**—*State v. Rust*, 35 N. H. 438. **N. Y.**—*People v. West*, 166 N. Y. 293, 12 N. E. 610, 60 Am. Rep. 452. **Ore.**—*State v. Carmody*, 50 Ore. 1, 91 Pac. 446, 1081, 12 L. R. A. (N. S.) 828; *State v. Shaw*, 22 Ore. 287, 29 Pac. 1628. **Tenn.**—*State v. Pennington*, 3 Head 119.

[e] In fact, it may be said that it is rarely necessary to do otherwise. *Stancliff v. United States*, 5 Ind. Terr. 480, 82 S. W. 882.

89. *Deady v. United States*, 152 U. S. 329, 14 Sup. Ct. 689, 38 L. ed. 345; *United States v. Britton*, 107 U. S. 455, 471, 2 Sup. Ct. 512, 27 L. ed. 210; *People v. Pundak*, 141 Cal. 581, 75 Pac. 170; *People v. Silva*, 8 Cal. App. 349, 97 Pac. 202.

As to necessity for following stat-

utory language where technical words employed, see *supra*, IX, E. 5, f, (III), (A).

90. *Carroll v. Com.*, 164 Ky. 599, 175 S. W. 1043; *Mann v. State*, 47 Ohio St. 556, 562, 26 N. E. 226, 11 L. R. A. 656; *Hagar v. State*, 35 Ohio St. 268, for in many cases something more is required.

91. *Carroll v. Com.*, 164 Ky. 599, 175 S. W. 1043.

[a] If, after a full expression has been given to the statutory terms, any of the other rules relating to the indictment are left uncomplied with, the indictment is still insufficient. *United States v. Reese*, 92 U. S. 214, 232, 23 L. ed. 563.

92. See the following: **U. S.**—*Ledbetter v. United States*, 170 U. S. 606, 18 Sup. Ct. 774, 42 L. ed. 1162; *Moore v. United States*, 160 U. S. 268, 16 Sup. Ct. 294, 40 L. ed. 422; *Evans v. United States*, 153 U. S. 584, 14 Sup. Ct. 934, 38 L. ed. 830; *U. S. v. Carll*, 105 U. S. 611, 26 L. ed. 1135; *United States v. Mann*, 95 U. S. 580, 24 L. ed. 531; *Ackley v. United States*, 200 Fed. 217, 118 C. C. A. 403; *Hart v. United States*, 183 Fed. 368, 105 C. C. A. 588; *Martin v. United States*, 168 Fed. 198, 93 C. C. A. 484; *Hardesty v. United States*, 168 Fed. 25, 93 C. C. A. 417; *Miller v. United States*, 136 Fed. 581, 69 C. C. A. 355; *United States v. Van Wert*, 195 Fed. 974; *United States v. Ballard*, 118 Fed. 757. **Ala.**—*Kimbell v. State*, 165 Ala. 118, 51 So. 16; *Burt v. State*, 159 Ala. 134, 48 So. 851; *Wester v. State*, 147 Ala. 121, 41 So. 969 (fraud was element of offense and intent to defraud was required to be alleged though not in statute); *Miles v. State*, 94 Ala. 106, 11 So. 493; *Grottan v. State*, 71 Ala. 344; *Bryan v. State*, 45 Ala. 86; *Sellers v. State*, 7 Ala. App. 78, 61 So. 485. **Ark.**—*Holland v. State*, 111 Ark. 214, 163 S. W. 781; *Farrell v. State*, 111 Ark. 180, 163 S. W. 768; *Kreider v. State*,

light of the common law and of other statutes on a like matter, enables the court to infer the intent of the legislature, does not dispense with

- 103 Ark. 438, 147 S. W. 449; *Caldwell v. State*, 73 Ark. 139, 83 S. W. 929, 198 Am. St. Rep. 28; *State v. Witt*, 39 Ark. 216; *State v. Graham*, 38 Ark. 549; *Mohatt v. State*, 11 Ark. 169; *Bell v. State*, 19 Ark. 536. Cal.—*People v. Finley*, 153 Cal. 59, 94 Pac. 248; *People v. Perales*, 141 Cal. 581, 75 Pac. 170; *People v. Neil*, 91 Cal. 165, 27 Pac. 769; *People v. McKenna*, 81 Cal. 158, 22 Pac. 488; *People v. Earl*, 19 Cal. App. 69, 124 Pac. 887. Conn.—*State v. McGee*, 81 Conn. 696, 72 Atl. 141; *State v. Cady*, 47 Conn. 44. Del.—*State v. Donovan*, 90 Atl. 220. Fla.—*Statute v. State*, 52 Fla. 119, 42 So. 51; *Holton v. State*, 28 Fla. 393, 9 So. 716. Ga.—*Glover v. State*, 126 Ga. 594, 55 S. E. 592; *Minter v. State*, 104 Ga. 743, 30 S. E. 989; *Yanmans v. State*, 7 Ga. App. 191, 66 S. E. 385; *Amorous v. State*, 1 Ga. App. 313, 57 S. E. 999. Ill.—*People v. Covitz*, 262 Ill. 514, 520, 104 N. E. 887; *People v. Stricker*, 258 Ill. 618, 192 N. E. 216; *People v. Clark*, 256 Ill. 14, 29, 99 N. E. 860, Ann. Cas. 1913E, 214; *Gallagher v. People*, 211 Ill. 168, 71 N. E. 842; *McCracken v. People*, 209 Ill. 215, 70 N. E. 749; *Glover v. People*, 204 Ill. 170, 68 N. E. 464; *Cochran v. People*, 175 Ill. 28, 51 N. E. 845; *West v. People*, 137 Ill. 189, 27 N. E. 34, 34 N. E. 254; *People v. Carbine*, 185 Ill. App. 161; *People v. Cully*, 185 Ill. App. 160. Ind.—*State v. Closser*, 179 Ind. 230, 99 N. E. 1057; *State v. Rodgers*, 175 Ind. 25, 93 N. E. 234; *State v. Bridgewater*, 171 Ind. 1, 85 N. E. 715; *State v. Romaine*, 171 Ind. 725, 86 N. E. 73; *Schmidt v. State*, 78 Ind. 41; *Bowles v. State*, 13 Ind. 427. Ia.—*State v. Kendig*, 123 Iowa 164, 110 N. W. 463; *State v. Beebe*, 115 Iowa 128, 88 N. W. 358; *State v. Reilly*, 198 Iowa 735, 78 N. W. 689; *State v. Smith*, 46 Iowa 670. Kan.—*State v. Briggs*, 145 Pac. 866 (words must be descriptive of offense, in order to be sufficient to charge it in language of statute); *State v. Seely*, 65 Kan. 185, 69 Pac. 103; *State v. Beverlin*, 30 Kan. 611, 2 Pac. 639. Ky.—*Carroll v. Com.*, 164 Ky. 599, 175 S. W. 1040; *Tudor v. Com.*, 134 Ky. 186, 119 S. W. 816; *Com. v. Gregory*, 121 Ky. 458, 89 S. W. 477; *Gidley v. Com.*, 110 Ky. 510, 62 S. W. 4. Pa.—*State v. Com.*, 21 Ky. L. Rep. 1522, 25 S. W. 687; *Com. v. Cook*, 13 B. Mon. 149; *Com. v. Stout*, 7 B. Mon. 217. La.—*State v. Marks*, 127 La. 1031, 31 So. 340; *State v. Souler*, 107 La. 794, 22 So. 175; *State v. Demosche*, 47 La. Ann. 611, 17 So. 209; *State v. Thibodeau*, 39 La. Ann. 476, 2 So. 400; *State v. Philono*, 38 La. Ann. 204; *State v. Maas*, 37 La. Ann. 292. Me.—*State v. Boran*, 99 Me. 329, 59 Atl. 440, 195 Am. St. Rep. 217; *State v. Snowman*, 94 Me. 99, 46 Atl. 815, 80 Am. St. Rep. 389, 50 L. R. A. 541. Mass.—*Com. v. Beaudin*, 213 Mass. 158, 99 N. E. 955, Ann. Cas. 1913E, 1080; *Com. v. Min Sing*, 202 Mass. 121, 88 N. E. 918; *Com. v. Malloy*, 119 Mass. 337. Mich.—*People v. Glazier*, 159 Mich. 528, 124 N. W. 582. Minn.—*State v. Comfort*, 22 Minn. 271. Miss.—*Harrington v. State*, 54 Miss. 499. Mo.—*State v. Perrigan*, 258 Mo. 233, 167 S. W. 576; *State v. Hilton*, 248 Mo. 522, 154 S. W. 729; *State v. Keatner*, 178 Mo. 487, 77 S. W. 522; *State v. Krueger*, 134 Mo. 262, 35 S. W. 604; *State v. Ramsauer*, 110 Mo. App. 401, 124 S. W. 67. Neb.—*Cordson v. State*, 77 Neb. 416, 109 N. W. 763; *Peterson v. State*, 64 Neb. 875, 90 N. W. 964; *Chapman v. State*, 61 Neb. 888, 86 N. W. 907; *Leisenberg v. State*, 60 Neb. 628, 84 N. W. 6. N. H.—*State v. Piper*, 73 N. H. 226, 69 Atl. 742; *State v. King*, 67 N. H. 219, 34 Atl. 461; *State v. Keneston*, 59 N. H. 36. N. J.—*State v. Nugent*, 77 N. J. L. 84, 71 Atl. 485; *State v. Bartholomew*, 69 N. J. L. 160, 54 Atl. 231; *State v. Halsted*, 39 N. J. L. 402. N. M.—*State v. Probert*, 140 Pac. 1168; *United States v. Medina*, 15 N. M. 204, 103 Pac. 976. N. Y.—*People v. People*, 72 N. Y. 334. N. C.—*State v. Halder*, 153 N. C. 606, 69 S. E. 66; *State v. Britt*, 150 N. C. 811, 63 S. E. 1006; *State v. George*, 93 N. C. 507; *State v. Stanton*, 23 N. C. 424. Ore.—*State v. Chapin*, 144 Pac. 1187; *State v. Ross*, 55 Ore. 450, 104 Pac. 506, 106 Pac. 1022. S. C.—*State v. Benson*, 1 McMill. 472. Tenn.—*Daniel v. State*, 3 Halsk. 257. Utah.—*State v. Thompson*, 41 Utah 33, 123 Pac. 888. Va.—*Griffith v. Com.*, 29 Grant. 844. Wash.—*State v. Dodd*, 147 Pac. 9. Wis.—*Donnell v. State*, 35 Wis. 689, 11 N. W. 497. Wyo.—*Koppala v. State*, 16 Wyo. 288, 89 Pac. 576, 93 Pac. 602.

[a] In the employment of certain

the necessity of alleging in the indictment all the facts necessary to bring the case within that intent.⁹³

It is not sufficient to charge the offense in the language of the statute alone, where the statute merely designates the offense without stating the elements thereof,⁹⁴ or when recourse must be had to the common

words in themselves descriptive of the crime—like assault, rape, and others, it is unnecessary to aver acts done, as such words are always enough to charge the facts indicated by them. *State v. Donovan* (Del.), 90 Atl. 220.

[b] **Other statements of the rule** are: (1) "The general rule is that, to render an indictment good by following the language of the statute, it must contain a statement of every fact necessary to constitute the offense. The offense as stated in the statute must be complete in itself." *Com. v. Gregory*, 121 Ky. 158, 89 S. W. 477. (2) "If every fact necessary to constitute the offense is charged, or necessarily implied by following the language of the statute, an indictment in the words of the statute is sufficient; otherwise it is not." *Farrell v. Com.*, 164 Ky. 599, 175 S. W. 1043.

[c] The rule that an indictment for a statutory misdemeanor is sufficient, if the language of the statute is used in charging the offense, is limited to cases where such words fully set forth all the assignments necessary to constitute the offense intended to be punished without uncertainty or ambiguity. *Evans v. United States*, 153 U. S. 584, 14 Sup. Ct. 934, 939, 38 L. ed. 830; *United States v. Baltimore*, etc. R. Co., 153 Fed. 997, 1008.

93. *Evans v. United States*, 153 U. S. 584, 14 Sup. Ct. 934, 939, 38 L. ed. 830; *United States v. Britton*, 107 U. S. 675, 901, 2 Sup. Ct. 512, 27 L. ed. 529; *United States v. Carl*, 105 U. S. 611, 26 L. ed. 1105; *United States v. Mann*, 95 U. S. 560, 566, 24 L. ed. 531; *State v. Paper*, 73 N. H. 226, 60 Atl. 742.

94. See the following: **U. S.**—*Evans v. United States*, 153 U. S. 584, 14 Sup. Ct. 934, 939, 38 L. ed. 830; *United States v. Hess*, 121 U. S. 483, 8 Sup. Ct. 571, 31 L. ed. 510; *United States v. Mann*, 95 U. S. 560, 24 L. ed. 531; *United States v. Rose*, 92 U. S. 214, 35 L. ed. 503; *Peters v. United States*, 23 Fed. 127, 90 Ct. A. 105; *United States v. Benson*, 76 Fed. 24, 17 Ct. C. A. 703; *United States v. Balto-*

more, etc. R. Co., 153 Fed. 997; *United States v. Beatty*, 60 Fed. 740; *United States v. Wardell*, 49 Fed. 914; *United States v. Trumbull*, 46 Fed. 755. **Ala.**—*May v. State*, 85 Ala. 14, 5 So. 14; *Anthony v. State*, 29 Ala. 27; *Williams v. State*, 15 Ala. 259; *Worrell v. State*, 12 Ala. 732. **Ark.**—*Farrell v. State*, 111 Ark. 180, 163 S. W. 768, citing *Houpt v. State*, 100 Ark. 409, 140 S. W. 294, Ann. Cas. 1913C, 690; *Holland v. State*, 111 Ark. 214, 163 S. W. 781; *State v. Graham*, 38 Ark. 519. **Cal.**—*People v. Neil*, 91 Cal. 465, 27 Pac. 760. **Conn.**—*State v. Jackson*, 39 Conn. 229. **Del.**—*State v. Donovan*, 90 Atl. 220; *State v. McDowell*, 1 Penne. 2, 39 Atl. 454. **Fla.**—*Cook v. State*, 25 Fla. 698, 6 So. 451. **Ga.**—*Sanders v. State*, 86 Ga. 717, 12 S. E. 1058; *Youmans v. State*, 7 Ga. App. 101, 66 S. E. 383. **Ill.**—*Johnson v. People*, 113 Ill. 99. **Ind.**—*State v. Rodgers*, 175 Ind. 25, 93 N. E. 223; *State v. Sutton*, 170 Ind. 473, 84 N. E. 824; *State v. New*, 165 Ind. 571, 76 N. E. 400; *John v. State*, 159 Ind. 413, 65 N. E. 287, 59 L. R. A. 789; *Stropes v. State*, 120 Ind. 562, 22 N. E. 773; *Bowles v. State*, 13 Ind. 427. **Kan.**—*State v. Foster*, 30 Kan. 365, 2 Pac. 628. **Ky.**—*Carroll v. Com.*, 164 Ky. 599, 175 S. W. 1043; *Com. v. Cook*, 13 B. Mon. 149; *Com. v. Stout*, 7 B. Mon. 247; *Com. v. Ward*, 13 Ky. L. Rep. 422, 17 S. W. 283. **La.**—*State v. Schwartz*, 137 La. —, 68 So. 608. **Me.**—*State v. Doran*, 99 Me. 329, 59 Atl. 440, 105 Am. St. Rep. 278; *State v. Symonds*, 57 Me. 148. **Mass.**—*Com. v. Filburn*, 119 Mass. 297; *Tully v. Com.*, 4 Mete. 357. **Minn.**—*State v. Farrington*, 59 Minn. 147, 60 N. W. 1088, 28 L. R. A. 395. **Miss.**—*Sullivan v. State*, 67 Miss. 316, 7 So. 275; *Kilfield v. State*, 4 How. 304. **Mo.**—*State v. Perrigin*, 258 Mo. 233, 167 S. W. 573; *State v. Krieger*, 134 Mo. 262, 35 S. W. 604; *State v. Pugh*, 15 Mo. 509; *State v. Brown*, 8 Mo. 210. **N. Y.**—*People v. Kane*, 61 N. Y. Supp. 632. **N. C.**—*State v. Howe*, 100 N. C. 449, 5 S. E. 671; *State v. Crede*, 91 N. C. 640. **Ohio.**—*Landerton v. State*, 11 Ohio 282. **Okla.**—*Pettitt v. State*, 7

law in order to determine the constituent elements of the crime," or if the facts stated are capable of two constructions upon one of which the facts might be true and not constitute a crime.⁹⁵ Nor is it sufficient to follow the language of the statute where there has been a misprint in the statute,⁹⁶ or where in so stating the offense, the charge would be made only by inference or argument,⁹⁷ or would amount only to a statement of a conclusion of law.⁹⁸ But if in any case, where it is not otherwise apparent, the defendant insists upon greater particularity than the language of the statute, it is for him to show that from the obvious intention of the legislature, or the known principles of law, the case falls within some exception to the general rule.¹

(2.) *Statute Using General or Specific Words.*—When the words or terms used in the statute have no technical or precise meaning, which of themselves imply the offense,² or where the particular facts or acts

Okla. Crim. 12, 121 Pac. 278, indictment for felony, although in language of statute, is not sufficient, unless it states all the elements necessary to constitute the offense. **Ore.**—State v. Lee, 17 Ore. 488, 21 Pac. 455; State v. Perhaps, 4 Ore. 188; State v. Packard, 4 Ore. 157. **Pa.**—Com. v. Fohnestock, 15 Pa. Co. Ct. 598. **Tenn.**—Cornell v. State, 7 Baxt. 720. **Tex.**—Bryan v. State, 54 Tex. Crim. 18, 111 S. W. 711; Portwood v. State, 29 Tex. 47, 94 Am. Dec. 258; State v. Campbell, 29 Tex. 44, 94 Am. Dec. 251; State v. Fancett, 15 Tex. 584; Autte v. State, 6 Tex. App. 202. **Vt.** State v. Fiske, 66 Vt. 434, 29 Atl. 633; State v. Higgins, 53 Vt. 191. **W. Va.** State v. Mitchell, 47 W. Va. 789, 35 S. E. 845. **Wis.**—Jackson v. State, 91 Wis. 253, 261, 64 N. W. 838.

And see generally *supra*, note 92.

[a] "It is well settled in this state that an indictment for committing a statutory offense may describe the offense in the general language of the statute, but the description must be accompanied by a statement of the particulars essential to constitute the crime charged, and must acquaint the accused with what he must meet upon the trial. Hought v. State, 160 Ark. 409, 140 S. W. 294, Ann. Cas. 1910¹, 690; Farrell v. State, 111 Ark. 180, 163 S. W. 768.

[b] An averment in the terms of the statute without amplification or explanation of an "attempt to set on fire" is by itself purely argumentative and does not sufficiently apprise the defendant of the nature and cause of the accusation against him. State v. Donovan (Del.), 90 Atl. 220.

95. State v. Donovan (Del.), 90 Atl. 220.

96. People v. Allison, 25 Cal. App. 716, 145 Pac. 529.

97. State v. Marshall, 14 Ala. 411, wherein indictment alleged assault with an "attempt" to murder, while statute read assault with "intent" to murder.

98. State v. Meyersburg, 171 Mo. 1, 71 S. W. 229; State v. McMillan, 60 Vt. 105, 37 Atl. 278.

That it is not sufficient to charge an offense only by inference or argument, see *supra*, IX, C, 3.

99. State v. Graham, 38 Ark. 510.

That facts and not conclusions should be averred, see *supra*, IX, D, 5.

1. Ledbetter v. United States, 170 U. S. 600, 612, 18 Sup. Ct. 774, 42 L. ed. 1102 (for defendant to show that greater particularity is required by reason of the omission from the statute of some element of the offense); United States v. Henry, 3 How. 39, 26 Fed. Cas. No. 15,272. **Ark.**—State v. Castle, 19 Ark. 612; Lesson v. State, 19 Ark. 171. **Conn.**—Whiting v. State, 14 Conn. 487, 36 Am. Rep. 499. **Md.** Parkinson v. State, 14 Md. 181, 14 Am. Dec. 222. **Miss.**—Riley v. State, 43 Miss. 297.

[a] In such case defendant has the burden of showing other averments are necessary to insure a fair trial or to protect him against another prosecution for the same offense. State v. Lockbaum, 38 Conn. 400, 140.

2. People v. Perales, 141 Cal. 281, 75 Pac. 170; People v. Silva, 8 Cal. App. 349, 97 Pac. 202.

which shall constitute it are not specified, but, from the general language used, many things may be done which may constitute an offense, it is then necessary to set forth the particular things or acts claimed to have been done, with reasonable clearness and distinctness;³ and, on the other hand, the rule is the same where several separate different and distinct acts are enumerated in the statute, any one of which may constitute the crime.⁴ So where the offense is described by general words in the statute, and really consists in a number of particulars, to follow the exact language of the statute is not sufficient.⁵ And where the definition of the offense includes generic terms, it is not sufficient to charge the offense in the same generic terms as in the definition, but it must state the species; it must descend to particulars.⁶

3. Cal.—*People v. Perales*, 141 Cal. 581, 75 Pac. 170; *People v. Silva*, 8 Cal. App. 349, 97 Pac. 202. Ind.—*Bowies v. State*, 13 Ind. 427. Wash.—*State v. Dodd*, 42 Wash. 218, 147 Pac. 9.

[a] Where the statute defines an offense as being committed by certain specified acts or means, "or otherwise," the acts otherwise or different from those specified must be more definitely described than by the general description of the statute. *Daniel v. State*, 61 Ala. 4; *Danner v. State*, 54 Ala. 127.

4. *People v. Lee*, 107 Cal. 477, 40 Pac. 754.

[a] "A person, for example, charged with vagrancy is of right entitled to know whether he is called upon to meet the charge as being a common drunkard, or as being a dissolute associate of known thieves, or as being a healthy beggar, in short, as belonging to what class, or as having habitually committed what act to lay him liable as a 'vagrancy man.'" *People v. Lee*, 107 Cal. 477, 40 Pac. 754.

5. Ark.—*Brittin v. State*, 10 Ark. 299. Cal.—*People v. McKenna*, 81 Cal. 158, 22 Pac. 488. Ill.—*Cochran v. People*, 175 Ill. 28, 51 N. E. 845; *Rank v. People*, 80 Ill. App. 40. Ind.—*State v. Romaine*, 171 Ind. 725, 86 N. E. 73; *State v. Bridgewater*, 171 Ind. 1, 85 N. E. 715; *State v. Metsker*, 169 Ind. 555, 83 N. E. 241; *s. c.*, 169 Ind. 701, 83 N. E. 1135; *Johns v. State*, 159 Ind. 413, 65 N. E. 287, 59 L. R. A. 789. N. J. *State v. Hatfield* (N. J. L.), 93 Atl. 677.

[a] "As for example, an indictment for obtaining money upon false pretenses, though in the very words of the statute, would be insufficient because of the uncertain and indefinite description of the offence. The defend-

ant in such cases, is entitled to be informed of the particular facts and circumstances constituting the crime alleged against him. The law would be the same in an indictment for profane cursing and swearing. It would not be sufficient to charge a party with having profanely sworn so many oaths, as a profane oath is a matter of law, depending upon the particular words used, and therefore not to be decided by the witness but by the court." *Brittin v. State*, 10 Ark. 299.

6. See the following cases: U. S. *United States v. Hess*, 124 U. S. 483, 8 Sup. Ct. 571, 31 L. ed. 516; *Ackley v. United States*, 200 Fed. 217, 118 C. C. A. 403; *United States v. Lancaster*, 2 McLean 431, 26 Fed. Cas. No. 15,556. Ga.—*Burkes v. State*, 7 Ga. App. 39, 65 S. E. 1091. Ind.—*Glover v. State*, 179 Ind. 459, 101 N. E. 629; *State v. Turner*, 171 Ind. 725, 85 N. E. 1027; *State v. Bridgewater*, 171 Ind. 1, 85 N. E. 715; *State v. Metsker*, 169 Ind. 555, 83 N. E. 241; *Johns v. State*, 159 Ind. 413, 65 N. E. 287, 59 L. R. A. 789; *State v. Patton*, 159 Ind. 248, 64 N. E. 850. Ia.—*State v. Mitchell*, 139 Iowa 455, 116 N. W. 808. Kan.—*State v. Seely*, 65 Kan. 185, 69 Pac. 163. Mo. *State v. Leaver*, 171 Mo. App. 371, 157 S. W. 821. Nev.—*State v. King*, 35 Nev. 153, 126 Pac. 880. N. C.—*State v. Credle*, 91 N. C. 640. Tex.—*McFain v. State*, 41 Tex. 385; *State v. West*, 10 Tex. 553. Va.—*Boyd v. Com.*, 77 Va. 52. Wash.—*State v. Muller*, 80 Wash. 368, 141 Pac. 910.

[a] "In such a case an information using the same generic terms of the statutory definition is insufficient as stating a conclusion. It must be more specific than the statute, and state such particulars as will bring the act

Where the statute uses generic terms whose meaning is limited by an enumeration of particular prohibited acts, it is not sufficient merely to charge the offense in the generic terms.⁷ When a general term, used in a statute creating an offense is followed by words of more precise and definite meaning, the indictment must charge the offense in the particular words used in the statute.⁸ Statutes, however, sometimes provide that when a statute creating or defining any offense uses special or particular terms, an indictment on it may use the general term, which in common language, embraces the special term.⁹

(3.) *Statute in Disjunctive*.—A further exception to the general rule that it is ordinarily sufficient in framing an indictment upon a statute, to use the very words of the statute,¹⁰ exists where a statute defining an offense enumerates several acts disjunctively as constituting the offense; in which case if it is sought to charge more than one of such acts in the same count, the conjunctive must ordinarily be used.¹¹

of the person charged within the generic terms, and notify him of the specific act charged." *State v. Muller*, 80 Wash. 368, 141 Pac. 910.

[b] "For example, the statutory offense of obtaining money or property upon 'false pretenses' would not be sufficiently charged in the language of the statute; for 'false pretenses' is a generic term, which includes an innumerable variety of acts and conduct. There is nothing of a generic nature about the statutory definition of the crime of 'living with a common prostitute.'" *State v. King*, 35 Nev. 153, 126 Pac. 880.

[c] An exception to this rule exists where the offense of sodomy is statutory, in which case it is sufficient to charge it in the language of the statute, without describing the particular manner or the details of the commission of the act. *Glover v. State*, 179 Ind. 459, 101 N. E. 629. And see the title, "**Sodomy.**"

7. *Danner v. State*, 54 Ala. 127, 25 Am. Rep. 662; *Horton v. State*, 53 Ala. 488, 493; *Johnson v. State*, 32 Ala. 583; *Bush v. State*, 18 Ala. 415; *Dix v. State*, 8 Ala. App. 338, 62 So. 1007; *Bell v. State*, 10 Ark. 536.

[a] An indictment for playing cards at a "public place" under a statute prohibiting playing at a number of specified places "or any public house, or highway or any other public place," is not supported by proof of playing cards in a "public highway." *Bush v. State*, 18 Ala. 415.

8. Ala.—*Johnson v. State*, 32 Ala. 583; *Bush v. State*, 18 Ala. 415; *State*

v. Raiford, 7 Post. 161. Ark.—*Bell v. State*, 10 Ark. 536. Me.—*State v. Casey*, 45 Me. 435. Mont.—*Territory v. Carland*, 6 Mont. 14, 16, 9 Pac. 578.

[a] Where statute punished stealing of "any horse, mare, or gelding, foal or filly, ass or mule," under a charge of stealing a horse, proof of stealing a gelding will not support a conviction. *State v. Plunket*, 2 Stew. (Ala.) 11.

9. See the following: Ala. Code, 1907, §7138; Tex. Code Crim. Proc., art. 440; *Ryrd v. State*, 72 Tex. Crim. 242, 102 S. W. 360, 361; *Forrell v. State* (Tex. Crim.), 152 S. W. 991.

10. See *supra*, IX, E. 5, f, (III), (I), (1).

11. See the following: Ariz.—*Dutton v. Territory*, 13 Ariz. 7, 198 Pac. 224. Ark.—*Thompson v. State*, 37 Ark. 498. Cal.—*People v. Tomlinson*, 35 Cal. 303; *People v. Hatch*, 13 Cal. App. 521, 109 Pac. 1097. Ill.—*Seaward v. People*, 121 Ill. 623, 13 N. E. 194. Ind.—*Regan v. State*, 171 Ind. 387, 84 N. E. 449. Ia.—*State v. Corwin*, 151 Iowa 420, 131 N. W. 659; *State v. Habbell*, 137 Iowa 570, 115 N. W. 102; *State v. Yates*, 145 Iowa 222, 104 N. W. 174; *State v. Esche*, 110 Iowa 118, 88 N. W. 378; *State v. Fouchaben*, 90 Iowa 220, 65 N. W. 299. Kan.—*State v. Senger*, 65 Kan. 711, 70 Pac. 599. La.—*State v. Philbin*, 38 La. Ann. 304; *State v. Price*, 37 La. Ann. 914. Mo.—*State v. Currier*, 223 Mo. 644, 117 S. W. 461; *State v. Pittman*, 70 Mo. 26; *State v. Pancher*, 71 Mo. 460; *State v. Pilot*, 62 Mo. 395; *State v. McCallum*, 44 Mo. 943; *State v. Fitzsimmons*, 29 Mo. 260; *State v.*

where the acts are not repugnant,¹² since alternative or disjunctive averments render an indictment bad for uncertainty.¹³ This rule, however, does not apply where the use of the disjunctive "or" does not render the statement of the offense uncertain,¹⁴ as where one term is used only as explaining or illustrating the other,¹⁵ or as synonymous with it,¹⁶ or where the language of the law makes either an attempt or procurement of an act, or the act itself, in the alternative, indictable.¹⁷

(7.) *Statute Including Innocent Acts.*—Where the language of the statute is so general as to include cases which, though within the terms, are not within the spirit or meaning of the statute, it is not sufficient to follow the language of the statute;¹⁸ but in such case, the indictment

Curtis, 185 Mo. App. 594, 172 S. W. 619; State v. Field, 139 Mo. App. 20, 119 S. W. 499. **N. H.**—State v. Naramore, 58 N. H. 273. **N. J.**—State v. Flynn, 76 N. J. L. 473, 72 Atl. 290; State v. Drake, 30 N. J. L. 422; State v. Price, 11 N. J. L. 203. **N. Y.**—People v. Kane, 61 N. Y. Supp. 632. **N. C.**—State v. Harper, 64 N. C. 129. See State v. Van Doran, 109 N. C. 864, 14 S. E. 32. **Okla.** Slover v. Territory, 5 Okla. 506, 49 Pac. 1009. **Ore.**—State v. Bergman, 6 Ore. 241; State v. Carr, 6 Ore. 134. **R. I.** State v. Colwell, 3 R. I. 284. **Tex.** Qualls v. State, 71 Tex. Crim. 67, 158 S. W. 539; Goodwin v. State, 70 Tex. Crim. 600, 158 S. W. 274; Countryman v. State, 52 Tex. Crim. 23, 105 S. W. 151; Venturio v. State, 37 Tex. Crim. 653, 40 S. W. 974; Davis v. State, 23 Tex. App. 637, 5 S. W. 149; Copping v. State, 7 Tex. App. 61. **Wis.**—Clifford v. State, 29 Wis. 327.

[a] "It is permissible where the statute may be violated in one of several ways, to charge or allege conjunctively that the party violated the statute by all the means set forth in the law; but it is not permissible, under any circumstances to charge it in the alternative. The allegations must be distinct and affirmative, and not uncertain or in the alternative." Venturio v. State, 37 Tex. Crim. 653, 40 S. W. 974. But see *infra*, IX.

12. State v. Flint, 62 Mo. 393; State v. Fitzsimmons, 30 Mo. 236; State v. Curtis, 185 Mo. App. 594, 172 S. W. 619.

[a] In State v. Flint, 62 Mo. 393, the court said: "The statute is in the disjunctive, and makes the act criminal when done in one or the other of different ways. The indictment fol-

lows the language of the statute, but charges the offense to have been committed conjunctively. This ordinarily is correct and proper pleading. Where a statute on which an indictment is founded, enumerates the offense or the intent necessary to constitute such offenses disjunctively, the indictment must charge them conjunctively where the acts are not repugnant. (State v. Fitzsimmons, 30 Mo. 236.) Where the contradictory or repugnant expressions do not enter into the substance of the offense, and the indictment will be good without them, they may be rejected as surplusage; or, where the repugnant matter is simply inconsistent with any preceding averments, it may also be rejected as superfluous."

As to repugnancy, see *supra*, IX, C, 6.

13. See *supra*, IX, C, 5.

14. State v. Van Doran, 109 N. C. 864, 14 S. E. 32.

15. State v. Van Doran, 109 N. C. 864, 14 S. E. 32.

[a] Where the disjunctive "or" is used in the sense of "to-wit," there would seem to be no objection to following the language of the statute. See State v. Harper, 64 N. C. 129.

16. **Cal.**—People v. Toulinson, 35 Cal. 503. **Mo.**—State v. Moore, 61 Mo. 276; State v. Ellis, 4 Mo. 474. **Wash.**—State v. Brookhouse, 10 Wash. 87, 38 Pac. 862. **Wis.**—Clifford v. State, 29 Wis. 327.

17. State v. Van Doran, 109 N. C. 864, 14 S. E. 32.

18. **U. S.**—United States v. Pond, 2 Curt. 265, 27 Fed. Cas. No. 16,067. **Ark.** Caldwell v. State, 73 Ark. 139, 83 S. W. 929. **Cal.**—People v. Conness, 150 Cal. 114, 88 Pac. 821. **Conn.**—State v.

should show that the act sought to be charged as constituting an offense is not one of the cases thus excluded.²⁰ Nor is it sufficient to follow the language of the statute where the statute shows that it was intended against wilful and intentional acts only, though not in terms so alleged.²¹

(IV.) Matters in Addition to Statutory Language. — Notwithstanding the rule permitted a statutory offense to be pleaded in the language of the statute,²² yet in charging such offenses, as in charging offenses at common law,²³ it is necessary that the indictment should leave no doubt in the minds of the accused and the court of the exact offense intended to be charged, so that the defendant may not only know what he is called upon to meet, but also that a plea of formal acquittal or conviction can be shown with accuracy by the record.²⁴ So too, in addition to the statutory language, the indictment should in some way individualize the particular offense charged, by appropriate averments as to time, place, person and other circumstances to identify the particular transaction.²⁵

Carroll, 82 Conn. 321, 73 Atl. 780; State v. Costello, 62 Conn. 128, 131, 25 Atl. 477; State v. Jackson, 39 Conn. 229, 230; State v. Bierce, 27 Conn. 320. Fla.—King v. State, 42 Fla. 260, 28 So. 200. Ind.—Vinnedge v. State, 167 Ind. 410, 79 N. E. 353; Strope v. State, 120 Ind. 562, 22 N. E. 773; State v. Welch, 88 Ind. 268; Schmidt v. State, 78 Ind. 41. Me.—Moulton v. Soutly, 111 Me. 425, 89 Atl. 944, 959; State v. Turnbull, 78 Me. 392, 6 Atl. 1. Mass.—Com. v. Barrett, 108 Mass. 390. Mo.—State v. Griffin, 89 Mo. 49, 1 S. W. 87. N. H.—State v. Goulding, 44 N. H. 284. Ore.—State v. Packard, 4 Ore. 157.

19. United States v. Pond, 2 Crut. 265, 27 Fed. Cas. No. 16,967.

20. Sellers v. State, 7 Ala. App. 78, 61 So. 485, must charge defendant "unlawfully" or "contrary to law" shot a pistol at, into or against dwelling house, though words not used in statute. See *supra*, IX, E, 5, c.

21. See *supra*, IX, E, 5, f, (11). (13), (14).

22. See *supra*, IX, C, 4.

23. See the following cases: U. S. Ledbetter v. United States, 170 U. S. 606, 48 Sup. Ct. 774, 42 L. ed. 1160; Blitt v. United States, 153 U. S. 308, 14 Sup. Ct. 924, 38 L. ed. 725; United States v. Hess, 124 U. S. 481, 8 Sup. Ct. 371, 31 L. ed. 510; United States v. Patton, 107 U. S. 655, 7 Sup. Ct. 512, 27 L. ed. 570; United States v. Simmons, 90 U. S. 300, 24 L. ed. 810; United States v. Mills, 7 Fed. 138, 3 L.

ed. 620; Armour Packing Co. v. Federal States, 153 Fed. 1, 10, 82 U. S. A. 133; United States v. Baltimore, etc. R. Co., 103 Fed. 997; United States v. Crosby, 1 Hughes 448, 23 Fed. Cas. No. 74,890. Ark.—Glass v. State, 45 Ark. 173; Moffatt v. State, 11 Ark. 100. Ky.—Com. v. Cook, 13 B. Mon. 149. Mo.—State v. Brown, 8 Mo. 210. N. H.—State v. Palmer, 43 N. H. 278. N. Y.—People v. Taylor, 3 Denio 91. Tex.—Tutwood v. State, 29 Tex. 47, 94 Am. Dec. 258.

24. See the following cases: Ala.—Anthony v. State, 29 Ala. 27. Ark.—State v. Graham, 38 Ark. 519. Cal.—People v. Thompson, 4 Cal. 28; People v. Silva, 8 Cal. App. 340, 97 Pac. 205, apply it *construere* to the person charged. Fla.—Mills v. State, 78 Fla. 76, 81 So. 278. Ind.—Rowles v. State, 35 Ind. 427; State v. Aydehart, 7 Ind. 47, 157. Ia.—State v. Cowdin, 151 Iowa 490, 131 N. W. 659; State v. Mitchell, 109 Iowa 455, 116 N. W. 888; State v. Handerson, 135 Iowa 469, 112 N. W. 438; State v. Kessig, 123 Iowa 104, 119 N. W. 403; State v. Barber, 102 Iowa 477, 73 N. W. 210; State v. Day, 107 Iowa 28, 60 N. W. 480. Mo.—State v. Cox, 29 Mo. 47; State v. Glass, 109 Mo. App. 700, 108 S. W. 388. N. Y.—People v. Wood, 106 N. Y. 298, 23 N. E. 916, 60 Am. Rep. 497; People v. Fuchs, 71 Misc. 69, 129 N. Y. Supp. 1019; People v. Webster, 17 Misc. 410, 40 N. Y. Supp. 1135.

[a] While it is usually necessary

(V.) **Negating Provisos and Exceptions.** — The rule is sometimes stated that if the exception or proviso is incorporated in the enacting clause, it is an essential part of the offense, and the indictment must negative the fact that the defendant comes within the exception or proviso,⁴⁵ but where the exception is in a subsequent section or statute,

to allege the facts even under an indictment following the language of the statute or as to show that the act of the defendant which the prosecution proposes to prove was an act forbidden by the statute, it is enough if the indictment individuates the offense, and states the material facts constituting it. If every element of the crime, as described in the statute, is charged in the indictment, it is sufficient. *State v. Lousman*, 137 Iowa 191, 114 N. W. 1932.

[b] "The rule that in describing an offense it is sufficient to use the words of the statute creating it is greatly misapplied and perverted . . . No one ever supposed that it meant to sanction an indictment charging one generally with the offence specified in the statute, without containing any particular act showing that the general provision has been violated. The rule means that the act, charged in the indictment as violating the general law, must be described by the words of the statute . . . The objection to this indictment is that it charges no particular act showing by its description in the words of the act that the general provision has been violated." *State v. Cox*, 29 Mo. 475, *followed* in *State v. Gibbs*, 129 Mo. App. 700, 108 S. W. 588; *State v. Sills*, 56 Mo. App. 408; *State v. Ryan*, 30 Mo. App. 159.

[c] "It would not do for instance to allege in a mere generalization that the defendant assaulted a person named with intent to do him a great bodily injury." *State v. Mitchell*, 139 Iowa 453, 116 N. W. 808.

25. **U. S.** — *Sims v. United States*, 121 Fed. 319, 58 C. C. A. 92; *United States v. Wood*, 159 Fed. 187, *followed* in *United States v. Wood*, 168 Fed. 438; *United States v. Stone*, 135 Fed. 392, 396; *United States v. Felderward*, 36 Fed. 490; *Nelson v. United States*, 30 Fed. 112, 116; *United States v. Nelson*, 29 Fed. 202; *United States v. Moore*, 11 Fed. 348. **Ala.** — *Bell v. State*, 104 Ala. 79, 15 So. 357; *Bellinger v. State*, 92 Ala. 86, 9 So. 339; *Grafton v. State*,

71 Ala. 344; *Clark v. State*, 19 Ala. 552, 554. **Ark.** — *State v. Ring*, 77 Ark. 139, 91 S. W. 11; *Halliburton v. State*, 71 Ark. 474, 75 S. W. 929; *Thompson v. State*, 37 Ark. 408; *Brittin v. State*, 10 Ark. 299. **Cal.** — *In re Wilcox*, 14 Cal. App. 164, 111 Pac. 374. **Colo.** — *Johnson v. People*, 33 Colo. 224, 231, 80 Pac. 133; *Packer v. People*, 26 Colo. 306, 57 Pac. 1087; *Harding v. People*, 10 Colo. 387, 15 Pac. 727. **Conn.** — *Crandall v. State*, 10 Conn. 339, 369; *Morse v. State*, 6 Conn. 9, 12. **Ga.** — *Herring v. State*, 114 Ga. 96, 39 S. E. 866; *Elkins v. State*, 13 Ga. 435; *Dukes v. State*, 9 Ga. App. 537, 71 S. E. 921; *Jones v. State*, 8 Ga. App. 411, 69 S. E. 315. **Hawaii.** — *Republic v. Ah Yee*, 12 Hawaii 169. **Ill.** — *People v. Trumbley*, 252 Ill. 29, 96 N. E. 573; *Williams v. People*, 20 Ill. App. 92. **Ind.** — *State v. Barrett*, 172 Ind. 169, 87 N. E. 7; *Yazel v. State*, 170 Ind. 535, 84 N. E. 972; *Steinkuehler v. Wempner*, 169 Ind. 154, 81 N. E. 482, 15 L. R. A. (N. S.) 673; *Russell v. State*, 50 Ind. 174; *Alexander v. State*, 48 Ind. 394. **Ia.** — *State v. Van Vliet*, 92 Iowa 476, 61 N. W. 241; *State v. Bencke*, 9 Iowa 203. **Ky.** — *Com. v. Louisville & N. R. Co.*, 140 Ky. 21, 130 S. W. 798; *Com. v. Hildreth*, 17 Ky. L. Rep. 1124, 33 S. W. 838; *Conner v. Com.*, 13 Bush 714. **La.** — *State v. Lyons*, 3 La. Ann. 154. **Me.** — *State v. Thomas*, 90 Me. 226, 33 Atl. 144; *State v. Boyington*, 56 Me. 512; *State v. Godfrey*, 24 Me. 232, 41 Am. Dec. 382. **Md.** — *Kiefer v. State*, 87 Md. 562, 40 Atl. 377; *Gibson v. State*, 54 Md. 447; *Ember v. State*, 50 Md. 161; *Rawlings v. State*, 2 Md. 201. **Mass.** — *Com. v. Jennings*, 121 Mass. 47, 23 Am. Rep. 249; *Com. v. Hart*, 11 Cush. 134. **Mich.** — *People v. Phippin*, 70 Mich. 6, 37 N. W. 888. **Minn.** — *State v. McIntyre*, 19 Minn. 93. **Mo.** — *State v. Hellscher*, 156 Mo. App. 63, 135 S. W. 959; *State v. Brand*, 153 Mo. App. 27, 131 S. W. 923; *State v. Renkard*, 150 Mo. App. 379, 131 S. W. 168. **Mont.** — *State v. Williams*, 9 Mont. 179, 23 Pac. 335; *Territory v. Burns*, 6 Mont. 72, 74, 9 Pac. 432. **N. H.** — *State v. Mc-*

the matter contained in the exception is matter of defense to be shown by the accused and need not be negatived by express averment.¹⁰ While this general rule will frequently hold good and prove a safe

Ohio, 34 N. H. 422; *State v. Adams*, 4 N. H. 322. N. J.—*State v. Lakewood Market Co.* (N. J. L.), 89 Atl. 194; *State v. Marks*, 95 N. J. L. 84, 46 Atl. 727; *Mayer v. State*, 84 N. J. L. 323, 43 Atl. 924. N. Y.—*People v. People*, 27 N. Y. 399, 319. N. C.—*State v. Moore*, 100 N. C. 794, 84 S. E. 294; *State v. Blackley*, 128 N. C. 629, 29 S. E. 340; *State v. Ford*, 106 N. C. 584, 10 S. E. 1053; *State v. Bloodworth*, 94 N. C. 918; *State v. George*, 62 N. C. 567; *State v. Houston*, 81 N. C. 542. Ore.—*State v. Egan*, 22 Ore. 237, 39 Pac. 282, 100 Pac. 457; *State v. Tinsley*, 19 Ore. 530, 25 Pac. 71. Pa.—*Com. v. Wickart*, 10 Pa. Co. Ct. 251. S. C.—*State v. Benthulight*, 65 S. C. 559, 43 S. E. 451; *State v. May*, 1 Gray, 169. Tenn.—*White v. State*, 147 Tenn. 94, 94 S. W. 674; *State v. Sadley*, 3 Lea 535; *Matthews v. State*, 2 Yerg. 219. Tex.—*George v. State* (Tex. Crim.), 148 S. W. 621; *Chapman v. State*, 95 Tex. Crim. 513, 240 S. W. 441; *Stophen v. State*, 59 Tex. Crim. 599, 129 S. W. 144; *Koth v. State*, 58 Tex. Crim. 448, 126 S. W. 569; *Thomson v. State*, 49 Tex. Crim. 617, 95 S. W. 517; *Faher v. State*, 27 Tex. App. 146, 11 S. W. 108. Utah.—*People v. Pughan*, 7 Utah 7, 24 Pac. 339; *People v. Fairbanks*, 7 Utah 3, 24 Pac. 338. Vt.—*State v. Caruth*, 85 Vt. 271, 81 Atl. 922. Va. Com. v. Hill, 5 Gratt. 682. W. Va.—*State v. Weir*, 71 W. Va. 98, 76 S. E. 138. Wis.—*Jensen v. State*, 60 Wis. 577, 19 N. W. 374; *Byrne v. State*, 12 Wis. 577. Can.—*Rog. v. White*, 23 U. C. C. P. 314. Eng.—*Hox v. Preston*, 9 T. R. 539, 101 Esp. Reprint 709; *Hox v. Byers*, 2 Str. 1101, 93 Eng. Reprint 1008.

[a] This rule was first adopted in England at a time when more than two hundred offenses were punishable with death, and when the judges were willing to discover means to relieve against the harshness and severity of the common law, and is not of universal application. *State v. Moore*, 166 N. C. 284, 84 S. E. 294.

[b] "The term 'emerging clause' should be construed to mean all parts of the statute which create and de-

fine the offense whether in one or more sections or acts." *State v. Byers*, 79 Vt. 274, 81 Atl. 922.

26. U. S.—*United States v. Cook*, 17 Wall. 168, 21 L. ed. 539; *United States v. Nelson*, 28 Fed. 2-2. Ala.—*State v. State*, 155 Ala. 133, 48 So. 189; *State v. State*, 155 Ala. 61, 52 So. 165; *State v. State*, 194 Ala. 79, 12 So. 322; *Hollinger v. State*, 92 Ala. 88, 9 So. 280; *McLeod v. State*, 8 Ala. App. 479, 67 So. 601. Ark.—*Richardson v. State*, 77 Ark. 291, 91 S. W. 709; *State v. Blinn*, 75 Ark. 199, 94 S. W. 11; *William v. State*, 55 Ark. 357; *Matthews v. State*, 94 Ark. 484. Conn.—*Cranford v. State*, 10 Conn. 319, 320; *Murray v. State*, 6 Conn. 2, 12. Ill.—*Subal v. People*, 112 Ill. 238, 72 N. E. 782; *Metzger v. People*, 14 Ill. 101. Ind.—*State v. Paris*, 119 Ind. 446, 191 N. E. 497; *Malone v. State*, 179 Ind. 184, 100 N. E. 267; *Wiley v. State*, 173 Ind. 408, 90 N. E. 825, 21 L. R. A. (N. S.) 1797; *State v. Weller*, 171 Ind. 22, 87 N. E. 701; *Yard v. State*, 170 Ind. 585, 86 N. E. 922; *Panner v. State*, 161 Ind. 247, 61 N. E. 500; *Russell v. State*, 66 Ind. 174. Kan.—*State v. Dink*, 84 Kan. 373, 111 Pac. 189. Ky.—*Com. v. Louisville & N. R. Co.*, 140 Ky. 31, 120 S. W. 798. Md.—*Jingles v. State*, 180 Md. 255, 87 Atl. 1080; *Wider v. State*, 110 Md. 410, 81 Atl. 606; *Pusher v. State*, 39 Md. 189, 27 Atl. 677; *Wider v. State*, 87 Md. 562, 46 Atl. 977; *Stearns v. State*, 81 Md. 941, 92 Atl. 282. Mont.—*State v. Williams*, 9 Mont. 138, 23 Pac. 305. N. J.—*Rider v. Lakewood Market Co.* (N. J. L.), 89 Atl. 194. N. Y.—*Jefferson v. People*, 191 N. Y. 19, 23, 2 N. E. 797. Vt.—*State v. Caruth*, 85 Vt. 271, 81 Atl. 922. Wis.—*Saunders v. State*, 149 Wis. 597, 129 N. W. 97; *Berne v. State*, 12 Wis. 577.

[a] In *State v. Paris*, 119 Ind. 446, 191 N. E. 497, the court said: "It is well established in this state that an indictment need negative only those exceptions which are closely connected with the creating clause or in the same clause that creates the offense. Where the exception comes by way of proviso or is contained in a different section of the statute it is not necessary

guide in criminal pleading,²⁷ it is not an accurate statement,²⁸ as the rule does not depend upon the place which the proviso or exception occupies in the statute, but upon its nature.²⁹ Neither does the question depend upon any distinction between the words "provided" or "excepted" as they may be used in the statute.³⁰

to show by negative averment that the defendant was not within the exception, but the exception in such case is a mere matter of defense."

[b] Under a statute making it an offense to convey liquor, except the conveyance of a lawful purchase as provided in the act, the indictment need not negative such exception. *Schave v. State*, 4 Okla. Crim. 285, 111 Pac. 922. See also *State v. Weller*, 171 Ind. 53, 85 N. E. 761, and the title "Intoxicating Liquors."

[c] This rule is especially applicable to affidavits or complaints made before inferior judicial officers in which that particularity required to be observed in indictments is dispensed with. *Hyde v. State*, 155 Ala. 133, 46 So. 489.

27. *United States v. Cook*, 17 Wall. (U. S.) 168, 21 L. ed. 538.

[a] "This rule, it is well said, will frequently hold good and prove a safe guide in pleading, but is not a universal criterion; as the words defining the offense may be so entirely separable from the exceptions, though contained in the same clause, that all the ingredients of the offense may be clearly and accurately alleged without reference to the exception; whereas cases have arisen where the exception, though in a subsequent clause or section, was nevertheless so incorporated as an amendment with the words previously employed in defining the offense, as to render it impossible to frame the actual statutory charge in the indictment, without alleging the accused was not within the exception contained in the subsequent clause, section or statute." *State v. Hamlett*, 129 Mo. App. 70, 167 S. W. 1012.

28. U. S.—*United States v. Cook*, 17 Wall. 168, 21 L. ed. 538. *Cal.*—*State v. Kendig*, 133 Iowa 164, 110 N. W. 463. *Mo.*—*State v. Hamlett*, 129 Mo. App. 70, 167 S. W. 1012.

29. U. S.—*United States v. Cook*, 17 Wall. 168, 21 L. ed. 538. *Cal.*—*People v. Grinnell*, 9 Cal. App. 238, 98 Pac. 681. *Md.*—*Kiefer v. State*, 87 Md. 562, 40 Atl. 377. *Mo.*—*State v. O'Gorman*,

68 Mo. 179. *Mont.*—*State v. Williams*, 9 Mont. 179, 23 Pac. 335. *Nev.*—*State v. Ah Chew*, 16 Nev. 50, 40 Am. Rep. 488. *N. J.*—*Mayer v. State*, 64 N. J. L. 323, 45 Atl. 624. *N. C.*—*State v. Moore*, 166 N. C. 284, 81 S. E. 294; *State v. Connor*, 142 N. C. 700, 55 S. E. 787. *R. I.*—*State v. Rush*, 13 R. I. 198; *State v. O'Donnell*, 10 R. I. 472. *Tenn.*—*Villines v. State*, 96 Tenn. 141, 33 S. W. 922. *Vt.*—*State v. Abbey*, 29 Vt. 60, 67 Am. Dec. 754.

[a] "Commentators and judges have sometimes been led into error by supposing that the words 'enacting clause,' as frequently employed, mean the section of the statute defining the offense, as contradistinguished from a subsequent section in the same statute, which is a misapprehension of the term, as the only real question in the case is whether the exception is so incorporated with the substance of the clause defining the offense as to constitute a material part of the description of the acts, omissions, or other ingredients which constitute the offense. Such an offense must be accurately and clearly described, and if the exception is so incorporated with the clause describing the offense that it becomes in fact a part of the description, then it cannot be omitted in the pleading, but if it is not so incorporated with the clause defining the offense as to become a material part of the definition of the offense, then it is matter of defense and must be shown by the other party, though it be in the same section or even in the succeeding sentence." *United States v. Cook*, 17 Wall. (U. S.) 168, 21 L. ed. 538. See also *Villines v. State*, 96 Tenn. 141, 33 S. W. 922.

30. *Cal.*—*People v. Grinnell*, 9 Cal. App. 238, 98 Pac. 681. *Mass.*—*Com. v. Hart*, 11 Cush. 136. *Minn.*—*State v. McIntyre*, 19 Minn. 93. *Nev.*—*State v. Ah Chew*, 16 Nev. 50, 40 Am. Rep. 488. *N. C.*—See *State v. Connor*, 142 N. C. 700, 55 S. E. 787. *Vt.*—*State v. Abbey*, 29 Vt. 66, 67 Am. Dec. 754.

[a] The word "except" is not necessary in order to constitute an ex-

The question is, is the exception so incorporated with the substance of the clause defining the offense as to constitute a material part of the description of the acts, omissions, or other ingredients which constitute the offense.¹¹ If it is so incorporated, whether it be contained in the clause creating the offense, or in a subsequent clause, or statute, it must be negatived,¹² but if the language of the section defining the offense is so entirely separable from the exception that the ingredients constituting the offense may be accurately and clearly defined without

ception within the rule. The words "unless," "other than," "not being," "not having," etc., have the same legal effect, and require the same form of pleading. *Com. v. Hart*, 11 Cush. (Mass.) 130.

31. **U. S.**—*United States v. Cook*, 17 Wall. 168, 21 L. ed. 538. **Mont.**—*State v. Williams*, 9 Mont. 179, 23 Pac. 377. **R. I.**—*State v. Flanagan*, 25 R. I. 369, 55 Atl. 876. **Vt.**—*State v. Carruth*, 85 Vt. 271, 81 Atl. 922; *State v. Paige*, 78 Vt. 286, 62 Atl. 1077; *State v. Bexins*, 70 Vt. 574, 41 Atl. 655.

[a] It is not necessary that an indictment should in every case negative all exceptions in the statute on which it is based. The test of such necessity is to be determined by the nature of the exceptions as a part of the description of the offense or as a qualification of it. *State v. Flanagan*, 25 R. I. 369, 55 Atl. 876.

32. **U. S.**—*United States v. Cook*, 17 Wall. 176, 21 L. ed. 538; *Shelp v. United States*, 81 Fed. 694, 696, 26 C. C. A. 579; *United States v. Stone*, 135 Fed. 392; *United States v. McCormick*, 1 Cranch 593, 26 Fed. Cas. No. 15,603.

Ala.—*Blackman v. State*, 98 Ala. 77, 13 So. 316; *Mays v. State*, 89 Ala. 37, 8 So. 28; *Davis v. State*, 39 Ala. 531.

Ark.—*State v. Fassell*, 45 Ark. 65; *Bone v. State*, 18 Ark. 109. **Cal.**—*Ex parte Horner*, 154 Cal. 355, 97 Pac. 891; *People v. Miles*, 9 Cal. App. 312, 101 Pac. 525. **Ga.**—*Herring v. State*, 144 Ga. 96, 39 S. E. 866. **Ill.**—*Sokal v. People*, 212 Ill. 238, 245, 72 N. E. 382;

Bensley v. People, 89 Ill. 571; *Meylor v. People*, 14 Ill. 101; *People v. Huston*, 178 Ill. App. 222; *People v. Brown*, 150 Ill. App. 303. **Ia.**—*State v. Kendall*, 123 Iowa 164, 110 N. W. 403. **Ky.** *Com. v. Kessner*, 11 B. Mon. 1. **Me.** *State v. Keen*, 34 Mo. 500. **Md.**—*Kiefer v. State*, 87 Md. 569, 40 A2 377; *Killenbeck v. State*, 10 Md. 441, 69 Am. Dec. 166. **Mass.**—*Com. v. Hart*, 11 Cush.

130; *Com. v. Maxwell*, 2 Pick. 129. **Minn.**—*State v. Tracy*, 82 Minn. 317, 84 N. W. 1915. **Miss.**—*Boonett v. State*, 100 Miss. 684, 56 So. 777; *Thompson v. State*, 54 Miss. 740; *Ellis v. State*, 44 Miss. 317. **Mo.**—*State v. De Groat*, 259 Mo. 224, 168 S. W. 702; *State v. O'Brien*, 74 Mo. 549; *State v. Meach*, 70 Mo. 255, 25 Am. Rep. 427; *State v. Humfeld*, 182 Mo. App. 619, 166 S. W. 323; *State v. Renkard*, 150 Mo. App. 570, 131 S. W. 178; *State v. Handlett*, 122 Mo. App. 70, 107 S. W. 1612. **Mont.**—*Territory v. Burns*, 6 Mont. 72, 74, 9 Pac. 432. **Neb.**—*Gee Wo v. State*, 26 Neb. 241, 54 N. W. 513. **Nev.**—*State v. Ah Chow*, 16 Nev. 50, 40 Am. Rep. 488. **N. H.**—*State v. Savage*, 48 N. H. 484; *State v. Abbott*, 31 N. H. 434, 440. **N. J.**—*State v. Pryor*, 71 N. J. L. 249, 256, 18 Atl. 1015. **N. Y.**—*Jefferson v. People*, 101 N. Y. 19, 3 N. E. 797. **N. C.**—*State v. Smith*, 157 N. C. 578, 72 S. E. 870; *State v. Connor*, 142 N. C. 709, 55 S. E. 787; *State v. Lanier*, 88 N. C. 658. **N. D.**—*State v. Longstreth*, 19 N. D. 268, 121 N. W. 1113, Ann. Cas. 1912D, 1317. **Okla.**—*Smythe v. State*, 2 Okla. Crim. 286, 161 Pac. 611, 169 Am. 86, Rep. 918; *Parker v. Territory*, 9 Okla. 169, 39 Pac. 9; *Young v. Territory*, 8 Okla. 525, 58 Pac. 774. **Ore.** *State v. Cassidy*, 50 Ore. 1, 31 Pac. 126, 1081. **R. I.**—*State v. Phosagen*, 25 R. I. 369, 55 Atl. 876; *State v. Mahoney*, 24 R. I. 338, 53 Atl. 194. **S. C.** *State v. Bunknight*, 55 S. C. 322, 38 S. E. 451; *Reynolds v. State*, 2 Nat. & McC. 266. **Tenn.**—*Villiams v. State*, 96 Tenn. 141, 39 S. W. 922. **Tex.**—*Slack v. State*, 41 Tex. Crim. 372, 408, 130 S. W. 1675, Ann. Cas. 1912D, 117; *Williams v. State*, 37 Tex. Crim. 228, 39 S. W. 663; *Rice v. State*, 37 Tex. Crim. 56, 38 S. W. 801; *Massey v. State*, 18 Tex. App. 311; *Alex v. State*, 4 Tex. App. 398, 419, 22 Am. Rep. 280. **Utah.** *State v. Walls*, 35 Utah 400, 100 Pac.

any reference to the exception, the indictment need not negative it, though it be in the same section, or in succeeding sections, but in such case the exception is a matter of defense.³³ Accordingly, though the enacting clause incorporates a subsequent clause merely by reference, by such words as "hereinafter mentioned" or the like, the exception

681, 136 Am. St. Rep. 1059, 19 Ann. Cas. 641. **Vt.**—*State v. Abbey*, 29 Vt. 60, 47 Am. Dec. 754. **Va.**—*Davine v. Case*, 107 Va. 800, 69 S. E. 37, 13 Ann. Cas. 301. **Eng.**—*Steel v. Smith*, 1 Barn. & Ald. 94, 100 Eng. Rep. 35.

[a] Where the offense, with all its ingredients, may be stated without reference to the exception, the fact that both are found in the same section does not require the indictment to negative the exception. *Villines v. State*, 96 Tenn. 141, 33 S. W. 922.

[b] A statute providing that "no person, unless a registered pharmacist, etc., shall retail medicines," etc., makes the limitation a substantial part of the offense and it must be negatived. *State v. Mahoney*, 24 R. I. 338, 53 Atl. 124. See 18 STANDARD PACE, 991.

[c] **The enacting clause of a statute** (1) is not necessarily alone or only that which purports to be such but comprehends every part of the statute which should be stated in order to define the offense with clearness and certainty. *Territory v. Burns*, 6 Mont. 72, 74, 9 Pac. 422. (2) The fact that the provision is contained in a separate section or a subsequent statute does not necessarily determine that it is not a part of the enacting clause, within the true meaning of that expression. *State v. Carruth*, 85 Vt. 271, 81 Atl. 923.

33. **U. S.**—*Eyans v. United States*, 123 F. S. 584, 608, 14 Sup. Ct. 934, 935, 38 L. ed. 820; *United States v. Cook*, 17 Wall. 165, 21 L. ed. 528; *Smith v. United States*, 367 Fed. 721, 85 C. C. A. 951; *United States v. Freed*, 179 Fed. 260; *Schloss v. United States*, 30 Fed. 109; *United States v. Nelson*, 29 Fed. 392. **Ala.**—*Hyde v. State*, 155 Ala. 123, 49 So. 480; *Bullinger v. State*, 92 Ala. 90, 9 So. 499; *Gentry v. State*, 71 Ala. 144; *Wright v. State*, 3 Ala. App. 149, 27 So. 1023. **Ark.**—*Kansas City R. Co. v. State*, 90 Ark. 343, 119 S. W. 288; *Dean v. State*, 37 Ark. 57, 59; *Perry v. State*, 27 Ark. 91. **Cal.**—*Ex parte Hamel*, 164 Cal. 369, 97 Pac. 891 (where a number of authorities are

reviewed); *Ex parte Hemstreet*, 13 Cal. App. 639, 123 Pac. 984; *People v. Priestley*, 17 Cal. App. 171, 118 Pac. 965; *Hogan v. Superior Court*, 16 Cal. App. 783, 117 Pac. 947; *People v. Bartley*, 12 Cal. App. 773, 108 Pac. 868. **Colo.**—*Fitch v. People*, 45 Colo. 298, 100 Pac. 1132; *People v. People*, 24 Colo. 519, 52 Pac. 1025; *Foster v. People*, 1 Colo. 294. **Dak.**—*Territory v. Scott*, 2 Dak. 212, 6 N. W. 435. **Del.**—*State v. Polk*, 6 Penn. 456, 69 Atl. 1006. **Fla.**—*Goff v. State*, 60 Fla. 13, 53 So. 327. **Ga.**—*Kitchens v. State*, 116 Ga. 847, 43 S. E. 256; *McAdams v. State*, 9 Ga. App. 166, 70 S. E. 893; *Jones v. State*, 8 Ga. App. 411, 69 S. E. 315; *Livingston v. State*, 6 Ga. App. 208, 64 S. E. 769. **Ill.**—*Beasley v. People*, 89 Ill. 571; *Metsker v. People*, 14 Ill. 101; *People v. Dosechio*, 157 Ill. App. 51; *People v. Ezell*, 155 Ill. App. 298; *People v. Evoldi*, 152 Ill. App. 658; *People v. Brown*, 150 Ill. App. 365. **Ind.**—*Schondel v. State*, 174 Ind. 734, 93 N. E. 67; *Witty v. State*, 173 Ind. 404, 90 N. E. 627, 25 L. R. A. (N. S.) 1297; *State v. Barrett*, 172 Ind. 169, 87 N. E. 7; *State v. Weller*, 171 Ind. 53, 85 N. E. 761; *Yazel v. State*, 170 Ind. 535, 84 N. E. 972; *Mergentheim v. State*, 107 Ind. 567, 8 N. E. 568. **Ia.**—*State v. Kendig*, 133 Iowa 164, 110 N. W. 463; *State v. Williams*, 70 Iowa 52, 29 N. W. 801; *State v. Bencke*, 9 Iowa 203. **Kan.**—*State v. Belle Springs Creamery Co.*, 83 Kan. 389, 111 Pac. 474; *State v. Bujs*, 83 Kan. 273, 111 Pac. 189. **Ky.**—*Com. v. Louisville & N. R. Co.*, 140 Ky. 21, 139 S. W. 798; *Com. v. McNutt*, 123 Ky. 702, 118 S. W. 978. **La.**—*State v. Slover*, 128 La. 460, 54 So. 942. **Me.**—*State v. Godfrey*, 24 Me. 232, 41 Am. Dec. 382. **Md.**—*Weber v. State*, 116 Md. 419, 81 Atl. 690; *Parker v. State*, 99 Md. 139, 57 Atl. 677; *Kiefer v. State*, 87 Md. 562, 40 Atl. 377. **Mass.**—*Com. v. Hyman*, 126 Mass. 248; *Com. v. Jennings*, 123 Mass. 47, 23 Am. Rep. 249; *Com. v. Hart*, 11 Cosh. 130. **Miss.**—*Bennett v. State*, 100 Miss. 684, 56 So. 777; *Thompson v. State*, 51 Miss. 740, 744. **Mo.**—*State v. De Great*, 259 Mo.

need not be negative unless necessary to a complete definition of the offense.³⁴ The practical test is, does the statute declare the criminality of the prohibited acts as an entire class, or such acts only when committed by designated persons, or under particular circumstances or during a specified period.³⁵ If it be clear that an act is only to become a crime when executed by persons of a particular class, or under particular conditions, then this class, or these conditions, must be set out in the indictment, no matter in what part of the statute they may be expressed.³⁶

364, 168 S. W. 702; *State v. Smith*, 233 Mo. 241, 135 S. W. 405, 33 L. R. A. (N. S.) 179; *St. Louis v. Tiedhousers*, 226 Mo. 130, 125 S. W. 1123; *State v. Doering*, 194 Mo. 398, 92 S. W. 489; *State v. O'Bryan*, 74 Mo. 540. **Mont.** *Territory v. Burns*, 6 Mont. 72, 75, 9 Pac. 432. **Neb.**—*S. Held v. State*, 61 Pac. 600, 85 N. W. 840; *O'Connor v. State*, 46 Neb. 137, 61 N. W. 710, overruling *Gee Wo v. State*, 36 Neb. 241, 54 N. W. 512. **Nev.**—*Ex parte Davis*, 33 Nev. 309, 110 Pac. 1131; *State v. Ah Chew*, 16 Nev. 50, 40 Am. Rep. 488; *State v. Rahay*, 8 Nev. 312. **N. H.** *State v. Wade*, 34 N. H. 405; *State v. Fuller*, 32 N. H. 259. **N. J.**—*State v. Price*, 71 N. J. L. 239, 256, 58 Atl. 1015. **N. Y.**—*Fleming v. People*, 27 N. Y. 379; *People v. Schultz*, 149 App. Div. 844, 134 N. Y. Supp. 293. **N. C.**—*State v. Smith*, 157 N. C. 578, 72 S. E. 850; *State v. Connor*, 142 N. C. 700, 55 S. E. 787. **Ohio.**—*Hamilton v. State*, 78 Ohio St. 76, 84 N. E. 601; *Hale v. State*, 58 Ohio St. 676, 51 N. E. 154; *Billigheimer v. State*, 32 Ohio St. 437; *Stanglein v. State*, 17 Ohio St. 453. **Okla.**—*De Graff v. State*, 2 Okla. Crim. 319, 103 Pac. 538; *Smythe v. State*, 2 Okla. Crim. 286, 101 Pac. 611, 129 Am. St. Rep. 918. **Ore.**—*State v. Tamlar*, 19 Ore. 528, 25 Pac. 71. **R. I.**—*State v. Heffernan*, 28 R. I. 477, 68 Atl. 304; *State v. Flanagan*, 25 R. I. 369, 55 Atl. 876; *State v. Gallagher*, 20 R. I. 206, 38 Atl. 655. **Tenn.** *Villines v. State*, 96 Tenn. 141, 33 S. W. 922. **Tex.**—*State v. Clayton*, 43 Tex. 410; *Johann v. State* (Tex. Crim.), 171 S. W. 211; *Brown v. State* (Tex. Crim.), 168 S. W. 861; *Walker v. State* (Tex. Crim.), 151 S. W. 318; *Doyle v. State* (Tex. Crim.), 143 S. W. 610; *Dankworth v. State*, 61 Tex. Crim. 157, 126 S. W. 789; *Slack v. State*, 61 Tex. Crim. 372, 400, 140 S. W. 1078, App. Cas. 1913B, 112; *Newman v. State*, 68 Tex. Crim. 223, 124 S. W. 956; *Wil-*

lams v. State, 37 Tex. Crim. 288, 30 S. W. 604; *Jellish v. State*, 33 Tex. Civ. App. 402, 114 S. W. 908. **Also v. State**, 6 Tex. App. 398, 70 Am. Rep. 560. **Utah.**—*State v. Williams*, 22 Utah 248, 60 Pac. 1002. **Vt.**—*State v. Caeruth*, 85 Vt. 271, 81 Atl. 922; *State v. McCaffrey*, 69 Vt. 82, 47 Atl. 244; *State v. Abbey*, 29 Vt. 60, 67 Am. Dec. 794. **Wash.**—*State v. Solfert*, 62 Wash. 596, 118 Pac. 740; *State v. Davis*, 43 Wash. 116, 86 Pac. 201. **W. Va.**—*State v. Dry Fork R. Co.*, 50 W. Va. 270, 49 S. E. 447. **Wis.**—*Splinter v. State*, 140 Wis. 567, 123 N. W. 97. **Wyo.** *Vines v. State*, 19 Wyo. 255, 116 Pac. 1019. **Can.**—*Rex v. Gill*, 18 Ont. L. R. 234, 12 Ont. W. R. 742; *Rex v. Nuan*, 10 Ont. Pr. 393. **Eng.**—*Rex v. Aulley* (1907), 1 K. B. 883.

[a] "When the exception is not a part of the definition of the offense, and in this way does not therefore become a part of the enacting clause, it is a matter of defense." *Territory v. Burns*, 6 Mont. 72, 9 Pac. 432.

[b] An information for a misdemeanor need not be as definite and certain as an indictment and need not negative matters of defense arising from statutory exceptions. *Com. v. Campbell*, 22 Pa. Super. 28.

34. **Mass.**—*Com. v. Jennings*, 121 Mass. 47, 23 Am. Rep. 242, overruling *Com. v. Hart*, 11 Cush. 130. **Mo.**—*State v. Doepke*, 68 Mo. 288, 30 Am. Rep. 785; *State v. O'Gorman*, 68 Mo. 170. **N. Y.** *Hart v. Chris*, 8 Johns. 31. **R. I.**—*State v. O'Donnell*, 10 R. I. 472. **Vt.**—*State v. Abbey*, 29 Vt. 60, 67 Am. Dec. 794. *Compare King v. Frazier*, 6 T. R. 309, 101 Eng. Reprint 792; *criticized in Com. v. Jennings*, 121 Mass. 47, 21.

35. *Mays v. State*, 89 Ala. 37, 8 So. 28.

36. **Ala.**—*Mays v. State*, 89 Ala. 37, 8 So. 28. **Ga.**—*Elphinstone v. State*, 110 Ga. 847, 43 S. E. 250; *Herring v. State*,

If the proviso is the statement of an exception, not qualifying the offense, but simply exempting certain specified acts and designated persons from the operation of the statute, it need not be negatived in the indictment, as it constitutes no part of the description of the offense.³⁷ A bare negative qualification, not entering into the gist of the charge need not be averred; it must be relied upon as matter of defense.³⁸

An exception which is not contained in the statute at all, but is made by reason of a constitutional provision, need not be negatived.³⁹

When there are several species of the same general crime with more or fewer circumstances of aggravation and they are subject to a gradation of punishment, it is not necessary in pleading to negative such circumstances.⁴⁰ Exceptions, relating to the evidence on the

114 Ga. 96, 39 S. E. 866; *Ellis v. State*, 13 Ga. 435. **Me.**—*State v. Damon*, 97 Me. 323, 54 Atl. 845. **Mo.**—*State v. Gow*, 225 Mo. 307, 138 S. W. 648; *State v. Casto*, 231 Mo. 298, 122 S. W. 1115.

37. **Cal.**—*Ex parte Hurrell*, 154 Cal. 355, 97 Pac. 891. **Colo.**—*Koike v. People*, 57 Colo. 413, 132 Pac. 415. **Conn.**—*State v. McGee*, 88 Conn. 369, 91 Atl. 276. **Ga.**—*Kitchens v. State*, 116 Ga. 847, 43 S. E. 259; *Herring v. State*, 144 Ga. 96, 39 S. E. 866; *Robins v. State*, 13 Ga. 435. **Ill.**—*Williams v. People*, 29 Ill. App. 92. **Ind.**—*Regan v. State*, 171 Ind. 387, 86 N. E. 449. **Ia.**—*State v. Kondig*, 103 Iowa 164, 110 N. W. 463; *State v. Carley*, 33 Iowa 359; *State v. Stapp*, 29 Iowa 531. **Md.**—*Parker v. State*, 29 Md. 189, 57 Atl. 677, regular licensed pharmacist exempted. **Mass.**—*Com. v. Pittsburg R. Co.*, 16 Allen 182. **Mo.**—*State v. O'Brien*, 74 Mo. 519; *State v. Hoffmiller*, 189 Mo. App. 338, 166 S. W. 331. **N. Y.**—*Flaming v. People*, 27 N. Y. 329; *People v. Schullis*, 149 App. Div. 844, 134 N. Y. Supp. 203. **N. C.**—*State v. Long*, 143 N. C. 676, 57 S. E. 340; *State v. Norman*, 10 N. C. 223. **Ohio.**—*Hamilton v. State*, 78 Ohio St. 76, 84 N. E. 601; *Hale v. State*, 18 Ohio St. 679, 31 N. E. 134. **R. I.**—*State v. Hoffmann*, 28 R. I. 477, 68 Atl. 364; *State v. Flanagan*, 25 R. I. 369, 55 Atl. 876. **Vt.**—*State v. Allsup*, 29 Vt. 69, 67 Am. Dec. 754.

38. **Cal.**—*People v. Nugent*, 4 Cal. 241, wherein indictment alleged an "assault with a deadly weapon, with intent to inflict a mortal injury," while statute added words "without criminal intent or provocation." **Colo.**—*Harding v. People*, 19 Colo. 387, 48 Pac. 727.

Mont.—*State v. Morrison*, 16 Mont. 84, 125 Pac. 649; *State v. Williams*, 9 Mont. 179, 23 Pac. 335, both holding that in prosecution for rape, it need not be averred that female was not wife of accused, since such negative matter is not an ingredient or constituent of the crime, but matter of defense.

39. *State v. Jenkins*, 124 Md. 376, 92 Atl. 773; *State v. Carruth*, 85 Vt. 271, 81 Atl. 922.

[a] The mere fact that an exception is created by a constitutional provision, instead of by statute, does not determine that the exception must be negatived. *State v. Carruth*, 85 Vt. 271, 81 Atl. 922.

[b] Thus, an indictment is not invalid because it does not negative an exception to the statute which is made by reason of a provision in the federal constitution. *State v. Jenkins*, 124 Md. 376, 92 Atl. 773.

[c] "An indictment in the state courts, regards only the law of the state against which the offense is committed. It is not necessary to negative possible and contingent defenses which may arise under the statutes of the United States, or under its treaties with other governments. The party justifying under such acts or treaties, must bring forward in his defense the facts necessary to make out his justification. *State v. Gurnee*, 37 Maine 149." *State v. Robinson*, 39 Mo. 159.

40. **Md.**—*Kelleher v. State*, 10 Md. 431, 69 Am. Dec. 166. **Mass.**—*Devereux v. Com.*, 3 Mete. 216; *Com. v. Squire*, 1 Mete. 268. **N. Y.**—*People v. Pierce*, 11 How. 693. **Vt.**—*State v. Ambler*, 56 Vt. 677, holding indictment for burning sugar house need not negative ex-

trial, need not be negatived in the indictment.⁴³ If a single statute creates several offenses, and only of which is charged, facts pertinent to the other statutory offenses need not be negatived.⁴⁴ But if the statute contains several provisos and exceptions requiring negation, the indictment must negative each and all of the provisos or exceptions.⁴⁵

Statutes in some states have dispensed with the necessity of negating statutory exceptions, and they are upheld as a proper exercise of legislative power,⁴⁶ but a statute providing that no indictment shall be deemed invalid for want of an averment of matter not necessary to be proved does not dispense with the necessity of negating exceptions constituting an essential element in the description of the offense.⁴⁷

Sufficiency of Negation.—Where a negative averment is required it need not be as minute or so nearly in the statutory words as must an affirmative one,⁴⁸ but it must be as broad as the exception or proviso is.⁴⁹ The exception may be negatived by placing the word "not" before it, though such exception contains an affirmative limited by a

ception providing less severe penalty for burning buildings not constituting a dwelling house or its out buildings.

41. *State v. Sutter*, 71 W. Va. 371, 70 S. E. 811.

42. *State v. McGovern*, 84 N. J. L. 444, 87 Atl. 81; *Lacy v. State*, 15 Wis. 13.

43. Ark.—*Thompson v. State*, 37 Ark. 408. Ky.—*Com. v. Hildreth*, 17 Ky. L. Rep. 1124, 33 S. W. 838. Mo. *State v. Thomas*, 90 Mo. 223. 38 All. 144. Mass.—*Com. v. Thayer*, 5 Mete. 240; *Com. v. Thurlow*, 24 Pick. 374. Mo.—*State v. Meek*, 70 Mo. 335, 337, 35 Am. Rep. 427; *Neakes v. State*, 10 Mo. 498; *State v. Falk*, 38 Mo. App. 554. N. H.—*State v. Abbott*, 31 N. H. 434. N. J.—*Hoffman v. Peters*, 51 N. J. L. 341, 17 Atl. 113. N. Y.—*Jefferson v. People*, 191 N. Y. 19, 3 N. E. 797. S. C.—*State v. May*, 1 Brev. 160. Eng. *Rex v. Pinfitt*, 9 T. R. 559, 101 Eng. Reprint 702.

44. *Slack v. State*, 61 Tex. Crim. 372, 136 S. W. 1073, Ann. Cas. 1913B, 112.

45. *State v. Meek*, 70 Mo. 335, 338, 35 Am. Rep. 427, wherein it was concluded license being a negative averment the state did not have to prove same as a part of its case, and it was therefore unnecessary to be alleged under such a statute.

[a] The failure to negative an exception otherwise necessary has been

held to be cured by a statute providing that "no indictment shall be deemed invalid or . . . be affected by reason of any defect or imperfection in matters of form . . . which shall not tend to the prejudice of the defendant," on the ground that such an averment was not necessary to be proved by the state and was therefore merely formal. *Ploming v. People*, 27 N. Y. 329, 332.

46. *Slack v. State*, 61 Tex. Crim. 372, 136 S. W. 1073, Ann. Cas. 1913B, 112.

47. Ark.—*State v. Fussell*, 45 Ark. 67. Kan.—*State v. Pittman*, 10 Kas. 293, wherein exception negatived county license but not city license. Mass. *Com. v. Thayer*, 5 Mete. 240. Mo.—*State v. Haden*, 15 Mo. 447. R. I.—*State v. Walsh*, 14 R. I. 507. Vt.—*State v. Munger*, 15 Vt. 290; *State v. Summers*, 3 Vt. 155.

[a] A general averment that defendant sold certain liquors "not having a license to sell said liquors as aforesaid" is sufficient. It refers to the time of sale and not to the time of finding the indictment. *State v. Munger*, 15 Vt. 290.

[b] An allegation negating a license to both defendants may be taken to apply to the defendants individually as well as jointly. *Com. v. Sloan*, 4 Crabb. [Mass.] Off. Com. v. Tower, 8 Mete. [Mass.] 527.

negative, and thus causes a double negative.⁴⁸ There is no necessity that the exact words of the statute be adopted; whatever amounts to a substantial negative is sufficient,⁴⁹ and if the allegations of the indictment upon the affirmative part of the statute necessarily involve a negative of the proviso or exception, it is sufficient.⁵⁰

If the statute makes certain acts criminal and specifies several exceptions disjunctively, the indictment should not state the exceptions conjunctively where the result of such allegation is to change the offense.⁵¹

F. CO-DEFENDANTS, ACCESSORIES, AND PRINCIPALS IN SECOND DEGREE.

1. **Co-defendants.**⁵²—An indictment or information against two or more persons jointly must charge a joint offense.⁵³ But it is not necessary, as a rule, to aver expressly that they acted together in the commission of the offense sought to be charged.⁵⁴ Nor need the particular

48. *State v. Damon*, 97 Me. 323, 54 Atl. 845, wherein indictment for polygamy averred that defendant's wife "not having been continuously absent for seven years previous thereto and not known to him the said — to be living within that time."

49. *Ind.*—*State v. Shoemaker*, 4 Ind. 169. *Ky.*—*Adams Express Co. v. Com.*, 129 Ky. 420, 112 S. W. 577, not necessary to negative exceptions in terms of statute, provided the whole indictment does so in language that leaves no doubt that the accused does not belong to the excepted class. *Me.*—*State v. Keen*, 24 Me. 500. *Md.*—*Wright v. State*, 88 Md. 433, 41 Atl. 795. *Mass.*—*Com. v. Wilson*, 11 Cush. 412. *Mo.*—*State v. Sutton*, 25 Mo. 339; *Neales v. State*, 10 Mo. 498; *State v. Raymond*, 54 Mo. App. 495. *R. I.*—*State v. Walsh*, 14 R. I. 507. *Tex.*—*State v. Duke*, 42 Tex. 455. *Vt.*—*State v. Munger*, 15 Vt. 290.

See also *United States v. Graham*, 164 Fed. 634.

50. *Ind.*—*Crane v. State*, 3 Ind. 193. *Ky.*—*Knoxville Nursery Co. v. Com.*, 108 Ky. 6, 55 S. W. 691. *Md.*—*State v. Price*, 12 Gill & J. 260, 37 Am. Dec. 81. *Neb.*—*Holmes v. State*, 82 Neb. 409, 118 N. W. 99. *Tenn.*—*Sword v. State*, 5 Humph. 102.

51. *Com. v. Hadcroft*, 6 Bush (Ky.) 91, wherein killing of ligasee to minor without written consent and request of father was alleged while statute made either criminal.

52. As to designation or description of accused generally, see *supra*, IX, E, 1.

As to indictments against partners, see *supra*, IX, E, 1, f.

As to joinder of parties, see *infra*, X.

53. *Ball v. State*, 67 Miss. 358, 7 So. 353, explaining *Strawhern v. State*, 57 Miss. 422; *State v. Hall*, 97 N. C. 474, 1 S. E. 683.

[a] Two persons cannot be convicted of distinct and independent offenses, upon an indictment which charges an offense as committed jointly. In order to convict both, a joint offense must be proved. *Ball v. State*, 67 Miss. 358, 7 So. 353.

54. *Ala.*—*Maul v. State*, 37 Ala. 160, word "jointly" need not be employed.

D. C.—*Polen v. United States*, 41 App. Cas. 4. *Miss.*—*Richards v. State*, 76 Miss. 268, 24 So. 536 (criticizing *Strawhern v. State*, 37 Miss. 422, and holding indictment sufficient though words "with" or "together with" omitted); *Ball v. State*, 67 Miss. 358, 7 So. 353. *N. J.*—*State v. Nugent*, 77 N. J. L. 80, 71 Atl. 484. **N. Y.**—*People v. Jeffercy*, 82 Hun 409, 31 N. Y. Supp. 267. **S. D.**—*State v. McPherson*, 30 S. D. 547, 139 N. W. 368. *Tex.*—*Loggins v. State*, 32 Tex. Crim. 358, 24 S. W. 408; *Gay v. State*, 3 Tex. App. 168; *Bell v. State*, 1 Tex. App. 598. *Va.*—*Hash v. Com.*, 88 Va. 172, 13 S. E. 498.

[a] "It is not necessary to the charge of a joint assault by several persons, that they be specifically charged as acting 'together and with each other.'" *Polen v. United States*, 41 App. Cas. (D. C.) 4.

[b] There is no partnership in crime. (1) and it is not necessary to allege that several committed an offense as partners. *State v. Gay*, 10 Mo. 410.

act which each did towards the consummation of the offense be set forth.⁵⁰ Nor if set forth, does an apparent impossibility therein vitiate the indictment.⁵¹

Where two or more persons are charged jointly, the indictment need not contain a count charging them each separately with the commission of the offense.⁵² It does not constitute a misjoinder to do so, however.⁵³ Their names need not be connected with the conjunction "and" where charged jointly in same count, if separated by commas.⁵⁴

Where several persons acting together are necessary to consummate an offense, an indictment against less than such number, though speaking of several other persons, is not sufficient, where such other persons are neither named nor charged to be unknown.⁵⁵

2. Accessories and Accomplices.—The manner of charging accessories is fully treated elsewhere in this work.⁵⁶

(2) Especially is it unnecessary to allege a partnership between defendants, where the parties may be joint principals and joint offenders without being partners. *Janks v. State*, 29 Tex. App. 234, 15 S. W. 815.

[c] An indictment which charges that the two accused persons, naming them, "did willfully, feloniously, and of their malice aforethought kill and murder," etc., is sufficient. *State v. Johnson*, 104 La. 417, 29 So. 24, holding also that it is neither necessary, nor preferable as a matter of concise expression to use the word "defendants," or "as defendants" immediately preceding the words, "did willfully, feloniously, etc."

[d] Where it was alleged in the indictment that the defendants made the false and fraudulent representations therein alleged, this was deemed an allegation that each of the defendants made such representations, and sufficient as to each. *People v. Jefferey*, 82 Hun 409, 91 N. Y. Supp. 207.

[e] **Surplusage.**—Such allegations, when made, is surplusage. *Louglas v. State*, 32 Tex. crim. 368, 24 S. W. 408; *Finney v. State*, 39 Tex. App. 184, 16 S. W. 175; *Walton v. State*, 28 Tex. App. 34, 12 S. W. 404; *Gay v. State*, 3 Tex. App. 168.

[f] An exception to the rule exists in Texas where it is held that in indictments for gaming the defendants must be charged with having used to games. *State v. Catchings*, 46 Tex. 604 (indictment against two persons for horse racing); *State v. Hanson*, 41 Tex. 166; *Horton v. State*, 36 Tex. 185; *Galloway v. State*, 36 Tex. 290; *State*

v. Roderica, 35 Tex. 507; *Parker v. State*, 26 Tex. 204; *Lewallen v. State*, 18 Tex. 518, indictment for betting on an election.

55. See the following: Ga.—*Rawlins v. State*, 124 Ga. 31, 32 S. E. 1, 111; *Hamilton v. People*, 114 Ill. 34, 55 Am. Rep. 393. Ia.—*State v. Zehart*, 47 Iowa 169. Mo.—*State v. Payton*, 60 Mo. 229, 2 S. W. 394; *State v. Egan*, 69 Mo. 417; *State v. Dalton*, 27 Mo. 12. Ohio. *Jones v. State*, 7 Ohio C. D. 305, 11 Ohio C. C. 35, not necessary to set out which one of defendants fired fatal shot in indictment for murder. *Tex. Williams v. State*, 42 Tex. 392.

And see 11 *STANDARD PACE*, 637.

56. *State v. Dalton*, 27 Mo. 13, (overruling, though not mentioning, *State v. Gray*, 21 Mo. 422); *State v. Grimes*, 29 Mo. App. 476; *State v. Fley*, 2 Bray. (S. C.) 348, 4 Am. Dec. 783.

57. *Shipper v. State*, 144 Ala. 160, 32 So. 43; *State v. Bradley*, 9 Bush. (S. C.) 168.

58. Where A and B are charged with embezzlement in one count, and in another count A is charged with the same act of embezzlement, this is not a misjoinder; but the latter count is mere surplusage, being embraced in the other. *State v. Harris*, 106 N. C. 682, 11 S. E. 377.

59. *Hash v. Cass*, 88 Va. 172, 13 S. E. 298.

[a] An omission of both the comma and conjunction renders it wholly defective as a joint indictment. *State v. Towner*, 16 Tex. 74.

60. *State v. O'Donnell*, 3 N. C. 101 (S. C.) 131, 10 Am. Dec. 607.

61. See generally the word "Access-

3. **Principals in Second Degree.**—Where, in cases of felony, several are present aiding and abetting therein, they may be joined with the principal in the first degree,⁶² and charged in the indictment, either as actual perpetrators, or as aiders and abettors.⁶³ But an indictment against a principal in the second degree need not describe him as such in express terms.⁶⁴ Nor is it necessary to set forth the manner or means by which he became thus guilty.⁶⁵ Nor where the acts constituting the crime charged are sufficiently stated with reference to the principal in the first degree, need they be repeated in charging one in the same indictment as a principal in the second degree.⁶⁶

If, however, instead of proceeding under a general indictment, the prosecution proceeds under a bill, charging each of the defendants with the particular acts done, or part performed by them respectively, should the facts alleged as to some of them be insufficient to show their guilt, the indictment as to them would be bad.⁶⁷ And if one cannot be

sories and Accomplices," 1 STANDARD PROC. 137 et seq.

62. See *infra*, X. A. note.

63. *Maughon v. State*, 9 Ga. App. 559, 71 S. E. 922; *State v. White*, 7 La. Ann. 531.

[a] "Where A and B are present, and A commits an offense in which B aids and abets him, the indictment may either allege the matter according to the facts, or charge them both as principals in the first degree, for the act of one is the act of the other, and upon such indictment B, who was present, aiding and abetting, may be convicted, though A is acquitted." *Maughon v. State*, 9 Ga. App. 559, 71 S. E. 922, *quoting* 1 Stark. on Cr. Pl. (2d ed.) 81.

[K] The better mode is to describe the part which each had in the crime, according to the truth of the facts, as is the usual practice. *State v. Rabon*, 4 Rich. (S. C.) 299.

64. *Millen v. State*, 60 Ga. 620.

[a] It is sufficient to charge both principals with the offense, and then allege that one of them perpetrated the crime, and that the other was present, aiding and abetting. *Millen v. United States*, 60 Ga. 620.

65. *State v. White*, 7 La. Ann. 531 (sufficient merely to describe him generally as being present, aiding and abetting at the felony committed in murder and force aforesaid); *Williams v. State*, 42 Tex. 392; *Davis v. State*, 3 Tex. App. 91.

[a] "It has been repeatedly held that it is not necessary to allege in the

indictment the facts relied upon to show the defendant to be a principal, although the offense with which he is charged may not have been actually committed by him. But if he is a principal offender by reason of the part performed by him in the commission of the offense, he may be convicted under an indictment charging him directly with its actual commission." *Williams v. State*, 42 Tex. 392.

66. *Everett v. State*, 33 Fla. 661, 15 So. 543.

67. *Williams v. State*, 42 Tex. 392; *Davis v. State*, 3 Tex. App. 91.

[a] An indictment intended to charge the accused as an accessory during the fact, in which the offense is stated in the language of the statute, without more, is substantially defective, where the same does not sufficiently show the guilt of the accused. *Farrell v. People*, 8 Colo. App. 524, 46 Pac. 411, wherein the court said: "The indictment, in merely stating that the defendant, upon the occasion of the robbery, stood by without interfering and without giving such help as was then and therein his power to prevent the commission of the crime, does not charge an offense. He might have possessed power to do something which, under the attendant circumstances, the law would not require him to exercise. The indictment should show what it was in his power to do without placing himself in peril. It should set forth what act he failed to do, which he might have safely done. The general and comprehensive language of the

indicted as an aider and abettor until the other is charged with the commission of a felony, an indictment is defective which charges both with an act which but one of them committed, and which fails to designate the particular one who did commit it.⁷⁰

Under statutes dispensing with the distinction between principals in the first degree and in the second degree, an indictment of a principal in the second degree need only aver such facts as are requisite against a principal in the first degree.⁷¹

G. ASSAULTS, ATTEMPTS AND SOLICITATIONS. — 1. Assaults. — The subject of assaults is fully treated elsewhere in this work.⁷²

2. Attempts.⁷³ — Though an indictment for an offense necessarily includes an attempt to commit the offense itself,⁷⁴ it has been said that an indictment for an attempt need not set forth the attempt with as much exactness as is required in an indictment for the commission of the offense itself,⁷⁵ but that greater particularity is required in charging an attempt than in charging an assault with an intent to commit an offense.⁷⁶

An indictment for an attempt must allege both the intent with which the attempted act was done,⁷⁷ and an overt act adapted to produce the effect intended,⁷⁸ and should specify the particular offense

charge gave the defendant no information of what case against him the prosecution expected to establish by proof; and in preparing his defense, he had nothing but conjecture to guide him. It is not the form merely of the indictment that is objectionable. The paper is substantially and radically defective, and the failure to take the objection before trial did not waive the defects."

68. *Com. v. Patrick*, 80 Ky. 605.

69. U. S.—*In re Roberts*, 24 Fed. 132. Ark.—*Hunter v. State*, 104 Ark. 245, 149 S. W. 99. Colo.—*Noble v. People*, 23 Colo. 9, 45 Pac. 376. Ga.—*Jones v. State*, 130 Ga. 274, 60 S. E. 840; *Bradley v. State*, 128 Ga. 20, 57 S. E. 237. Ill.—*Ussulton v. People*, 149 Ill. 612, 36 N. E. 952. Okla.—*Druse v. Territory*, 9 Okla. 398, 60 Pac. 101.

70. See generally the title "Assault and Battery." See also the title "Homicide."

71. Form of information for attempt to steal. See *State v. Baker*, 69 Wash. 589, 125 Pac. 1616.

72. *Rivers v. State*, 27 Ala. 72, 12 So. 434; *People v. Webb*, 187 Mich. 29, 86 N. W. 401. See *infra*, XIII.

73. *Hayes v. State*, 15 La. (Tenn.) 64; *State v. Montgomery*, 7 Dav. (Tenn.) 169. See also *State v. Hughes*, 76 Mo. 323. But see *State v. Wilson*,

30 Conn. 500, wherein it is stated that this is not true as a general proposition.

74. *State v. Custer*, 85 Kan. 445, 116 Pac. 537.

[a] Reason.—This is due to the fact that the act done towards the commission of an offense is an element of the crime of an attempt to commit an offense, while it is not an element of the assault. *State v. Custer*, 85 Kan. 445, 116 Pac. 537.

75. Ariz.—*Dawson v. United States*, 8 Ariz. 31, 98 Pac. 555. Conn.—*State v. Wilson*, 30 Conn. 509. Fla.—*Hogan v. State*, 50 Fla. 80, 29 So. 304, 7 Ann. Cas. 129. Ga.—*Chadsey v. State*, 191 Ga. 340, 49 S. E. 328. Me.—*State v. Duran*, 22 Me. 220, 29 Atl. 440, 102 Am. St. Rep. 278. Mass.—*Com. v. McLaughlin*, 100 Mass. 460.

76. U. S.—*United States v. Ford*, 34 Fed. 26; *United States v. Uibel*, 5 Dill. 132, 28 Fed. Cas. No. 16,704. Ariz.—*Dawson v. United States*, 8 Ariz. 31, 98 Pac. 555. Conn.—*State v. Wilson*, 30 Conn. 509, 503. Fla.—*Hogan v. State*, 50 Fla. 80, 29 So. 304, 7 Ann. Cas. 129. Failure to move arrest and take defendant into custody through delay will be arrested. Ill.—*Thompson v. People*, 90 Ill. 158. Ind.—*Rushington v. State*, 119 Ind. 332, 21 N. E. 913. Kan.—*State v. Custer*, 85 Kan. 445, 116

which the defendant is charged with attempting to commit,⁷⁷ though the felony intended need not be alleged with as much certainty and particularity as would be required in an indictment for the actual commission of the offense.⁷⁸

To charge an attempt to commit a designated offense⁷⁹ is not ordi-

Pac. 597; *State v. Frazier*, 53 Kan. 87, 36 Pac. 58, 42 Am. St. Rep. 274. **Me.** *State v. Doran*, 99 Me. 329, 59 Atl. 440, 105 Am. St. Rep. 278. **Mass.**—*Com. v. Ponslee*, 177 Mass. 267, 59 N. E. 55; *Com. v. Shedd*, 140 Mass. 451, 5 N. E. 274; *Com. v. McLaughlin*, 105 Mass. 443; *Com. v. Sherman*, 105 Mass. 169. **Mo.**—*State v. Smith*, 119 Mo. 439, 24 S. W. 1069; *State v. Montgomery*, 109 Mo. 645, 19 S. W. 221. **Nev.**—*State v. Brannan*, 3 Nev. 380. **N. Y.**—*People v. Kane*, 161 N. Y. 380, 55 N. E. 946. *Compare*, *People v. Bush*, 4 Hill 133. **N. C.**—*State v. Porter*, 90 N. C. 719. **Okl.**—*Gatlin v. Territory*, 2 Okla. 523, 37 Pac. 509. **Pa.**—*Smith v. Com.*, 54 Pa. 209, 93 Am. Dec. 686; *Randolph v. Com.*, 6 Serg. & R. 398; *Com. v. J. J. 21 Pa. Co. Ct. 225*. **Tenn.**—*Clark v. State*, 86 Tenn. 511, 8 S. W. 145. **Tex.**—*Fonville v. State* (Tex. Crim.), 62 S. W. 575. **Va.**—*Cunningham v. Com.*, 88 Va. 37, 13 S. E. 309; *Com. v. Clark*, 6 Gratt. 675. **W. Va.**—*State v. Balles*, 26 W. Va. 90, 58 Am. Rep. 66.

See also: **Kan.**—*State v. Russell*, 64 Kan. 798, 68 Pac. 615. **N. Y.**—*People v. Lawton*, 56 Barb. 126. **N. C.**—*State v. Gross*, 128 N. C. 781, 38 S. E. 293. **Va.**—*Hicks v. Com.*, 86 Va. 223, 9 S. E. 1094.

[a] In *United States v. Ford*, 34 Fed. 20, the court said: "The indefinite nature of the offense, at common law, of an attempt to commit a crime, has induced the enactment of many statutes in England and this country, setting forth, in express terms, what acts shall constitute an attempt to commit the crimes referred to in such statutes. In a case not thus specifically defined, the offense of an attempt to commit a crime, although declared, in general terms, in a statute as a crime, remains as at common law, and its nature is dependent upon its peculiar circumstances, and they must be distinctly alleged in an indictment. The overt acts or words that indicate the intention of the alleged wrongdoer must be considered by the jury, upon the evidence, in determining the essential

question—whether such intention was criminal. Everything necessary to be proved must be alleged."

[b] In *State v. Frazier*, 53 Kan. 87, 36 Pac. 58, 42 Am. St. Rep. 274, the court said: "Under the statute relating to attempts, there must be, first, an intention to commit the crime, and, second, some direct overt act done toward its commission. . . . The second is an essential element of the offense, and should be specifically set forth in the charge. The physical acts done towards the commission of the offense should be stated in the information or indictment, so that the court may see whether or not the law has been violated, and so the accused may know to what he must make answer."

[c] To charge the overt act as "by picking her pocket" is insufficient, being too uncertain and equivocal. *State v. Wilson*, 30 Conn. 500.

77. *State v. Doran*, 99 Me. 329, 59 Atl. 440, 105 Am. St. Rep. 278; *People v. Kane*, 161 N. Y. 380, 55 N. E. 946, *affirming* 61 N. Y. Supp. 195, 632.

[a] An averment that defendant broke and entered a certain car for the purpose of committing a "felony" is not sufficient. *State v. Doran*, 99 Me. 329, 59 Atl. 440, 105 Am. St. Rep. 278.

78. *State v. Doran*, 99 Me. 329, 59 Atl. 440, 105 Am. St. Rep. 278; *Com. v. Doherty*, 10 Cush. (Mass.) 52; *Josslyn v. Com.*, 6 Mete. (Mass.) 236.

[a] It is ordinarily sufficient to state the intended offense generally (1) as by alleging an intent to steal, or commit the crime of larceny, rape or arson (*State v. Doran*, 99 Me. 329, 59 Atl. 440, 105 Am. St. Rep. 278), (2) And while the use of words descriptive of the crime as assault, rape and others is sufficient, it was held in *State v. Donovan* (Del.), 99 Atl. 221, insufficient to allege an "attempt to set on fire" a warehouse, because it did not plainly inform defendant of the nature and cause of the accusation against him.

79. *Conn.*—*State v. Wilson*, 30 Conn. 500, not enough to charge an attempt merely. **Fla.**—*Hogan v. State*, 50 Fla.

narily sufficient, but under the statutes existing in some states defining an attempt, it is sufficient to allege an attempt to commit an offense in the language of the statute without setting out the particular manner in which the attempt was made.⁸⁰ It is not necessary to allege failure in the attempt.⁸¹ Nor is it necessary to allege directly that the act attempted was a crime punishable by law, provided it appears to be so from the facts alleged.⁸²

3. Solicitations.—Solicitations to commit a crime are punishable as such in some states and an indictment therefor need not allege that the person solicited to commit the offense acceded to the request,⁸³ nor need it show any overt act tending to carry out the crime counseled, other than the solicitation,⁸⁴ but should set forth all the elements of the offense solicited to be committed.⁸⁵

If the attempt to commit an offense is the subject-matter of the

86, 39 So. 464, 7 Ann. Cas. 139. **Ind.** *Kiningham v. State*, 119 Ind. 332, 21 N. E. 911. **Kan.**—*State v. Frazier*, 53 Kan. 87, 36 Pac. 58, 42 Am. St. Rep. 274. **Wash.**—*State v. George*, 79 Wash. 262, 140 Pac. 337.

[a] To charge that defendant attempted to do a certain thing is little more than an averment that he intended to do the thing. *Kiningham v. State*, 119 Ind. 332, 21 N. E. 911.

[b] In *Hogan v. State*, 50 Fla. 86, 39 So. 464, 7 Ann. Cas. 139, the court said: "No overt act is averred in the indictment before us; boiled down it merely alleges that the accused attempted to commit rape by attempting to commit rape. Such an indictment, even under the most liberal construction that obtains under the statute of our state, cannot be upheld; the defect is not one of form but of substance and defendant was not sufficiently advised of the accusation against him."

[c] To charge an attempt to commit sodomy is not sufficient. *State v. George*, 79 Wash. 262, 140 Pac. 337.

80. **Ala.**—*Jackson v. State*, 91 Ala. 55, 8 So. 773, 24 Am. St. Rep. 800; *Lewis v. State*, 35 Ala. 380. **Mass.** *Com. v. Murphy*, 12 Allen 449. **Mo.** *State v. Hughes*, 76 Mo. 323. **N. Y.** *People v. Bush*, 4 Hill 123; *Mahesey v. People*, 6 Park. Crim. 114. **Tenn.** *Hayes v. State*, 15 Lea 64; *State v. Montgomery*, 7 Baxt. 169, 181. **Utah.** *State v. Evans*, 27 Utah 12, 78 Pac. 1947. **Wash.**—*State v. Baker*, 69 Wash. 589, 590, 125 Pac. 1016, wherein the

court said: "We think that, under the liberal rules of criminal pleading enjoined by our statute, the information is sufficient."

[a] "The principle upon which an indictment which merely charges an 'attempt' to commit an offense is held good, is, that the word 'attempt' has a legal meaning—is an adjoined word, and, therefore, when a person is indicted for an 'attempt,' he, in law, is as fully advised of what the indictment charges, as if the statute had defined, with precision, the acts necessary to constitute an 'attempt.'" *Jackson v. State*, 91 Ala. 55, 8 So. 773, 24 Am. St. Rep. 800.

81. *Hogan v. State*, 50 Fla. 86, 39 So. 464, 7 Ann. Cas. 139.

82. *Com. v. Flynn*, 3 Cash. (Mass.) 529.

83. **Conn.**—*State v. Avery*, 7 Conn. 206, 18 Am. Dec. 105. **Mass.**—*Com. v. Flagg*, 135 Mass. 345. **N. Y.**—*People v. Bush*, 4 Hill 123. **S. C.**—*State v. Bowers*, 35 S. C. 262, 14 S. E. 488, 28 Am. St. Rep. 847, 15 L. R. A. 192.

[a] **Forms.**—See the following cases for (1) solicitation to commit arson (*Com. v. Flagg*, 135 Mass. 345); (2) solicitation to set fire to warehouse (*State v. Donovan* [Del.], 90 Atl. 221); (3) solicitation to murder. *Com. v. Randolph*, 146 Pa. 80, 23 Atl. 388, 18 Am. St. Rep. 782.

84. *Com. v. Flagg*, 135 Mass. 345.

85. *Rivers v. State*, 97 Ala. 72, 12 So. 434; *State v. Donovan* (Del.), 90 Atl. 221.

indictment in order that the solicitation may be relied upon as an overt act, such solicitation must be alleged,⁸⁶ and the solicitation by the defendant and the acts which he actually did in making the attempt may be set forth in the same count.⁸⁷

II. BY MEANS OF SEPARATE COUNTS.—1. Form and Sufficiency

a. *In General*.—Where an indictment contains several counts, each count is to be treated as a separate charge,⁸⁸ and must be sufficient and complete within itself,⁸⁹ except that for some allegations subsequent counts may refer to the first or former counts.⁹⁰ As the rule is sometimes stated, an allegation in one count cannot aid another count, unless it is incorporated into the other count by reference thereto.⁹¹

Each count must charge the defendant as if he had committed a distinct offense.⁹² It is not necessary, however, to aver the offense described in each of the several counts to be other and different from that described in the others.⁹³ Nor is it necessary that each count

86. *Com. v. Peaslee*, 177 Mass. 267, 59 N. E. 55.

87. *State v. Hayes*, 78 Mo. 307.

88. *Ill.*—*Watson v. People*, 134 Ill. 374, 25 N. E. 567. *Tex.*—*Boren v. State*, 23 Tex. App. 28, 4 S. W. 463. *Va.*—*Lithgow v. Com.*, 2 Va. Cas. 297, 311. *Eng.*—*Latham v. Reg.*, 9 Cox C. C. 516, 117 E. C. L. 635.

[a] "Each count is a separate indictment, and in legal contemplation, is an indictment for a separate, distinct and substantive offense, and the court cannot understand but that the evidence upon these counts is to be wholly different and unconnected." *Lithgow v. Com.*, 2 Va. Cas. 297, 311.

89. *Fla.*—*Keech v. State*, 15 Fla. 591. *Ill.*—*Watson v. People*, 134 Ill. 374, 25 N. E. 567. *Ind.*—*State v. Longley*, 10 Ind. 482. *Kan.*—*State v. Briggs*, 145 Pac. 866; *State v. Fields*, 70 Kan. 391, 78 Pac. 833. *Mo.*—*State v. Wade*, 147 Mo. 73, 47 S. W. 1070; *State v. Wagner*, 118 Mo. 626, 24 S. W. 219; *State v. Stacy*, 103 Mo. 11, 15 S. W. 147. *N. C.*—*State v. Phelps*, 65 N. C. 459. *S. C.*—*State v. Banks*, 84 S. C. 543, 66 S. E. 999; *State v. Johnson*, 45 S. C. 483, 23 S. E. 619. *Tex.*—*Long v. State*, 43 Tex. 167. *Va.*—*Early v. Com.*, 86 Va. 921, 11 S. E. 795. *W. Va.*—*State v. Bruce*, 26 W. Va. 153. *Can.*—*Reg. v. Weir*, 3 Can. Cr. Cas. 499.

[a] It is not proper in counts subsequent to the first, to omit any of the

averments necessary to a complete statement of the offense. *Keech v. State*, 15 Fla. 591, 603.

[b] Each count "must be as complete as if it stood alone and were the sole pleading." *State v. Fields*, 70 Kan. 391, 78 Pac. 833.

90. See *infra*, IX, H, 3.

91. *U. S.*—*Patterson v. United States (C. C. A.)*, 222 Fed. 599, 626, allegation as to venue in first and second counts could not aid third count where no allegation incorporating it into third count. *Cal.*—*People v. Smith*, 193 Cal. 563, 37 Pac. 516. *Ind.*—*State v. Longley*, 10 Ind. 482. *W. Va.*—*State v. Bruce*, 26 W. Va. 153.

92. *Cal.*—*People v. Ellenwood*, 119 Cal. 166, 51 Pac. 553. *Ind.*—*Mershon v. State*, 51 Ind. 14. *Mo.*—*State v. Wagner*, 118 Mo. 626, 24 S. W. 219 (old and familiar rule); *State v. Stacy*, 103 Mo. 11, 15 S. W. 147. *Pa.*—*Com. v. Ault*, 10 Pa. Super. 651, 658. *S. C.*—*State v. Banks*, 84 S. C. 543, 66 S. E. 999. *Tex.*—*Manovitch v. State*, 50 Tex. Crim. 260, 96 S. W. 1.

[a] Though it is usual to charge the offense as if the offense in each count was a distinct offense, yet that is matter of form, and an omission to do so does not render the indictment bad under statutory provisions for the cure of defects in form. *State v. Doyle*, 15 R. I. 527, 9 Atl. 900.

93. *State v. Rust*, 35 N. H. 438.

expressly show the accused to be the same person charged therein.⁹⁴

The insufficiency of one count where others therein are good does not vitiate the indictment or information,⁹⁵ and a conviction thereon will be sustained.⁹⁶

Any repugnancy between matters set out in two counts of an indictment becomes immaterial where the prosecuting officer enters a *nolle prosequi*, and dismisses one of such counts.⁹⁷

b. *Caption, Commencement, Conclusion and Signature.*—The necessity of each separate count of an indictment or information having a caption,⁹⁸ a commencement,⁹⁹ a formal conclusion,¹ and signature, both of the foreman of the grand jury,² and of the prosecuting officer,³ is treated elsewhere in this title.

2. **Referring From One Count to Another.**—While the practice of referring from one count to another is not a good one in any case,⁴ the merely formal parts of the indictment, when once stated in the first count, may be referred to in the subsequent counts.⁵ Matters of substance cannot be made a part of one count by reference to another count, however,⁶ except that one count may refer to matter in a previous count so as to avoid unnecessary repetition.⁷ in making such aver-

94. *Boren v. State*, 23 Tex. App. 28, 34, 4 S. W. 463, wherein it was contended that second count should have averred that "the said B. did," etc.

95. *Cal.*—*People v. Lapique*, 6 Cal. Unrep. 839, 67 Pac. 14, reversed on other grounds, 136 Cal. 503, 69 Pac. 226. *Me.* *State v. Hadlock*, 43 Me. 282. *Va.* *Pryor v. Com.*, 26 S. E. 864.

96. *Lehman v. United States*, 127 Fed. 41, 43. See *supra*, XVII, C, 2.

[a] Though one count be good and the other bad, a general verdict is proper; it will be assigned to the good count. *Boren v. State*, 23 Tex. App. 28, 4 S. W. 463.

97. *Chester v. State*, 23 Tex. App. 577, 5 S. W. 125.

As to repugnancy generally, see *supra*, IX, C, 6.

98. See *supra*, VIII, A, 3, b; VIII, B, 2.

99. See *supra*, VIII, A, 4, a; VIII, B, 1.

1. See *supra*, VIII, A, 6; VIII, B, 6.

2. See *supra*, VIII, A, 7, a.

3. See *supra*, VIII, A, 7, b; VIII, B, 7.

4. *United States v. Jolly*, 37 Fed. 108.

[a] This is a defect in form, however, cured by statutory provisions for

the cure of defects in form. *United States v. Jolly*, 37 Fed. 108.

5. *State v. Dufour*, 63 Ind. 567.

6. *Cal.*—*People v. Ellenwood*, 119 Cal. 160, 51 Pac. 353. *Fla.*—*Kouch v. State*, 15 Fla. 591. *Ind.*—*State v. Dufour*, 63 Ind. 567.

7. *U. S.*—*Crain v. United States*, 162 U. S. 625, 633, 16 Sup. Ct. 952, 40 L. ed. 1008; *Blitz v. United States*, 153 U. S. 308, 317, 14 Sup. Ct. 924, 38 L. ed. 725; *Glass v. United States* (C. C. A.), 222 Fed. 773, 780; *Bartholomew v. United States*, 177 Fed. 902, 191 U. C. A. 182; *United States v. New Department Mfg. Co.*, 204 Fed. 107; *United States v. Ridgway*, 109 Fed. 286; *United States v. Winslow*, 195 Fed. 578; *United States v. Patten*, 187 Fed. 604; *United States v. McKinley*, 127 Fed. 106; *United States v. Peters*, 87 Fed. 984. See *United States v. Howard*, 132 Fed. 325, 344. *D. C.*—*Hyde v. United States*, 27 App. Cas. 262; *Benson v. United States*, 27 App. Cas. 331, 332; *Loyens v. United States*, 24 App. Cas. 237, 303. *Me.*—*State v. Nelson*, 29 Me. 339. *N. Y.*—*People v. Graves*, 5 Park. Crim. 134; *People v. Danihy*, 63 Hun 579, 18 N. Y. Supp. 467. *Pa.*—*Com. v. Ault*, 10 Pa. Super. 651, 658. *Tenn.* *State v. Lea*, 1 Coldw. 175. *Tex.*—*Marston v. State*, 31 Tex. Crim. 1, 18 S. W. 647. *W. Va.*—*State v. Bruce*, 26 W. Va. 153.

ments as those in reference to time and place,⁸ and the like.⁹ Such reference, however, must be so full and distinct as to, in effect, incorporate the matter going before with that in the count in which the reference is made.¹⁰

Matter set forth in one count cannot ordinarily be imported into another count merely by the use of the word "said,"¹¹ or the word

[a] "To some extent the pleader may avoid repetitions by referring from one count to another." *State v. Bruce*, 20 W. Va. 153.

8. Fla.—*Buie v. State*, 67 So. 102. Ill.—*Noe v. People*, 39 Ill. 96. Ind.—*Redman v. State*, 1 Blackf. 429. La.—*State v. Hertzog*, 41 La. Ann. 775, 6 So. 622. Mass.—*Com. v. Goodwin*, 122 Mass. 49. Neb.—*Partley v. State*, 53 Neb. 310, 73 N. W. 744; *Fisk v. State*, 9 Neb. 62, 2 N. W. 381. N. Y.—*People v. Lewis*, 111 App. Div. 558, 98 N. Y. Supp. 88. Ohio.—*Evans v. State*, 24 Ohio St. 208. Tex.—*Manovitch v. State*, 50 Tex. Crim. 260, 96 S. W. 1; *Boggs v. State* (Tex. Crim.), 25 S. W. 770 ("county aforesaid" in second count sufficiently incorporates name of county, where it is stated in first count); *Morgan v. State*, 31 Tex. Crim. 1, 18 S. W. 647.

[a] One count of an indictment may by apt expressions refer to a previous count for specifications of time and place, when the data referred to are not repugnant to the count in which the reference is made and the reference cannot reasonably be harmful to the accused. *Buie v. State* (Fla.), 67 So. 102.

9. *Redman v. State*, 1 Blackf. (Ind.) 429 (value); *State v. Nelson*, 29 Me. 329, a count for receiving stolen goods, though it does not mention the names of the owners, may, by referring to the other counts in which the names are set out, be sufficient.

10. D. C.—*Benson v. United States*, 27 App. Cas. 331. La.—*State v. Ackerman*, 51 La. Ann. 1209, 26 So. 84. Me.—*State v. McAllister*, 26 Me. 374. Mo.—*State v. Wade*, 147 Mo. 73, 47 S. W. 1070. W. Va.—*State v. Bruce*, 20 W. Va. 153. Wis.—*State v. Lyon*, 17 Wis. 245.

[a] Where the second indictment alleges certain payments were made to influence official action "under the said circumstances and conditions set

forth in the first count of this indictment, while knowing all and singular the premises set forth in that count," the reference to the preceding count is sufficient to incorporate the circumstances and conditions in the second count. *Benson v. United States*, 27 App. Cas. (D. C.) 331.

11. *People v. Ellenwood*, 119 Cal. 166, 51 Pac. 553; *Reg. v. Martin*, 9 Car. & P. 215, 38 E. C. L. 135.

[a] In *Reg. v. Martin*, 9 Car. & P. 215, 38 E. C. L. 135, "an indictment in the first count charged the defendant with having assaulted 'E. R., an infant above the age of ten years and under the age of twelve years,' with intent to carnally know and abuse her, and in the second count charged that the defendant 'unlawfully did put and place the private parts of him the said T. M., against the private parts of her the said E. R., and did thereby then and there unlawfully attempt and endeavor to carnally know and abuse the said E. R.'" The offense intended to be charged in the second count was an attempt to have carnal knowledge of a child between ten and twelve years old. But the court decided that the offense was not so charged by the language used, and that the second count was bad for not alleging that E. R. was between the ages of ten and twelve, so as to bring the case within the statute. *State v. Lyon*, 17 Wis. 245.

[b] Compare *Keech v. State*, 15 Fla. 591, 603 (wherein the court said: "It is allowed, however, in a second count to refer to persons named in the first count, as 'the said A. B.,' 'the said wife,' etc., thus pointing to the same person named in the first. (Bish. Cr. Proc., §187 and cases cited.) But the only safe rule is to state the offense and the names of persons and places in each count, in all cases where it is deemed necessary to employ more than one statement of the offense"); also *Com. v. Ault*, 10 Pa. Super. 651, 658,

"aforesaid,"¹³ the rule being that the words "aforesaid" or "before mentioned" and the like, in a second or subsequent count, may import into it by reference any quality or adjunct of a subject-matter treated of in a prior count, provided such quality or adjunct be inseparable from the subject-matter as necessarily and invariably belonging to it,¹⁴ but not otherwise.¹⁵

holding that "when the first count of an indictment properly charges the larceny of certain specific chattels, alleging the value and ownership thereof, and the second count charges the felonious receiving of 'the said' chattels, enumerating the same, the words 'the said' refer to the first count, and the allegations as to ownership and value set forth in that count are to be read into the second count."

[c] Where the names of the defendant are set forth in the first count, they are clearly referred to in a second count by the use of the words "said defendants." *Chapple v. State*, 124 Tenn. 105, 135 S. W. 321.

12. Fla.—*Keech v. State*, 15 Fla. 591. Kan.—*State v. Fields*, 70 Kan. 391, 78 Pac. 833. Mo.—*State v. Wagner*, 118 Mo. 626, 24 S. W. 219. Wis.—*State v. Lyon*, 17 Wis. 245.

[a] In *State v. Wade*, 147 Mo. 73, 47 S. W. 1079, the court said: "Though it is well settled that time, place or person may be referred to by the use of the word 'said,' 'aforesaid,' 'same,' etc., yet that this is the limit of such short method of reference; it cannot without more particularity, without express reference to a previous count supply those descriptive averments, which enter into the vitals of the offense. [*State v. Wagner*, 118 Mo. 626, and cases cited.] Such reference, Bishop says, 'must be so full and distinct as, in effect, to incorporate the matter going before with that in the count wherein it is made.' [1 Bishop New Crim. Proc., §131] Thus, he says by way of illustration, that though the first count charged an assault on 'Father Ricketts, an infant above the age of ten and under the age of twelve years' etc., yet that the second count by the use of the words 'the said Father Ricketts,' did not with such reference carry with it the allegation contained in the first count that Father Ricketts was 'an infant above the age of ten and under the age of twelve

years' [*State v. Martin & Co. v. P.*, 215.] So, also, where a first count set out the larceny of goods of a stated value, and ownership, it was adjudged such ownership and value were not incorporated into the second count which charged a receiving of the 'goods aforesaid' [*State v. Lyon*, 17 Wis. 237.] To same effect is *State v. Wagner*, 118 Mo. 626, 24 S. W. 219.

[b] Illustrations.—(1) Use of words 'articles aforesaid' not sufficient to incorporate previous recital as to value of such articles. *State v. Wagner*, 118 Mo. 626, 24 S. W. 219. And see *State v. Lyon*, 17 Wis. 237, holding that words 'goods and chattels, etc., aforesaid,' did not import into a second count the allegations of the first as regard to the value and ownership of the property. *Compare Com. v. Ault*, 10 Pa. Super. 651, 658 see statement in note immediately preceding). (2) Nor are the words, "the aforesaid nest cattle," used alone as a description of property in a count in an information charging the offense of receiving stolen property, sufficient for that purpose. *State v. Fields*, 70 Kan. 391, 78 Pac. 833. (3) And they are likewise insufficient to be incorporated into that count allegations of number, sex, age, color and brands characterizing cattle fully described in the preceding count. *State v. Fields*, 70 Kan. 391, 78 Pac. 833. (4) But in *Peters v. United States*, 94 Fed. 127, 3d C. C. A. 105, a subsequent count of an indictment containing several counts averred that a designated person, "having then and there the custody of said association, as aforesaid, did," etc. It was held that the language used could refer to but one person, and to but one association, and necessarily included the entire description of the officer and of the association as set forth in the first count.

13. *Reg. v. Waverton*, 17 Ad. & Ell. 502, 79 E. C. L. 502.

14. *Reg. v. Waverton*, 17 Ad. & Ell.

Reference to Defective or Dismissed Count.—Though a previous count properly referred to in a subsequent one, be defective,¹⁵ or be for some reason rejected,¹⁶ that will not vitiate the remaining counts, if the reference be sufficiently full to incorporate the matter going before. The same is true in case a *nolle prosequi* is entered as to such previous count,¹⁷ and even in case of an acquittal of the defendant upon such count.¹⁸

I. INTERPRETATION AND CONSTRUCTION.—**1. In General.**—While some courts have adopted extremely strict and often highly technical rules for the construction of indictments and informations,¹⁹ the rule of liberal construction has been adopted in many states,²⁰ where crim-

562, 79 E. C. L. 562. In this case, which was an indictment for non-repair of a highway, the first count described the highway by termini, alleged that it was situate in the township of W., and was ruinous, etc. for want of repair, and charged the defendants with liability to repair it. The second count did not directly allege that the way was out of repair, or that it was within the township; but it stated "that the said part of the same highway hereinbefore mentioned to be ruinous," etc., as aforesaid, was repairable by the defendants. It was held that the words "hereinbefore mentioned to be ruinous" did not amount to an averment that it was in fact ruinous; and that the words "same highway hereinbefore mentioned," etc., would not be taken to import that averment from the first count, stating the rule laid down in the text. It was held, however, that by such rule, the words "hereinbefore mentioned" were a sufficient allegation, by reference, that the way alleged to be ruinous was in the township.

15. U. S.—*Crain v. United States*, 162 U. S. 623, 16 Sup. Ct. 952, 40 L. ed. 1098; *Blitz v. United States*, 153 U. S. 308, 14 Sup. Ct. 924, 38 L. ed. 725. **D. C.**—*Benson v. United States*, 27 App. Cas. 231. **Pa.**—*Com. v. Kaas*, 3 Brewst. 422; *Com. v. Ault*, 10 Pa. Super. 651, 658.

16. U. S.—*Crain v. United States*, 162 U. S. 623, 16 Sup. Ct. 952, 40 L. ed. 1098. **Ind.**—*State v. Dufour*, 63 Ind. 567. **Mo.**—*State v. Knock*, 142 Mo. 515, 44 S. W. 235. **Neb.**—*Bartley v. State*, 53 Neb. 310, 73 N. W. 744. **N. Y.**—*People v. McLaughlin*, 150 N. Y. 365, 44 N. E. 1617. **Pa.**—*Com. v. Hill*, 4 Luz. Leg. Obs. 52, 2 Penns. 432. **Tex.**—*Boles v. State*, 13 Tex. App. 650.

17. Ill.—*People v. Viskniskki*, 155 Ill. App. 292. **Ia.**—*State v. Gaston*, 96 Iowa 505, 65 N. W. 415. **Mo.**—*Wills v. State*, 8 Mo. 52. **Tenn.**—*State v. Lea*, 1 Coldw. 175. **Tex.**—*Manovitch v. State*, 50 Tex. Crim. 260, 96 S. W. 1.

[a] **Where the first count is dismissed** (1) it may still be looked to, if necessary, to supply the date and venue of the offense. *Manovitch v. State*, 50 Tex. Crim. 260, 96 S. W. 1. (2) In *State v. Gaston*, 96 Iowa 505, 65 N. W. 415, the court said: "It is insisted, however, that, as the first count was dismissed by the state, nothing remained to fix the date. This contention is not sound, for the reason that the dismissal by the state of the first count did not eliminate it from the indictment. It still remained as a part of the presentment, and the whole instrument should still be considered in determining its sufficiency. This exact question was presented in the case of *Wills v. State*, 8 Mo. 52, and the point was ruled adversely to appellant's contention."

18. Com. v. Clapp, 16 Gray (Mass.) 237.

19. State v. Beasom, 40 N. H. 367, 374 (where, in an indictment for obstructing an officer it was held necessary to allege that the process which the officer was attempting to serve was legal and the allegation that he was in the "due and lawful execution of his said office, in the service and execution of a writ of replevin" was not sufficient); *State v. Brown*, 143 Wis. 405, 127 N. W. 956.

20. Ala.—*Franklin v. State*, 52 Ala. 414. **Idaho.**—*State v. Caldwell*, 21 Idaho 663, 123 Pac. 299; *State v. Squires*, 15 Idaho 545, 98 Pac. 413. **Ky.**

inal pleadings are now construed as liberally as civil pleadings.²⁰ Indeed, the rigor of rules formerly laid down has been mitigated by statutes in some jurisdictions,²² under which the words used are to be construed according to their common acceptance, except such as are technical or defined by law,²³ which latter are to be construed according to their legal meaning.²⁴

Even in those jurisdictions where indictments are strictly con-

Rutland v. Com., 160 Ky. 77, 169 S. W. 584. **N. J.**—State v. Cooney, 72 N. J. L. 76, 60 Atl. 60. **Tex.**—Perry v. State, 44 Tex. 473. **Wis.**—State v. Brown, 143 Wis. 405, 127 N. W. 956.

[a] In State v. Brown, 143 Wis. 405, 127 N. W. 956, the court said: "The letter as well as the spirit of our statute law is utterly antagonistic to the idea of applying exceedingly strict and technical rules to the construction of indictments or informations. This is particularly true where, as here, the defendant is not deprived of any substantial right by adopting a more liberal rule of construction and one more consonant with reason and better calculated to promote the ends of justice."

21. People v. Hunt, 120 Cal. 281, 52 Pac. 658; State v. Smith, 25 Idaho 541, 138 Pac. 1107.

22. Blackwell v. State (Fla.), 68 So. 479 (under Gen. St., 1906, §3962); State v. Brown, 143 Wis. 405, 127 N. W. 956. See generally the statutes.

[a] "The strictness of the common law in the construction of indictments has been materially modified by our statute (Gen. Stats. §3962), which forbids that an indictment be quashed or judgment arrested on account of defect in form, unless the indictment be so vague, indistinct, and indefinite as to mislead the accused or embarrass him in the preparation of his defense, or expose him, after conviction or acquittal, to substantial danger of a new prosecution for the same offense." Blackwell v. State (Fla.), 68 So. 479.

23. See the following: **U. S.**—Davis v. Utah Territory, 151 U. S. 202, 14 Sup. Ct. 328, 38 L. ed. 153, under Utah statute. **Ala.**—Code, 1907, §7135. **Ark.**—Kisby's Dig., 1904, §2242. **Cal.**—Penal Code, §957; People v. Littlefield, 5 Cal. 335, by statute. **Colo.**—Shultz v. People, 148 Pac. 805. **Ga.**—Rimes v. State, 7 Ga. App. 556, 67 S. E. 228. **Idaho.**—Rev. Codes, 1907, §7684. **Ind.**—Furness

Ann. St., 1913, §2044; State v. Day, 52 Ind. 483. **Ia.**—Code, 1897, §5257. **Kan.**—Gen. St., 1905, §5995; Smith v. State, 1 Kan. 365, by statute. **Mo.**—State v. Sakowski, 191 Mo. 635, 90 S. W. 435, 4 Am. & Eng. Ann. Cas. 751. **Mont.**—Rev. Codes, 1907, §9154. **Neb.**—Smith v. State, 72 Neb. 345, 100 N. W. 806. **Nev.**—Rev. L., 1912, §7057. **N. H.**—State v. Pratt, 14 N. H. 456. **N. M.**—State v. Khasner, 145 Pac. 679. **N. Y.**—Code Crim. Proc., §282. **N. D.**—Rev. Codes, 1905, §9854. **Ohio.**—State v. Messenger, 63 Ohio St. 398, 59 N. E. 105. **Okla.**—Comp. Laws, 1909, §6792. **Ore.**—Lord's Laws, §1446. **S. D.**—Code Crim. Proc., §227. **Utah.**—Comp. Laws, 1907, §4739. **Wash.**—Rem. & Ball. Codes & St., §2063. **Eng.**—King v. Stevens, 5 East 244, 259, 102 Eng. Reprint 1063.

[a] Where the words used to describe an offense are commonly used in a sense which does not necessarily import an offense, and they are used without any qualification, the indictment will be bad, though the same words, in a more strict and technical sense, may describe a criminal act. State v. Parker, 43 N. H. 83.

[b] If the sense of any word be in ordinary acceptance ambiguous, (1) it shall be construed according as the context and subject-matter require it to be in order to make the whole consistent and sensible. King v. Stevens, 5 East 244, 102 Eng. Reprint 1063. (2) The word "until" may therefore be construed either exclusive or inclusive of the day to which it is applied, according to the context and subject-matter. King v. Stevens, 5 East 244, 102 Eng. Reprint 1063.

24. See the following: Davis v. Utah Territory, 151 U. S. 202, 14 Sup. Ct. 328, 38 L. ed. 153; United States v. Clafflin, 13 Blatchf. 178, 15 Fed. Cas. No. 14,798; State v. Parker, 43 N. H.

strued,²⁵ a reasonable interpretation of the language employed in stating the offense is always permissible,²⁶ particularly in respect to matters of description or inducement.²⁷ If then the sense of an indictment is clear, nice or technical exceptions thereto will not now, as a rule, be favorably regarded.²⁸

In determining the sufficiency of an indictment, it will be read and considered as a whole,²⁹ and if when so read and considered it substantially conforms to the requirements of the statute in respect to the matters therein pointed out as material and necessary, it will be a good indictment.³⁰ But the courts are not at liberty to depart from the words of the pleading itself and speculate as to the possible intention of the writer.³¹ In the case of ambiguity or uncertainty, the court must apply the rule that the pleading is to be taken most strongly against the pleader.³² If the language used is equally capable of two interpretations, upon one of which the facts might be true and not constitute an offense, then it is insufficient.³³

Words interlined by means of a caret will be read so as to make sense, without much regard to the position of the caret.³⁴

52. See generally the statutes cited in the preceding note.

25. See *supra*, this section.

26. *State v. Kiefer* (Iowa), 151 N. W. 440; *State v. Minneapolis Milk Co.*, 124 Minn. 34, 144 N. W. 417.

27. *State v. Minneapolis Milk Co.*, 124 Minn. 34, 144 N. W. 417.

28. Ala.—*Couch v. State*, 6 Ala. App. 43, 63 So. 539. Ky.—See *Rutland v. Com.*, 160 Ky. 77, 169 S. W. 584; *Overstreet v. Com.*, 147 Ky. 471, 144 S. W. 751. Eng.—*King v. Stevens*, 5 East 244, 259, 102 Eng. Reprint 1063.

As to effect of mere clerical errors, omissions, etc., see *supra*, IX, C, 2, e.

As to effect of omission of words, see *supra*, IX, C, 2, f.

As to effect of mistakes in spelling or errors in grammar, see *supra*, IX, C, 2, e.

[a] "The court is not inclined to favor hypercritical objections to indictments; (1) the trend of the best modern thought is not along the lines of rigid adherence to rules not based upon a reasonable interpretation of the aims and spirit of present day criminal procedure." *Rutland v. Com.*, 160 Ky. 77, 169 S. W. 584. (2) Especially in the case of ambiguity is this so, as they are construed less strictly. *Couch v. State*, 6 Ala. App. 43, 63 So. 539.

29. *Regadanz v. State*, 171 Ind. 387,

86 N. E. 449 (sufficiency of criminal charge determined from its general scope and structure); *Overstreet v. Com.*, 147 Ky. 471, 144 S. W. 751.

30. *Overstreet v. Com.*, 147 Ky. 471, 144 S. W. 751.

31. *People v. Hallberg*, 259 Ill. 502, 102 N. E. 1005.

32. Ind.—*Littell v. State*, 133 Ind. 577, 33 N. E. 417. Ky.—*Com. v. T. J. Megibben Co.*, 101 Ky. 195, 19 Ky. L. Rep. 291, 40 S. W. 694 (rule applies more strongly in criminal than in civil cases); *Com. v. G. W. Taylor*, 19 Ky. L. Rep. 1334, 43 S. W. 399. Tex.—*State v. Eubanks*, 41 Tex. 291.

See generally 5 STANDARD PROC. 343.

[a] It is not allowable to cast upon accused the burden of correctly interpreting doubtful or uncertain allegations. *Regadanz v. State*, 171 Ind. 387, 86 N. E. 449.

33. *People v. Williams*, 35 Cal. 671; *People v. Allison*, 25 Cal. App. 746, 145 Pac. 539; *State v. Parkes*, 43 N. H. 83.

[a] The indictment cannot be aided by presumption, since all presumptions are in favor of innocence, and if the facts stated may or may not constitute a crime, the presumption is that no crime is charged. *People v. Allison*, 25 Cal. App. 746, 145 Pac. 539.

34. *State v. Daniels*, 44 N. H. 383.

In determining the antecedent of a pronoun used, the court will be governed by the sense and meaning intended and not refer it arbitrarily to the last preceding noun.³⁵ It must be referred to that antecedent to which the tenor of the instrument and the principles of law require that it should relate, whether according to the rules of syntax or not.³⁶ The same general rule is true in reference to the use of the word "said."³⁷ In other respects also, the court before determining the meaning, will consult sound sense to the disregard of captious objections, and of two otherwise permissible renderings will accept the one sustaining the proceedings.³⁸

Where an indictment or information contains common law phrases and references, these are to be given their common law meaning.³⁹ But indictments where statutory forms have been provided are sui generis and the rules of construction as to indictments at common law are not applicable.⁴⁰

2. Caption as an Aid to.— Though the caption may be looked to in aid of the indictment in some respects,⁴¹ it cannot be referred to by the court to aid in clarifying imperfect or uncertain allegations in the body of the indictment,⁴² since it is neither technically nor substantially a part thereof.⁴³

3. Use of Preliminary Affidavit or Complaint.— The rule is quite generally recognized that an information cannot be aided by reference to the complaint or affidavit upon which it is based.⁴⁴ But the court may, to aid it in deciphering the writing in the information or indictment, have recourse to the complaint or affidavit upon which the same is based.⁴⁵

4. Reading Statute in Connection With Indictment.— In inter-

35. *Miller v. State*, 107 Ind. 152, 7 N. E. 898; *Steeple v. Downing*, 60 Ind. 478.

36. *Strobhar v. State*, 55 Fla. 167, 47 So. 4; *Com. v. Call*, 21 Pick. (Mass.) 515.

37. The reference of the word "said" in an indictment is determined in any given case by the sense. It does not refer to the next antecedent necessarily. *Wilkinson v. State*, 10 Ind. 372.

38. *Benson v. United States*, 27 App. Cas. (D. C.) 331; *Strobhar v. State*, 55 Fla. 167, 47 So. 4. See also *State v. Klasner* (N. M.), 145 Pac. 679.

39. *Chapman v. People*, 39 Mich. 357.

40. *Wilson v. State*, 61 Ala. 151; *White v. State*, 44 Ala. 409.

41. As to caption aiding indictment, see *supra*, VIII, A, 3, a.

42. *United States v. Howard*, 132 Fed. 325, 343; *State v. Flower* (Idaho), 147 Pac. 786.

43. See *supra*, VIII, A, 3, a.

44. *Keiser v. State*, 78 Ind. 430; *Smith v. State*, 25 Tex. App. 454, 8 S. W. 645; *Williams v. State*, 19 Tex. App. 409.

[a] Thus, omissions in the allegations as to ownership (1) of property charged to have been stolen (*Williams v. State*, 19 Tex. App. 409), (2) or of the name of the accused (*Keiser v. State*, 78 Ind. 430), (3) or of the necessary allegations as to venue (*Smith v. State*, 25 Tex. App. 454, 8 S. W. 645; *Orr v. State*, 25 Tex. App. 453, 8 S. W. 644; *Lawson v. State*, 13 Tex. App. 83), cannot be supplied in this manner.

[b] That the offense charged was committed anterior to the filing of the information cannot be shown by reference to preliminary complaint or affidavit. *Kennedy v. State*, 22 Tex. App. 693, 3 S. W. 480.

45. *Irvin v. State*, 7 Tex. App. 109.

preting an indictment it is proper for the court to read the same in connection with the statute upon which it is based.⁴⁶

J. SURPLUSAGE.—1. What Is Surplusage.—a. *In General.* Surplusage is variously defined as the allegation of unnecessary matter,⁴⁷ or such an averment as may be stricken out and yet leave a sufficient description of the offense.⁴⁸

The rule in regard to the rejection of unnecessary allegations in an indictment or information as surplusage is well defined; the only difficulty arises in its application to specific cases.⁴⁹ Generally, it may be said that if the elements of the offense are set forth,⁵⁰ other matter

46. *People v. White*, 34 Cal. 183; *State v. Messenger*, 63 Ohio St. 398, 59 N. E. 105.

47. *State v. Ean*, 90 Iowa 534, 58 N. W. 898; *Robertson v. Com.*, 1 Va. Dec. 851, 20 S. E. 362.

48. **Ark.**—*State v. Porter*, 38 Ark. 637. **Conn.**—*State v. Corrigan*, 24 Conn. 286. **Ill.**—*People v. Boer*, 262 Ill. 152, 104 N. E. 162; *Sutton v. People*, 145 Ill. 279, 34 N. E. 420; *Durham v. People*, 5 Ill. 172, 39 Am. Dec. 407. **Ind.** *Botkins v. State*, 36 Ind. App. 179, 75 N. E. 298; *Barnett v. State*, 22 Ind. App. 599, 54 N. E. 414. **Ia.**—*State v. Anselme*, 15 Iowa 44. **Me.**—*State v. Robinson*, 39 Me. 150, citing *Roscoe's Cr. Ev.* 84. **Md.**—*Rawlings v. State*, 2 Md. 201. **Mass.**—*Com. v. Wellington*, 7 Allen 299; *Com. v. Ferry Co.*, 13 Allen 589. **Minn.**—*State v. Crummev*, 17 Minn. 72. **Mo.**—*State v. Thomas*, 250 Mo. 189, 157 S. W. 330; *State v. Meyers*, 99 Mo. 107, 12 S. W. 516. **Neb.**—*Hurlbert v. State*, 52 Neb. 428, 72 N. W. 471; *Blodgett v. State*, 50 Neb. 121, 69 N. W. 751; *State v. Kendall*, 38 Neb. 817, 57 N. W. 525. **N. H.**—*State v. Bailey*, 31 N. H. 521; *State v. Copp*, 15 N. H. 212. **N. Y.**—*People v. White*, 22 Wend. 167. **N. C.**—*State v. Morrison*, 24 N. C. 9; *State v. Haney*, 8 N. C. 460. **Ohio.**—*Dana v. State*, 2 Ohio St. 91, 97; *State v. Decker*, 1 Ohio Dec. (Reprint) 627. **Tenn.**—*State v. Belleville*, 7 East. 548; *State v. Brown*, 8 Humph. 80. **Tex.**—*Zweig v. State* (Tex. Crim.), 171 S. W. 747; *Byrd v. State*, 72 Tex. Crim. 240, 162 S. W. 360; *Goodwin v. State*, 70 Tex. Crim. 600, 168 S. W. 274; *Creed v. State* (Tex. Crim.), 155 S. W. 240; *Thompson v. State* (Tex. Crim.), 157 S. W. 803. **Vi.** *State v. Gilbert*, 12 Vi. 647. **Va.** *Lafer v. Com.*, 10 Gratt. 708. **W. Va.**

State v. Reece, 27 W. Va. 375; *State v. Howes*, 26 W. Va. 110.

[a] **Incorporation.**—Where only the de facto existence of a corporation need be proved, an allegation that the corporation "was organized under the laws" of a given state may be rejected as surplusage. *People v. Stricker*, 170 Ill. App. 485. See also *McCarney v. People*, 83 N. Y. 408.

[b] **Acting Together.**—An allegation that defendant and another "acted together" may be rejected as surplusage. *Watson v. State*, 28 Tex. App. 34, 12 S. W. 404.

49. *State v. Sakowski*, 191 Mo. 635, 90 S. W. 435, 4 Am. & Eng. Ann. Cas. 751.

50. **Ala.**—*Burt v. State*, 159 Ala. 134, 48 So. 851; *Henderson v. State*, 105 Ala. 82, 16 So. 931; *Ware v. State* (Ala. App.), 67 So. 763. **Ark.**—*Tharp v. State*, 99 Ark. 188, 137 S. W. 1097; *Downs v. State*, 60 Ark. 521, 31 S. W. 149; *Butler v. State*, 34 Ark. 480. **Cal.** *People v. Handley*, 100 Cal. 370, 34 Pac. 853; *People v. Flores*, 64 Cal. 426, 1 Pac. 498; *People v. Myers*, 20 Cal. 76. **Conn.**—*State v. Brown*, 51 Conn. 1, 3. **Fla.**—*Clark v. State*, 59 Fla. 9, 52 So. 518; *Hodge v. State*, 26 Fla. 11, 7 So. 593. **Ga.**—*Shrorder v. State*, 121 Ga. 615, 49 S. E. 702; *Tigner v. State*, 119 Ga. 114, 45 S. E. 1001. **Idaho.** *People v. Ah Hop*, 1 Idaho 698. **Ill.** *Sutton v. People*, 145 Ill. 279, 285, 34 N. E. 420; *People v. Carter*, 186 Ill. App. 453; *People v. Mackin*, 159 Ill. App. 125; *Snell v. People*, 29 Ill. App. 470. **Ind.**—*State v. Goodwin*, 169 Ind. 265, 82 N. E. 459; *State v. Sarlis*, 135 Ind. 195, 34 N. E. 1129; *Trout v. State*, 111 Ind. 499, 12 N. E. 1005; *Myers v. State*, 92 Ind. 390. **Ia.**—*State v. Staf-*

unnecessarily added may be rejected as surplusage. Upon this prin-

ford, 145 Iowa 285, 123 N. W. 167 ("noxious" unnecessarily added); State v. Judd, 132 Iowa 296, 109 N. W. 822 (feloniously unnecessarily added); State v. Boomer, 103 Iowa 106, 72 N. W. 424; State v. Orniston, 66 Iowa 143, 23 N. W. 870. **Kan.**—State v. Farney, 43 Kan. 115, 21 Pac. 213, 13 Am. St. Rep. 262. **Ky.**—Spencer v. Com., 12 Ky. L. Rep. 605. **La.**—State v. Minap, 37 La. Ann. 226. **Me.**—State v. Hatch, 94 Me. 61, 46 Atl. 796; State v. Robbins, 66 Me. 224; State v. Staples, 45 Me. 220; State v. Noble, 15 Me. 476. **Md.** Rawlings v. State, 2 Md. 201. **Mass.** Com. v. Walker, 163 Mass. 226, 39 N. E. 1014; Com. v. Dyer, 128 Mass. 70; Com. v. Balkom, 3 Pick. 281. **Mich.** People v. Kennedy, 176 Mich. 384, 142 N. W. 771; McNamee v. People, 31 Mich. 473. **Miss.**—Simmons v. State, 68 So. 913. **Mo.**—State v. Parker, 170 S. W. 1121; State v. McConnell, 240 Mo. 269, 144 S. W. 836; State v. Lawler, 220 Mo. 26, 119 S. W. 639; State v. Flanders, 118 Mo. 227, 23 S. W. 1086 (matters of aggravation are surplusage); State v. Taylor, 117 Mo. 181, 22 S. W. 1103; State v. Wall, 39 Mo. 532; State v. Murphy, 102 Mo. App. 680, 77 S. W. 157; State v. Boatright, 61 Mo. App. 469. **Mont.**—State v. Tudor, 47 Mont. 185, 121 Pac. 632; State v. McGowan, 36 Mont. 422, 93 Pac. 552. **Neb.**—Nelson v. State, 86 Neb. 856, 126 N. W. 518; Hubbard v. State, 52 Neb. 428, 79 N. W. 471. **N. H.**—State v. Webster, 39 N. H. 96; State v. Bailey, 31 N. H. 521; State v. Noyes, 36 N. H. 279; State v. Lord, 16 N. H. 357. **N. J.**—State v. Keen, 51 N. J. L. 259, 17 Atl. 114. **N. C.**—State v. Wynne, 151 N. C. 644, 65 S. E. 459, use of superfluous words should be disregarded. **Ohio.**—Turner v. State, 1 Ohio St. 422; Gaiger v. State, 5 Ohio C. C. 283, 3 Ohio C. D. 141; Brown v. Toledo, 7 Ohio N. P. 435, 5 Ohio S. & C. P. Dec. 210. **Okla.**—Wood v. State, 3 Okla. Crim. 553, 107 Pac. 937; Chandler v. State, 3 Okla. Crim. 254, 105 Pac. 375. **Ore.**—State v. Morris, 58 Ore. 396, 114 Pac. 476; State v. Emmons, 55 Ore. 352, 104 Pac. 882, 106 Pac. 451; State v. Loo Wan, 11 Ore. 325, 8 Pac. 353; State v. Lee Ping Bow, 10 Ore. 27. **Pa.**—Com. v. Miller, 31 Pa. Super. 309,

S. C.—State v. Jefferat, 54 S. C. 166, 32 S. E. 298; State v. Cassady, 1 Rich. L. 90. **S. D.**—State v. Parker, 23 S. D. 550, 118 N. W. 1042; State v. Allen, 21 S. D. 121, 110 N. W. 92. **Tenn.** Harris v. State, 14 Lea 487; State v. Bellville, 7 Baxt. 518; State v. Brown, 8 Humph. 89. **Tex.**—Bunker v. State (Tex. Crim.), 177 S. W. 108; Mackins v. State (Tex. Crim.), 171 S. W. 792; Goodwin v. State, 70 Tex. Crim. 600, 158 S. W. 274; Thompson v. State (Tex. Crim.), 152 S. W. 893 (unnecessary words may and should be rejected as surplusage); Rocha v. State, 43 Tex. Crim. 169, 63 S. W. 1618; Taylor v. State, 29 Tex. 466, 509; Hammons v. State, 29 Tex. 444; Rivers v. State, 10 Tex. 177; Sublett v. State, 9 Tex. 53. **Vt.**—State v. Hurt, 25 Vt. 373. **Va.** Thornton v. Com., 113 Va. 736, 73 S. E. 481. **Wash.**—State v. Kyle, 14 Wash. 550, 45 Pac. 147. **W. Va.**—State v. McClung, 35 W. Va. 280, 13 S. E. 654; State v. Hall, 26 W. Va. 236; State v. Gould, 26 W. Va. 258; State v. Cain, 9 W. Va. 559.

[a] Where a certain act as, for instance, card playing, is prohibited in a certain class of places, it is sufficient if the indictment or information aver the act to have been done in a place of that particular class, and allegations further identifying it are not requisite since they would be surplusage. Sublett v. State, 9 Tex. 53.

[b] In an indictment against an insolvent bank for receiving money or currency or the equivalent thereof, the averment that money so received was lawful money of the "United States" may be rejected as surplusage. State v. Boomer, 103 Iowa 106, 72 N. W. 424.

[c] On a prosecution for unlawfully issuing bills intended to circulate as money, an allegation that bills were engraved may be rejected as surplusage where they were in fact printed. Luckey v. State, 26 Tex. 362.

[d] Feloniously when used unnecessarily may be rejected as surplusage. State v. Judd, 132 Iowa 296, 109 N. W. 822; Hess v. State, 5 Ohio 5, 22 Am. Dec. 767.

ciple meaningless,⁵¹ or inaccurate words,⁵² which in no way mislead the defendant to his prejudice,⁵³ and are neither repugnant nor contradictory to the body of the indictment or information,⁵⁴ and which do not render unintelligible any of the material, traversable matters constituting the charge,⁵⁵ nor describe the identity of a thing or fact material to the charge⁵⁶ may be treated as surplusage.

Words which are merely formal,⁵⁷ or unnecessary description,⁵⁸ as that the defendant was a married man, in an indictment for incest,⁵⁹ or that the knife with which an assault was committed was a deadly weapon,⁶⁰ or matters in aggravation of the offense,⁶¹ or the conclusion of an indictment contrary to the form of the statute in such case made and provided, when the offense is not a statutory one,⁶² or averments as

51. Ky.—*Travis v. Com.*, 96 Ky. 77, 27 S. W. 803 (wherein money was described as "lawful currency of the United States of Kentucky"); *Richer v. Com.*, 81 Ky. 524. Mass.—*Com. v. Wright*, 166 Mass. 174, 14 N. E. 129; *Com. v. Penniman*, 8 Mete. 519. Miss.—*Tift v. State*, 23 Miss. 567. Mo.—*State v. Walker*, 107 Mo. 667, 67 S. W. 228. Nev.—*State v. Johnson*, 9 Nev. 175. Tex.—*Burke v. State*, 5 Tex. 74; *Rivers v. State*, 19 Tex. 177.

[a] The use of the word *accommodation* in connection with the embezzlement of certain property as bailee does not vitiate the indictment. Such word *accommodation* has no common acceptation and its insertion could not prejudice defendant. *People v. Flores*, 64 Cal. 420, 1 Pac. 438.

52. La.—*State v. Jackson*, 106 La. 189, 30 So. 809. Mass.—*Com. v. Philpot*, 130 Mass. 59; *Eastman v. Com.*, 4 Gray 416; *Com. v. Squire*, 1 Mete. 258. Mich.—*Turner v. Circuit Judge*, 95 Mich. 1, 54 N. W. 705. Ohio.—*Turner v. State*, 1 Ohio St. 422. Va.—*Lazier v. Com.*, 10 Gratt. 798.

53. Ky.—*Travis v. Com.*, 96 Ky. 77, 27 S. W. 803. Nev.—*State v. Pierce*, 8 Nev. 291. N. Y.—*People v. Laurence*, 137 N. Y. 517, 33 N. E. 517.

54. Ala.—*State v. Bailey*, 8 Port. 478. Me.—*State v. Marchery*, 48 Me. 218. Mo.—*State v. Philp.*, 62 Mo. 393. Neb.—*State v. Kendall*, 38 Neb. 817, 57 N. W. 525. N. Y.—*People v. Lohman*, 2 Barb. 210. Tex.—*Taylor v. State*, 29 Tex. App. 400, 16 S. W. 302.

55. *Taylor v. State*, 29 Tex. App. 400, 16 S. W. 302.

56. Cal.—*People v. Myers*, 20 Cal. 76. Ga.—*Hall v. State*, 120 Ga. 142, 47 S. E. 519. Ky.—*Bryant v. Com.*, 24

Ky. L. Rep. 447, 68 S. W. 846. Miss.—*Green v. State*, 23 Miss. 509. Mo.—*State v. Sakowski*, 191 Mo. 635, 90 S. W. 435, 4 Am. & Eng. Ann. Cas. 751. S. C.—*State v. Coppenburg*, 2 Strobb. 273. Tex.—*Gordon v. State*, 2 Tex. App. 154; *Warrington v. State*, 1 Tex. App. 168. Utah.—*United States v. Ker-shaw*, 5 Utah 618, 19 Pac. 194. Vt.—*State v. Burt*, 25 Vt. 373.

See *infra*, IX, J, 2, a.

57. *Bryant v. Com.*, 24 Ky. L. Rep. 447, 68 S. W. 846.

58. Ind.—*Allen v. State*, 52 Ind. 486. Ia.—*State v. Dankwardt*, 107 Iowa 704, 77 N. W. 495, wherein Jr. so treated as surplusage. Mass.—See also *Com. v. Lewis*, 1 Met. 151, where the addition "wife of B" was so considered. Eng.—*Rex v. Ogilvie*, 2 Car. & P. 230, 12 E. C. L. 542, where esquire was considered surplusage.

[a] The words "a firm" may be rejected as surplusage in an indictment charging A & B, a firm, with a violation of the local option law. *Rawls v. State*, 48 Tex. Crim. 622, 89 S. W. 1071.

[b] That the defendant is "a freed-man" may be rejected as surplusage. *McGehee v. State*, 52 Ala. 224.

59. *State v. Brown*, 209 Mo. 413, 107 S. W. 1068.

60. *State v. Harris*, 209 Mo. 423, 108 S. W. 28.

61. Me.—*State v. Staples*, 45 Me. 320; *State v. Smith*, 32 Me. 369, 54 Am. Dec. 578. Mo.—*State v. Flanders*, 118 Mo. 227, 23 S. W. 1086. N. Y.—*People v. White*, 22 Wend. 167. Va.—*Hawley v. Com.*, 75 Va. 847.

62. See *supra*, VIII, A, 6, c.

to the time,⁶⁶ or place of commission of an offense, where time and place are not material,⁶⁴ may be rejected as surplusage. So may conclusions of law, summing up the offense unnecessarily.⁶⁵

Upon the same principle, allegations that the offense is a continuing one, where not such in fact,⁶⁶ or setting out an assault, when an assault is necessarily implied in the offense charged,⁶⁷ or a misdemeanor of the person upon whom the offense was alleged to have been committed appearing in an immaterial part of the pleading,⁶⁸ or the averment, in an information for keeping open on Sunday a place where liquor is sold, that such place was a licensed saloon, where the statute applied to all places,⁶⁹ have all been treated as surplusage.

Likewise words unnecessarily repeated do not affect the validity of an information or indictment,⁷⁰ nor does an averment that the other Christian name of the accused is unknown,⁷¹ since all such allegations may be stricken from the pleading and still leave it legally sufficient.

A whole count may be rejected as surplusage.⁷²

b. *Insufficient Charge of Second Offense.*—An indictment charging one offense sufficiently is not vitiated by an insufficient averment of another offense, in the same pleading,⁷³ since the latter may be rejected as

63. *White v. State* (Wyo.), 148 Pac. 342. See *supra*, IX, E, 5, d.

64. *United States v. Smith*, 3 Bond 223, 27 Fed. Cas. No. 16,222; *Borgstrasser v. People*, 134 Ill. App. 609.

65. *Hawley v. Com.*, 75 Va. 847, 850, as where an indictment for taking a false oath not amounting to perjury, concludes "and so the said A. B. did commit perjury." See *supra*, IX, D, 5.

66. *Eggart v. State*, 40 Fla. 527, 25 So. 144.

67. *State v. Crittenden*, 38 La. Ann. 448, 452.

68. **U. S.**—*United States v. Howard*, 3 Sumn. 12, 26 Fed. Cas. No. 15,499. **Mass.**—*Com. v. Hunt*, 4 Pick. 272. **N. H.**—*State v. Bailey*, 31 N. H. 571. **Tex.**—*Mayo v. State*, 7 Tex. 342. **Eng.**—*Rox v. Morris*, 1 Leach C. C. 109.

69. *State v. Grant*, 20 S. D. 164, 105 N. W. 97.

70. **Ala.**—*Lodano v. State*, 25 Ala. 64. **Ark.**—*Dawds v. State*, 60 Ark. 521, 31 S. W. 149. **Kan.**—*State v. Farney*, 41 Kan. 115, 21 Pac. 213, 13 Am. 84. **Rep.** 262. **Mass.**—*Com. v. Chioyano*, 129 Mass. 482. **Tenn.**—*State v. Belleville*, 7 Hunt. 348.

71. *Taylor v. State*, 100 Ala. 68, 14 So. 875.

72. *People v. Ah Hop*, 1 Idaho 698,

wherein statute required accessory to be indicted as principal and one count charged accessory as accessory and another count charged all defendants as principals.

73. **Ark.**—*Ireland v. State*, 99 Ark. 32, 136 S. W. 947; *Elais v. State*, 24 Ark. 327, 126 S. W. 1064; *Kansas City So. R. Co. v. State*, 90 Ark. 343, 119 S. W. 288. **Ind.**—*Smith v. State*, 85 Ind. 553; *State v. Dawson*, 38 Ind. App. 483, 78 N. E. 352. **Mass.**—*Com. v. Brown*, 14 Gray 419. **Mich.**—*Turner v. Circuit Judge*, 95 Mich. 1, 54 N. W. 765. **Miss.**—*Green v. State*, 23 Miss. 509. **Mo.**—*State v. McCoy*, 12 Mo. App. 780. **Neb.**—*Johnson v. State*, 88 Neb. 288, 129 N. W. 281. **N. H.**—*State v. Norris*, 30 N. H. 279. **N. Y.**—*Polinsky v. People*, 73 N. Y. 65; *Dawson v. People*, 25 N. Y. 399; *People v. Lawrence*, 66 Hun 574, 21 N. Y. Supp. 818. **N. C.**—*State v. Morrison*, 24 N. C. 9, wherein larceny and assault and battery were charged, but averments as to larceny were insufficient. **Ohio.**—*Bardhouse v. State*, 31 Ohio St. 39; *Kappes v. State*, 15 Ohio C. D. 722; *State v. Sparks*, 1 Ohio S. & C. P. Dec. 275, 31 Writ. L. Ind. 84. **Tex.**—*Ellis v. State*, 59 Tex. 609, 128 S. W. 1125; *State v. Coffey*, 41 Tex. 46; *Johnson v. State*, 26 Tex. 117; *State v. Umwer*, 31 Tex.

surplusage, though if both offenses be effectually charged⁷⁴ the pleading may be bad.⁷⁴

c. *Repetition or Redundant Matter*.—Words unnecessarily repeated,⁷⁵ or redundancy in non-descriptive matter may be rejected as surplusage, and will not vitiate the indictment,⁷⁶ as long as it is not so prolix as in any way to prejudice the substantial rights of the defendant.⁷⁷

d. *As to Statutory Offenses*.—An erroneous averment as to the statute upon which the indictment was found,⁷⁸ or an erroneous recital as to an exception contained in a statute may be rejected as surplusage where all the essential elements of the offense are set forth in the indictment.⁷⁹

e. *Repugnancy*.—While repugnancy in a material allegation cannot be rejected as surplusage,⁸⁰ repugnant averments which may be wholly omitted without detriment to the indictment may be rejected as surplusage.⁸¹

656; *Hammons v. State*, 29 Tex. App. 445, 16 S. W. 99; *Henderson v. State*, 2 Tex. App. 88. See *Shockley v. State* (Tex. Crim.), 160 S. W. 452. **Wash.** *State v. Kyle*, 14 Wash. 450, 45 Pac. 147. **W. Va.**—*State v. McClung*, 35 W. Va. 280, 13 S. E. 654; *State v. Reece*, 27 W. Va. 375; *State v. Howes*, 26 W. Va. 110. **Eng.**—*Rex v. Jones*, 2 B. & Ad. 611, 22 E. C. L. 256.

[a] Where one offense is sufficiently charged, an allegation of other offenses on divers other days and with divers other persons may be rejected as surplusage. **Ore.**—*Burchard v. State*, 2 Ore. 78. **Pa.**—*Com. v. Goldsmith*, 12 Phila. 622. **S. C.**—*State v. Jeffcoat*, 54 S. C. 196, 32 S. E. 298.

74. *Barnhouse v. State*, 31 Ohio St. 39. See *infra*, XI.

75. **Ala.**—*Lodano v. State*, 25 Ala. 64. **Ark.**—*Downs v. State*, 60 Ark. 521, 31 S. W. 149. **Kan.**—*State v. Furney*, 41 Kan. 115, 21 Pac. 213, 13 Am. St. Rep. 262. **Mich.**—*McNamee v. People*, 31 Mich. 473. **Neb.**—*State v. Kendall*, 38 Neb. 817, 57 N. W. 525. **Tenn.** *State v. Bellville*, 7 Baxt. 548.

76. *Gordon v. State*, 2 Tex. App. 154.

77. *People v. Laurence*, 137 N. Y. 517, 33 N. E. 547.

[a] An indictment clogged with so much unnecessary matter, as to perplex and confuse the case, and to render it difficult to perceive the real charge intended to be exhibited is highly objectionable. *Jacobs v. Com.*, 2 Leigh (Va.) 709, 713.

78. *State v. Hatch*, 94 Me. 58, 46 Atl. 796. See *supra*, IX, E, 5; e.

79. *Rawlings v. State*, 2 Md. 201.

80. **Ark.**—*State v. Hand*, 6 Ark. 165. **Cal.**—*People v. Myers*, 20 Cal. 76. **Mo.** *Jane v. State*, 3 Mo. 61. **Vt.**—*State v. Haven*, 59 Vt. 399, 9 Atl. 841.

See *supra*, this title, p. 339.

[a] Will only vitiate an information or indictment (1) when it contains statements which, if true, would constitute a legal bar to the prosecution. (*Trout v. State*, 111 Ind. 499, 12 N. E. 1005; *Watson v. State*, 111 Ind. 599, 12 N. E. 1008), (2) or when it affects the substantial rights of the accused. *Myers v. State*, 101 Ind. 379; *State v. Haney*, 8 N. C. 160.

81. **U. S.**—*Respublica v. Shryber*, 1 Dall. 68, 1 L. ed. 40. **Ala.**—*Taylor v. State*, 100 Ala. 68, 14 So. 875; *Reese v. State*, 90 Ala. 624, 8 So. 818. **Ind.** *Watson v. State*, 111 Ind. 599, 12 N. E. 1008; *Trout v. State*, 111 Ind. 499, 12 N. E. 1005; *Myers v. State*, 101 Ind. 379. **Ia.**—*State v. Finnan*, 10 Iowa 19; *State v. Freeman*, 8 Iowa 428, 74 Am. Dec. 317. **Ky.**—*Richey v. Com.*, 81 Ky. 524. **Mass.**—*Com. v. Crowther*, 117 Mass. 116; *Com. v. Pray*, 13 Pick. 359. **Mo.**—*State v. Henson*, 81 Mo. 384, 386; *State v. Flint*, 62 Mo. 393. **Pa.**—*Com. v. Bell*, Add. 156, 1 Am. Dec. 298. **Va.** *Robertson v. Com.*, 1 Va. Dec. 851, 20 S. E. 362 (wherein wound was charged at two different places); *Lazier v. Com.*, 10 Gratt. 708.

See *supra*, this title, p. 341.

f. *Alternative Allegations*.—A disjunctive or alternative charge may sometimes be rejected as surplusage.⁸²

2. **What Is Not Surplusage.**—a. *Matters of Description*.—No averment in an indictment can be rejected as surplusage which is descriptive either of the offense or of the manner in which it was committed. All such averments must be proved as laid, or the failure to do so will amount to a variance.⁸³ The rule is sometimes stated that an unnecessary description of an unnecessary fact may be rejected as surplusage,⁸⁴ but an unnecessarily minute description of a necessary fact cannot be so rejected but must be proved as charged.⁸⁵

82. See *supra*, this title, p. 335.

83. **U. S.**—United States *v.* Howard, 3 Sumn. 12, 26 Fed. Cas. No. 15,493; United States *v.* Brown, 3 McLean 233, 24 Fed. Cas. No. 14,666. **Cal.**—People *v.* Ross, 134 Cal. 256, 66 Pac. 229; People *v.* Handley, 160 Cal. 370, 34 Pac. 853; People *v.* Myers, 20 Cal. 76. **Conn.**—United States *v.* Porter, 3 Day 283. **Ga.**—Shrouder *v.* State, 121 Ga. 615, 49 S. E. 702; Hall *v.* State, 120 Ga. 142, 47 S. E. 519; Fulford *v.* State, 50 Ga. 591. **Ill.**—Sykes *v.* People, 132 Ill. 32, 23 N. E. 391. **Ind.**—Lewis *v.* State, 113 Ind. 59, 14 N. E. 892; Dennis *v.* State, 91 Ind. 291; Morgan *v.* State, 61 Ind. 447; Wertz *v.* State, 42 Ind. 161. **Ia.**—State *v.* Hesner, 55 Iowa 491, 8 N. W. 329; State *v.* Newland, 7 Iowa 242, 71 Am. Dec. 444. **Ky.**—Bryant *v.* Com., 68 S. W. 846; Clark *v.* Com., 16 B. Mon. 206; Com. *v.* Magowan, 1 Met. 368, 71 Am. Dec. 480. **Me.**—State *v.* Weeks, 30 Me. 182; State *v.* Jackson, 30 Me. 29; State *v.* Noble, 15 Me. 476. **Mass.**—Com. *v.* Stone, 152 Mass. 498, 25 N. E. 967; Com. *v.* Wellington, 7 Allen 299. **Miss.**—Dick *v.* State, 30 Miss. 631; John *v.* State, 24 Miss. 569. **N. H.**—State *v.* Sherburne, 59 N. H. 99; State *v.* Langley, 34 N. H. 529; State *v.* Copp, 15 N. H. 312. **N. Y.**—McGary *v.* People, 45 N. Y. 153; People *v.* Slater, 5 Hill 491. **Tenn.**—Turner *v.* State, 3 Heisk. 459. **Tex.**—Hill *v.* State, 41 Tex. 253; Gray *v.* State, 11 Tex. App. 411; Lancaster *v.* State, 9 Tex. App. 223; McGee *v.* State, 4 Tex. App. 625; Courtney *v.* State, 3 Tex. App. 257; Warrington *v.* State, 1 Tex. App. 168.

84. See *supra*, IX, J. 1, a.

85. **U. S.**—United States *v.* Brown,

3 McLean 233, 24 Fed. Cas. No. 14,666. **Ark.**—Rhodes *v.* State, 96 Ark. 63, 131 S. W. 48. **Cal.**—People *v.* Ross, 134 Cal. 256, 66 Pac. 229; People *v.* Myers, 20 Cal. 76; *Ex parte* Wilcox, 14 Cal. App. 164, 111 Pac. 374. **Ga.**—Shrouder *v.* State, 121 Ga. 615, 49 S. E. 702; Hall *v.* State, 120 Ga. 142, 47 S. E. 519; Fulford *v.* State, 50 Ga. 591. **Ill.**—Sykes *v.* People, 132 Ill. 32, 23 N. E. 391 (wherein incorporation under laws of certain state was held matter of description necessary to be proved as alleged); Raymond *v.* People, 9 Ill. App. 344. **Ind.**—Lewis *v.* State, 113 Ind. 59, 14 N. E. 892; Morgan *v.* State, 61 Ind. 447. **Ia.**—State *v.* Newland, 7 Iowa 242. **Ky.**—Bryant *v.* Com., 68 S. W. 846; Clark *v.* Com., 16 B. Mon. 206. **Me.**—State *v.* Jackson, 30 Me. 29; State *v.* Noble, 15 Me. 476. **Mass.**—Com. *v.* Stone, 152 Mass. 498, 25 N. E. 967; Com. *v.* McCarthy, 145 Mass. 575, 14 N. E. 643; Com. *v.* Buckley, 145 Mass. 181, 13 N. E. 368; Com. *v.* Wellington, 7 Allen 299; Com. *v.* Atwood, 11 Mass. 93. **Miss.**—John *v.* State, 24 Miss. 569. **Mo.**—State *v.* Smith, 31 Mo. 120. **N. H.**—State *v.* Sherburne, 59 N. H. 99; State *v.* Langley, 34 N. H. 529; State *v.* Copp, 15 N. H. 312. **N. Y.**—McGary *v.* People, 45 N. Y. 153; Alkenbrack *v.* People, 1 Denio 80. **N. C.**—State *v.* Ammons, 7 N. C. 123. **Ohio.**—Griffin *v.* State, 14 Ohio St. 55; Moore *v.* State, 12 Ohio St. 387, 391; Dana *v.* State, 2 Ohio St. 91, 97; Knapp *v.* State, 4 Ohio C. C. (N. S.) 184, 15 Ohio C. D. 571; Pringle *v.* State, 1 Ohio Dec. (Reprint) 283. **Tenn.**—Turner *v.* State, 3 Heisk. 459; Hite *v.* State, 9 Yerg. 237. **Tex.**—Hill *v.* State, 41 Tex. 253; Coleman *v.* State, 21 Tex. App. 523, 2 S. W. 879; Gray *v.* State, 11 Tex. App. 411; Lancaster *v.* State, 9 Tex. App. 223; Allen *v.* State, 8 Tex. App. 360; Mayo

If the act with which the accused is charged is sufficiently set out, additional allegations as to the manner in which such act was done, although unnecessary, cannot be treated as surplusage.⁸⁶ So the name of the person in whom the property which is the subject of the charge is laid,⁸⁷ or on whom the offense is stated to have been committed,⁸⁸ an unnecessarily minute description of money⁸⁹ or notes in respect to which the offense was committed cannot be rejected as surplusage.⁹⁰ But it is necessary that the averment be descriptive of the identity of that which is legally essential to the charge;⁹¹ otherwise the rule does not apply.⁹²

v. State, 7 Tex. App. 342; *Hampton v. State*, 5 Tex. App. 463; *McGee v. State*, 4 Tex. App. 625; *Meuly v. State*, 3 Tex. App. 382; *Courtney v. State*, 3 Tex. App. 257; *Warrington v. State*, 1 Tex. App. 168. **Vt.**—*State v. Freeman*, 15 Vt. 723.

[a] **Local Offense.**—If the offense charged is of a local nature whatever is alleged by way of describing the place where it was committed must be proved precisely as stated. *People v. Slater*, 5 Hill (N. Y.) 401.

86. *Henderson v. State*, 113 Ga. 1148, 39 S. E. 446; *Langston v. State*, 109 Ga. 153, 35 S. E. 166, 779 (wherein it was alleged female was seduced "by persuasion and promises of marriage," and "by false and fraudulent means"); *Fulford v. State*, 50 Ga. 591. But compare *People v. Ross*, 134 Cal. 256, 66 Pac. 229.

87. *McGary v. People*, 45 N. Y. 153.

[a] But in an indictment for arson an allegation as to ownership of the house sufficiently described otherwise, is immaterial and need not be proved. *People v. Handley*, 100 Cal. 370, 34 Pac. 853.

88. **Ill.**—*Sykes v. People*, 132 Ill. 32, 23 N. E. 391. **N. Y.**—*McGary v. People*, 45 N. Y. 153. **Tex.**—*Wisdom v. State*, 49 Tex. Crim. 531, 95 S. W. 505, wherein name of corporation upon whom forged instrument was passed was alleged.

89. *Lewis v. State*, 113 Ind. 59, 14 N. E. 892.

[a] The courts of Nebraska, however, in the case of *Tracey v. State*, 46 Neb. 361, 64 N. W. 1069, refused, under a statute (§1429, Crim. Code, now §2554, vol. 1, 1903, Const. & Codes) which was simply declaratory of the common law, to apply this rule in a case where

money was unnecessarily described in an indictment.

90. *Clark v. Com.*, 16 B. Mon (Ky.) 206 (wherein notes were erroneously alleged as being on certain banks); *Griffin v. State*, 14 Ohio St. 55, which was an indictment for selling counterfeit bank notes, and words and figures in the margin were unnecessarily added.

[a] But where bank notes are described and it is further added "of the money, goods, and chattels" of a designated person, such words may be rejected as surplusage. **Mass.**—*Eastman v. Com.*, 4 Gray 416. **Ohio.**—*Turner v. State*, 1 Ohio St. 422. **Va.**—*Com. v. Moseley*, 2 Va. Cas. 154. **Eng.**—*King v. Morris*, 1 Leach C. C. 468; *Reg. v. Radley*, 1 Denison 450.

91. **U. S.**—*United States v. Howard*, 3 Sumn. 12, 26 Fed. Cas. No. 15,403; *United States v. Brown*, 3 McLean 233, 24 Fed. Cas. No. 14,666. **Cal.**—*People v. Myers*, 20 Cal. 76. **Ill.**—*Sykes v. People*, 132 Ill. 32, 23 N. E. 391; *Raymond v. People*, 9 Ill. App. 344. **Ind.**—*Morgan v. State*, 61 Ind. 447. **Ky.**—*Com. v. Garland*, 3 Met. 478; *Clark v. Com.*, 16 B. Mon. 206. **Miss.**—*Dieck v. State*, 30 Miss. 631; *John v. State*, 24 Miss. 569. **N. Y.**—*McGary v. People*, 45 N. Y. 153. **Ohio.**—*Griffin v. State*, 14 Ohio St. 55, 61; *Moore v. State*, 12 Ohio St. 387, 391; *Dana v. State*, 2 Ohio St. 91, 97. **S. C.**—*State v. Coppenburg*, 2 Strobb. 273. **Tex.**—*Hill v. State*, 41 Tex. 253; *Hammon v. State*, 29 Tex. App. 445, 16 S. W. 99; *Withers v. State*, 21 Tex. App. 210, 17 S. W. 725; *Mayo v. State*, 7 Tex. App. 342.

[a] Allegations of value are, in no proper sense, descriptive of identity. *Com. v. Garland*, 3 Met. (Ky.) 478.

[b] The brand of an animal cannot be rejected as surplusage. *Ranjel v. State*, 1 Tex. App. 461.

92. **D. C.**—*Sinclair v. District of*

b. *Matter Showing Prosecution Not Maintainable.*—Unnecessary matter of a sort or so averred as to negative the offense intended to be charged, or otherwise to show the prosecution not maintainable, cannot be rejected as surplusage.⁹²

3. *Effect.*—Irrespective of statute surplusage does not vitiate an indictment or information when there is sufficient matter alleged to indicate the offense charged,⁹³ unless it renders the indictment uncertain.

Columbia, 29 App. Cas. 344. Ill.—Durham v. People, 5 Ill. 112. Ky.—Com. v. Garland, 3 Mete. 478. Me.—State v. Staples, 45 Me. 320; State v. Smith, 32 Me. 269, 54 Am. Dec. 578. Miss. Dick v. State, 39 Miss. 631. Mo.—State v. Flanders, 118 Mo. 227, 23 S. W. 1086. N. H.—State v. Copp, 15 N. H. 212. Tex.—Smith v. State, 7 Tex. App. 382.

93. Ala.—State v. Mahan, 2 Ala. 240. Ga.—Woodson v. State, 114 Ga. 844, 40 S. E. 1013. Ill.—Raymond v. People, 9 Ill. App. 344. Mo.—State v. McConnell, 240 Mo. 269, 141 S. W. 836; State v. Leonard, 171 Mo. 622, 71 S. W. 1017, 94 Am. St. Rep. 798. Neb.—State v. Kendall, 38 Neb. 817, 57 N. W. 523. W. Va.—State v. Massie, 72 W. Va. 444, 78 S. E. 382, 47 L. R. A. (N. S.) 679.

[a] Compare *State v. Ferrato*, 72 Wash. 112, 129 Pac. 898, wherein the court said: "In the absence of a motion to strike or make more definite and certain, the parts of the information which are relied on to show that no crime is charged may be rejected as surplusage, and enough will be left under our practice allowing a crime to be charged in the language of the statute to pass the grounds of demurrer, and especially the ground that the information does not state facts sufficient to constitute the crime of grand larceny. The crime grand larceny being charged, and the part of the information objected to being treated as a matter of inducement, the information is sufficient; for we have a charge as nearly in the language of the statute as it can be made."

94. U. S.—United States v. Mondy, 164 Fed. 269; United States v. Patterson, 55 Fed. 605, 54 Fed. 1005; United States v. Lehman, 39 Fed. 708. Ala. Paine v. State, 89 Ala. 26, 8 So. 1031; Carden v. State, 89 Ala. 130, 7 So. 801; Rosenberg v. State, 5 Ala. App.

196, 19 So. 366; Brannon v. State, 4 Ala. App. 195, 23 So. 328. Ark.—Tharp v. State, 99 Ark. 198, 137 S. W. 1091. Conn.—State v. Corrigan, 91 Conn. 270; Ill.—Sutton v. People, 165 Ill. 276, 34 S. E. 420; Barton v. People, 108 Ill. 405, 25 N. E. 716, 20 Am. St. Rep. 375, 16 L. R. A. 36, 68 Am. Ill. App. 573; Lassar v. People, 133 Ill. 504, 34 N. E. 68; People v. Carter, 180 Ill. App. 422. Ind.—Myers v. State, 169 Ind. 465, 52 N. E. 751; Solley v. State, 101 Ind. 607, 69 N. E. 467; State v. Sarlis, 145 Ind. 195, 34 N. E. 1129; Musgrave v. State, 134 Ind. 207, 32 N. E. 885; State v. White, 120 Ind. 153, 28 N. E. 425; Felgel v. State, 85 Ind. 580; State v. Judy, 69 Ind. 128; State v. Dawann, 38 Ind. App. 453, 78 N. E. 232. Ia.—State v. Flores, 77 Iowa 241, 42 N. W. 181. Kan.—State v. Purney, 43 Kan. 115, 21 Pac. 219, 13 Am. St. Rep. 337. Ky.—Bailey v. Com., 130 Ky. 301, 118 S. W. 140; Truxie v. Com., 96 Ky. 77, 27 S. W. 801; Olive v. Com., 5 Bush 370. La.—State v. Claxton, 129 La. 501, 56 So. 610; State v. McCarthy, 44 La. Ann. 323, 10 So. 679; State v. Smith, 41 La. Ann. 791, 6 So. 623. Md.—Rawlings v. State, 2 Md. 201. Mass.—Com. v. East Boston Ferry Co., 13 Allen 589. Mich.—People v. Aldrich, 104 Mich. 465, 62 N. W. 570. Mo.—State v. Packer, 170 S. W. 1121; State v. Thomas, 260 Mo. 189, 167 S. W. 229; State v. Byrns, 247 Mo. 216, 140 S. W. 871; State v. Whales, 234 Mo. 309, 137 S. W. 881; State v. Taylor, 117 Mo. 181, 22 S. W. 1103. Mont.—State v. Ross, 40 Mont. 571, 107 Pac. 899; State v. Phillips, 36 Mont. 112, 92 Pac. 309. Nev.—State v. Pierce, 8 Nev. 301. N. M.—Territory v. McGrath, 16 N. M. 302, 114 Pac. 364. N. Y.—People v. Lawrence, 197 N. Y. 517, 43 N. E. 647; Dawson v. People, 95 N. Y. 399; Lohman v. People, 1 N. Y. 379, 4 How. 17, 40, 42 Am. Dec. 210; People v. McLaughlin, 70 Misc. 101, 126 N. Y. Supp. 177; People v. Reppin, 126 N. Y.

double or repugnant,⁹⁵ or contradictory;⁹⁶ it is merely disregarded.⁹⁷

Statutes in some states expressly provide that surplusage or repugnant allegations shall not vitiate the indictment if it be sufficient to indicate the crime and the person charged;⁹⁸ but such a provision does not authorize the court to go over a pleading and garble it, picking out a word or sentence here and there, or a part of a sentence regardless of the general tenor and scope of the pleading, so as to entirely change its meaning.⁹⁹

K. AFFIDAVIT OR COMPLAINT.—1. In General.—An affidavit or complaint is sometimes used as the basis of a criminal prosecution, particularly in justices' courts and other courts of similar jurisdiction.¹ Moreoften, however, it is used as the basis of an information, upon which the prosecution is had.²

The same general rules governing the charging of an offense in an indictment or information apply, as a rule, in charging an offense triable before a justice of the peace, or a court of similar jurisdiction, upon a complaint or affidavit.³ It is true, the same degree of certainty and

Supp. 169. **N. C.**—*State v. Wynne*, 151 N. C. 644, 65 S. E. 459; *State v. Battle*, 126 N. C. 1636, 35 S. E. 624; *State v. Jordan*, 119 N. C. 491, 14 S. E. 752; *State v. Fain*, 166 N. C. 760, 11 S. E. 593. **N. D.**—*State v. Noah*, 20 N. D. 281, 124 N. W. 1121. **Okla.**—*Williams v. State* (Okla. Crim.), 142 Pac. 1181; *Wood v. State*, 3 Okla. Crim. 553, 107 Pac. 937. **Ore.**—*State v. Runyon*, 62 Ore. 246, 124 Pac. 259 (does not render it demurrable); *State v. Morris*, 58 Ore. 397, 114 Pac. 476. **Pa.**—*Clary v. Com.*, 4 Pa. 210; *Com. v. Casey*, 14 Pa. Co. Ct. 389. **R. I.**—*State v. Wright*, 16 R. I. 518, 17 Atl. 998. **S. C.**—*State v. Pentacost*, 87 S. C. 405, 69 S. E. 880; *State v. Crawford*, 38 S. C. 330, 17 S. E. 36. **Tex.**—*Baskins v. State* (Tex. Crim.), 171 S. W. 723; *Schapiro v. State* (Tex. Crim.), 169 S. W. 683; *Byrd v. State*, 72 Tex. Crim. 242, 162 S. W. 360; *Kaykendall v. State*, 72 Tex. Crim. 153, 161 S. W. 130; *Johnson v. State* (Tex. Crim.), 169 S. W. 702; *Shockley v. State*, 71 Tex. Crim. 475, 160 S. W. 452; *Creed v. State* (Tex. Crim.), 155 S. W. 240; *State v. Elliott*, 14 Tex. 423. **Wash.**—*State v. Kyle*, 14 Wash. 559, 45 Pac. 147; *State v. Achilles*, 8 Wash. 462, 36 Pac. 597. **W. Va.**—*State v. Howes*, 26 W. Va. 110.

[a] Surplusage no more vitiates an indictment than a pleading in a civil action. *People v. Laurence*, 137 N. Y. 317, 524, 33 N. E. 547.

95. *Cole v. State*, 10 Ark. 318;

Feigel v. State, 85 Ind. 580; *Wilkinson v. State*, 10 Ind. 372. See *supra*, IX, C, 6; IX, J, 1 and 2.

96. *People v. Lohman*, 2 Barb. (N. Y.) 216, 49 Am. Dec. 340.

97. **Ark.**—*Downs v. State*, 60 Ark. 521, 31 S. W. 149; *Sanders v. State*, 55 Ark. 365, 18 S. W. 376; *Moose v. State*, 49 Ark. 499, 5 S. W. 885. **N. Y.**—*McCarney v. People*, 83 N. Y. 408, 38 Am. Rep. 456. **N. C.**—*State v. Wynne*, 151 N. C. 644, 65 S. E. 459. **Tex.**—*Johnson v. State* (Tex. Crim.), 160 S. W. 702; *Shockley v. State*, 71 Tex. Crim. 475, 160 S. W. 452; *Creed v. State* (Tex. Crim.), 155 S. W. 240.

[a] **Striking it out** does not affect the proceedings. *State v. Robinson*, 39 Me. 150; *Williams v. State* (Okla. Crim.), 142 Pac. 1181.

98. **Ind.**—*Musgrave v. State*, 133 Ind. 297, 32 N. E. 885; *State v. White*, 129 Ind. 153, 28 N. E. 425; *State v. Callahan*, 124 Ind. 364, 24 N. E. 732; *State v. Patterson*, 116 Ind. 45, 10 N. E. 289, 18 N. E. 270; *Wall v. State*, 23 Ind. 150. **Mo.**—*State v. Chamberlain*, 89 Mo. 129, 1 S. W. 145. **Neb.**—*State v. Kendall*, 38 Neb. 817, 57 N. W. 525. **Va.**—*Lazier v. Com.*, 10 Gratt. 708.

99. *Littell v. State*, 133 Ind. 577, 33 N. E. 417.

1. See *supra*, I, D.

2. As to preliminary affidavit or complaint, see *supra*, V.

3. See *supra*, IX, C to IX, J, inclusive.

particularity is not required in an affidavit or complaint for a crime, as is necessary in an indictment or an information for a felony,⁴ nevertheless, the affidavit or complaint should be reasonably definite and certain in its allegations.⁵

2 Necessity of Information Following Affidavit or Complaint.

Where an information is directly based upon a preliminary affidavit or complaint, or upon a commitment after a preliminary examination, it must follow such affidavit, complaint or commitment, as the case may be, and charge the same offense as that described therein,⁶ though un-

4. **Ala.**—*Williams v. State*, 88 Ala. 80, 7 So. 101. **Cal.**—*In re Winston*, 160 Cal. 18, 116 Pac. 390. **Conn.**—*State v. Holmes*, 28 Conn. 230; *Rawson v. State*, 19 Conn. 291, 296. **Kan.**—*State v. McLaughlin*, 35 Kan. 659, 12 Pac. 32; *Redmond v. State*, 12 Kan. 172. **La.**—*State ex rel. Cotonio v. Marmouget*, 110 La. 191, 34 So. 498. **Mass.**—*Com. v. Keenan*, 139 Mass. 193, 29 N. E. 477. **N. Y.**—*People v. Pillion*, 78 Hun 74, 29 N. Y. Supp. 267; *People v. Payne*, 71 Misc. 72, 129 N. Y. Supp. 1007. **Pa.**—*Com. v. Campbell*, 22 Pa. Super. 98. **Wis.**—*Ford v. State*, 3 Pinn. 449, 4 Chand. 148.

See *supra*, this title, p. 334.

[a] The affidavits on which prosecutions before recorders' courts are based are sufficiently formal if they fairly acquaint the accused with the offense charged. *State ex rel. Cotonio v. Marmouget*, 110 La. 191, 34 So. 498.

As to certainty required in indictment or information, see *supra*, IX, C, 4.

5. See the following cases: **Conn.**—*State v. Holmes*, 28 Conn. 230; *Rawson v. State*, 19 Conn. 291, 296. **Del.**—*Vandever v. State*, 1 Marv. 209, 40 Atl. 1105. **Ga.**—*Dickson v. State*, 62 Ga. 583; *Johnson v. State*, 58 Ga. 397. **Mass.**—*Com. v. Bartley*, 138 Mass. 181; *Com. v. Phillips*, 16 Pick. 211. **N. Y.**—*People v. James*, 11 App. Div. 609, 43 N. Y. Supp. 315; *People v. Davis*, 122 N. Y. Supp. 788. **Ohio.**—*Hummel v. State*, 10 Ohio Dec. 492, 8 N. P. 48. **R. I.**—*State v. Fiske*, 18 R. I. 416, 28 Atl. 348.

[a] "It is a well settled rule of criminal pleading, that an indictment must aver, with reasonable certainty, all the material facts which are necessary to be proven, to procure a conviction, and this rule has not been changed by the code of criminal pro-

cedure. *Ellars v. State*, 25 Ohio St. 385, 388. This rule of pleading applies to prosecutions in the police court, based upon affidavits. If there is any relaxation of the rule as to magistrates generally, it is as to matters of form only, and not as to matters of substance. The charge, whether in affidavit or indictment, must allege, in some form, with reasonable certainty, every material fact necessary to be proven to procure a conviction—and this includes every fact essentially necessary to a description of the offense." *Hummel v. State*, 10 Ohio Dec. 492, 8 N. P. 48. See *Stewart v. State*, 2 Ohio C. C. (N. S.) 290; *Emery v. State*, 3 Ohio N. P. 204.

6. See the following: **Cal.**—*People v. Nogli*, 142 Cal. 590, 76 Pac. 490; *People v. Wallace*, 94 Cal. 407, 20 Pac. 950; *People v. Parker*, 91 Cal. 21, 27 Pac. 537; *Ex parte Fowler*, 5 Cal. App. 549, 90 Pac. 958. **Del.**—*State v. Barr*, 7 Penn. 349, 79 Atl. 739. **Ga.**—*Eady v. State*, 10 Ga. App. 818, 74 S. E. 903; *Crawford v. State*, 4 Ga. App. 789, 62 S. E. 531; *Hunter v. State*, 4 Ga. App. 579, 61 S. E. 1139. **Ind.**—*Dyer v. State*, 85 Ind. 595; *Giroux v. State*, 29 Ind. 93; *State v. Record*, 16 Ind. 111; *Mount v. State*, 7 Ind. 654. **Mich.**—*People v. James*, 24 Mich. 215. **Mo.**—*State v. Pusey*, 75 Mo. App. 203, must follow complaint. **N. Y.**—*People v. Streep*, 154 N. Y. Supp. 172. **Tex.**—*Hardin v. State*, 62 Tex. Crim. 84, 126 S. W. 768; *Hanson v. State* (Tex. Crim.), 61 S. W. 120; *Casey v. State*, 5 Tex. App. 492 (both information and affidavit should set out substantially the same offense); *Johnson v. State*, 4 Tex. App. 504; *Ferguson v. State*, 4 Tex. App. 559; *Turner v. State*, 3 Tex. App. 551; *Dean v. State*, 3 Tex. App. 415; *Davis v. State*, 2 Tex. App. 184. **Utah.**—*State v. Schofield*, 146 Pac. 306; *State v. Pay*, 146

der some statutes the district or prosecuting attorney is given some discretion in this matter, being confined, however, to the offense or offenses shown on the preliminary hearing,⁷ or if the hearing is waived, to the offense shown by the preliminary affidavit or complaint.⁸

The information must be against the same person or persons⁹ and must be sufficient within itself. The complaint upon which it is based cannot be referred to in order to correct any defect therein.¹⁰ On the other hand, if the complaint or affidavit upon which the information is based is insufficient, the information cannot be sustained.¹¹

Pac. 300, last two cases holding information must be for same offense charged in the complaint and for which the accused was held to answer, or for one embraced or included within it. Wyo.—*State v. Boulter*, 5 Wyo. 236, 39 Pac. 883.

As to the necessity for basing an information upon a preliminary affidavit or complaint or upon a preliminary examination and commitment, see *supra*, V; IV, B, 1, b.

[a] "As was said by this court in *Davis v. The State*, 2 Texas Ct. App. 184, that by the 8th section of the act of 1876 (Acts Fifteenth Legislature, 20), providing the mode of procedure in prosecutions by information, the affidavit is made a most important and fundamental part of the information. 'The information shall be based upon it,' is the language used. It follows that if the information must be based upon the affidavit, then the offense stated in the information must be characterized by, and correspond with, that as stated in the affidavit." *Johnson v. State*, 4 Tex. App. 594.

[b] "They must agree as to the time and place of the commission of the offense, as well as to the names of the alleged wrongdoer and the injured party, and there must also be a substantial agreement as to the description of the offense intended to be charged." *Cole v. State*, 11 Tex. App. 67.

[c] In California the information must be based upon the commitment and not upon the preliminary complaint, since the magistrate may hold the accused for any offense shown by the evidence regardless of the averments of the complaint, and the district attorney has no discretion in the matter. *People v. Lee Look*, 143 Cal. 216, 76

Pac. 1028; *People v. Nogiri*, 142 Cal. 596, 76 Pac. 490, overruling *People v. Christian*, 101 Cal. 471, 474, 35 Pac. 1043; *People v. Vierra*, 67 Cal. 231, 7 Pac. 640; *People v. Lee Ah Chuck*, 66 Cal. 662, 6 Pac. 859.

[d] In Kansas the accused may be held to answer for an offense entirely different from that named on the preliminary complaint, and presumably the information should be for the offense for which he is held to answer. See *Redmond v. State*, 12 Kan. 172.

7. *Hoffman v. Allegan Circ. Judge*, 150 Mich. 58, 113 N. W. 584; *People v. Karste*, 132 Mich. 455, 93 N. W. 1081; *People v. Oscar*, 105 Mich. 704, 63 N. W. 971; *People v. Whitney*, 105 Mich. 622, 63 N. W. 765; *People v. Bechtel*, 80 Mich. 623, 45 N. W. 582; *Brown v. People*, 39 Mich. 57; *People v. Annis*, 13 Mich. 511, 514; *Porath v. State*, 90 Wis. 527, 63 N. W. 1061, 48 Am. St. Rep. 954.

[a] He cannot depart from the transaction outlined in the examination. Thus, an examination on a complaint and warrant charging the larceny of a stick pin only is not a sufficient basis for an information charging the larceny of a stick pin and a sum of money. *Clute v. Ionia Circ. Judge*, 139 Mich. 337, 102 N. W. 843.

8. *State v. Jarrett*, 46 Kan. 754, 27 Pac. 146.

[a] In Washington there is "no law requiring the information to charge the same crime as that named in the commitment." *State v. Myers*, 8 Wash. 177, 35 Pac. 580, 736.

9. *Mount v. State*, 7 Ind. 654.

10. *Keiser v. State*, 78 Ind. 430; *Pittman v. State*, 14 Tex. App. 576; *Stinson v. State*, 5 Tex. App. 31.

11. *Strader v. State*, 92 Ind. 376;

In complying with such rules, however, the information need not be confined literally to the charge in the affidavit or complaint, or commitment.¹² If the charge in the complaint is substantially the same as that set forth in the information, a plea of a variance between the complaint and the information is unavailing.¹³ The charge in the information or accusation may be more restricted,¹⁴ though it cannot be broader than the affidavit on which it is based,¹⁵ except to comply with the requisites of a good pleading.¹⁶

If the identity of the transaction set forth in the affidavit with that

State v. Beebe, 83 Ind. 171; Suddeth v. State (Tex. Crim.), 100 S. W. 155.

[a] "In order to charge an offense, there must be a complaint setting out the elements of the offense as defined by the statute, and without proper complaint there can be no legal information. In other words, in order to justify an information on the part of the county attorney, there must be a legal complaint." Suddeth v. State (Tex. Crim.), 100 S. W. 155.

[b] But where the information is based upon the commitment and not upon the preliminary complaint, the insufficiency of the latter becomes immaterial after a preliminary hearing, commitment and an information based thereon. See People v. Lee Look, 143 Cal. 216, 76 Pac. 1028; People v. Nogiri, 142 Cal. 596, 76 Pac. 490. But see People v. Howard, 111 Cal. 655, 44 Pac. 342.

12. Cal.—People v. Arberry, 13 Cal. App. 749, 114 Pac. 411, sufficient to charge generally same offense. Ind. State v. Record, 16 Ind. 111; Mount v. State, 7 Ind. 654, information need not follow affidavit in manner in which it sets forth the particular facts which constitute the offense. Ohio.—Eichenlaub v. State, 36 Ohio St. 140. Tex. Steinberger v. State, 35 Tex. Crim. 492, 34 S. W. 617.

[a] But it must, in every material allegation, follow and correspond with the affidavit. Kinley v. State, 29 Tex. App. 532, 16 S. W. 339; Stinson v. State, 5 Tex. App. 31.

13. Neb.—Van Syce v. State, 69 Neb. 520, 96 N. W. 266; Mills v. State, 53 Neb. 263, 73 N. W. 761; Hackenberger v. State, 49 Neb. 707, 68 N. W. 1037; Cowan v. State, 22 Neb. 519, 35 N. W. 465. Okla.—Chappelle v. State, 10 Okla. Crim. 392, 136 Pac. 978; Tucker

v. State, 9 Okla. Crim. 587, 130 Pac. 825. Tex.—Cole v. State, 11 Tex. App. 67, wherein the court said: "The demands of the law seem to be met when there is a substantial agreement between the affidavit and the information in matters of substance."

14. Glass v. State, 119 Ga. 299, 46 S. E. 435.

15. Glass v. State, 119 Ga. 299, 46 S. E. 435.

[a] The information or accusation need not go beyond a recital of the terms of the affidavit, if those terms are so ample and minute that they would suffice in a regular indictment. Smith v. State, 63 Ga. 168.

16. Lepusky v. State, 7 Ga. App. 287, 66 S. E. 965; Hunter v. State, 4 Ga. App. 579, 61 S. E. 1130.

[a] "The affidavit and warrant are merely for the purpose of bringing the party before the court. The accusation must frequently be much more specific, in order to present such a valid charge as will meet the requirements of criminal pleading by putting the defendant on notice of the identical charge he is expected to meet, and enable him to prepare to defend against the charge." Lepusky v. State, 7 Ga. App. 287, 66 S. E. 965.

[b] Though the affidavit merely charges a "misdemeanor," the complaint may amplify the description of offense. Crawford v. State, 4 Ga. App. 789, 62 S. E. 501; Hunter v. State, 4 Ga. App. 579, 61 S. E. 1130.

[c] An affidavit charging the defendant with "the offense of resisting an officer in the discharge of his duty" is broad enough to support an accusation charging him with resisting an officer by assaulting and beating him. Howell v. State, 5 Ga. App. 186, 60 S. E. 1000.

charged in the information or accusation is apparent, the latter will not be quashed though the affidavit does not properly designate or describe the offense charged.¹⁷

A material variance between the complaint or affidavit and the information is fatal to the information.¹⁸ Thus if a different offense be charged in the information than is charged in the complaint, affidavit, or commitment,¹⁹ or if there be a material variance in the description of the manner or means by which the offense attempted to be charged was committed,²⁰ or as to the time or date of its commission,²¹ or the place where

17. *Crawford v. State*, 4 Ga. App. 759, 62 S. E. 501.

18. *Chaney v. State*, 59 Tex. Crim. 283, 128 S. W. 614; *Cardenas v. State*, 58 Tex. Crim. 109, 124 S. W. 953; *Kinley v. State*, 29 Tex. App. 532, 16 S. W. 339; *Johnson v. State*, 4 Tex. App. 594.

[a] The prosecution is not dismissed because of the defective information, however; but opportunity is given for the making of another information predicated upon the complaint or affidavit upon which it should have been based. *Landrum v. State*, 37 Tex. Crim. 666, 40 S. W. 737.

19. Cal.—*Ex parte Fowler*, 5 Cal. App. 549, 90 Pac. 958. Mich.—See *People v. Jones*, 24 Mich. 215, holding that if objection that information charged different offense from that charged in complaint had been made before plea of not guilty, it would have been fatal to information. Utah.—*State v. Potello*, 42 Utah 396, 132 Pac. 14.

[a] A different offense is not charged in the information than that set forth in the complaint within the meaning of the rule stated in the text where the information charges matters of aggravation more fully than the complaint. *Strickland v. State*, 7 Tex. App. 34.

[b] In *Cole v. State*, 11 Tex. App. 67, (1) it was contended that the information charged an aggravated assault and battery, while the affidavit only charged an aggravated assault. The court said: "As we have seen, the affidavit charges in terms the commission of an aggravated assault, and sets out in connection therewith the circumstances of the assault which constitute the battery,—thus, by *striking*, *beating*, etc.—and that the injured person was a female and the assaulting party an adult male. The affidavit charges an aggravated assault, and

sets out the circumstances which render the offense an aggravated assault and battery, agreeably to article 495, Penal Code. In our opinion the affidavit forms a sufficient support for the information for an aggravated assault and battery committed by an adult male on the person of a female, and the court did not err in overruling the motion to quash." (2) But in *Davis v. State*, 2 Tex. App. 184, wherein the information charged the accused with an aggravated assault and battery, while the affidavit charged an assault with an intent to murder, it was held that the variance was fatal.

[c] Though a complaint charges murder and a preliminary examination is had for such offense, the information may charge manslaughter, such latter offense being lesser in degree and necessarily included in the former. *People v. Sessions*, 58 Mich. 594, 26 N. W. 291.

[d] A complaint charging a felony cannot serve as the basis or predicate for an information for a misdemeanor, and the latter will be bad in case it is attempted to so vary the offense. *Kinley v. State*, 29 Tex. App. 532, 16 S. W. 339.

As to waiver of objections, see *infra*, XV.

20. *Smith v. State*, 57 Tex. Crim. 609, 124 S. W. 665 (wherein complaint charged an assault with "a knife and with a chair" and information charged one with "fists and a chair," and it was held that the variance was fatal); *Ferguson v. State*, 4 Tex. App. 156, information failing to describe instrument or weapon with which the assault is made substantially as it is done in affidavit fatally defective.

21. *Dyer v. State*, 85 Ind. 525; *Lackey v. State*, 53 Tex. Crim. 459, 110 S. W. 903; *Smith v. State* (Tex. Crim.),

it was committed,²² or as to the ownership of property involved, where this is a necessary ingredient of the offense,²³ or as to the person or

86 S. W. 753; *Taylor v. State* (Tex. Crim.), 30 S. W. 1015; *McKinney v. State* (Tex. Crim.), 49 S. W. 370 (variance of one day fatal); *McJunkins v. State*, 37 Tex. Crim. 117, 38 S. W. 993; *Little v. State* (Tex. App.), 19 S. W. 339; *Baumgartner v. State*, 93 Tex. App. 235, 5 S. W. 113 (variance of ten days fatal); *Huff v. State*, 23 Tex. App. 791, 4 S. W. 899; *Hofner v. State*, 16 Tex. App. 575; *Calvert v. State*, 8 Tex. App. 538; *Swink v. State*, 7 Tex. App. 73; *Hawthorne v. State*, 6 Tex. App. 562 (variance of three days fatal); *Williamson v. State*, 5 Tex. App. 485 (wherein information alleged date of commission of offense as on May 1, 1877, whereas the affidavit charged it as upon May 7, 1877); *Brewer v. State*, 5 Tex. App. 248; *Collins v. State*, 5 Tex. App. 37; *Hoerr v. State*, 4 Tex. App. 75.

[a] Where an information charged that the defendant lived in open and notorious fornication between certain dates specified, including a month before and a month after the time charged in the affidavit, it was nevertheless held upon motion in arrest of judgment that the information was sufficient. *State v. Record*, 16 Ind. 111, wherein the court said that: "Whatever might be the effect of the discrepancy between the affidavit and information on a motion to quash, we are satisfied that it was not sufficient ground for arresting the judgment."

[b] Where the information is not confined strictly to the affidavit or complaint, but may be based partly upon the facts as brought out upon the preliminary examination, it is permissible to fix the date by the date shown on the examination, though it vary slightly from that stated in the complaint. *People v. Whitney*, 105 Mich. 622, 63 S. W. 765.

[c] On or About.—(1) There is no fatal variance between an information charging the commission of the offense on a given date and a complaint charging its commission on or about such date. *People v. Flock*, 109 Mich. 512,

59 S. W. 737; *Whitley v. State* (Tex. Crim.), 66 S. W. 69; *Dyer v. State* (Tex. Crim.), 59 S. W. 67. (2) There is a fatal variance, however, between an information alleging the commission of an offense on a designated date and an affidavit alleging its commission on or about a totally different date. *Hoerr v. State*, 4 Tex. App. 75.

[d] Continuing Offenses.—Where an information charges the commission of an offense on a day certain, and on divers other days and times between that day and a previous day specified, it being a continuous offense, it is not invalidated by the fact that the complaint charged the offense as having been committed upon the particular day only. *People v. Russell*, 110 Mich. 46, 67 N. W. 1099.

22. Where an information described a church into which it was alleged that a shot was fired by the accused as "St. Paul Church," whereas the complaint described it as the "St. Paul Methodist Church," the variance was fatal. *Landrum v. State*, 37 Tex. Crim. 666, 40 S. W. 737.

[a] Where no venue is alleged in the affidavit, an information based thereon is invalid, though it states the venue. *Rice v. State*, 15 Ind. App. 427, 44 N. E. 319; *Smith v. State*, 3 Tex. App. 549, wherein the court said: "The information is, and must be, based upon the complaint; and, if the complaint is fatally defective, it follows that the information cannot stand."

23. *Calvert v. State*, 8 Tex. App. 538.

As to necessity for averments as to ownership of property, see *supra*, IX, E, 4.

[a] Possession.—Where the information does not follow or correspond with the affidavit as to the person from whose possession certain property was stolen, but alleges that it was stolen from the possession of another and different person from the one alleged in the affidavit, the variance is fatal. *Johnson v. State*, 4 Tex. App. 594.

persons charged,²⁴ or other persons involved therein,²⁵ it is fatal to the information.

An immaterial variance, however, between such instruments, will not render the information fatally defective.²⁶ Thus, where matter in

24. *Moody v. State*, 56 Tex. Crim. 333, 129 S. W. 196 (variance in Christian name of accused); *Riddle v. State* (Tex. Crim.), 25 S. W. 21; *Juniper v. State*, 27 Tex. App. 478, 11 S. W. 483; *McDevro v. State*, 23 Tex. App. 429, 5 S. W. 132, variance in surname of accused.

25. Where, in a prosecution for unlawfully riding on a train, the complaint charged the riding upon a train upon the G. H. & S. A. Ry. Co., while the information charged the riding upon a train upon the Galveston, Harrisburg & San Antonio Railway Company, the variance was held fatal. *Cardenas v. State*, 58 Tex. Crim. 109, 124 S. W. 953.

26. See the following: *People v. Bianchino*, 5 Cal. App. 633, 91 Pac. 112 (mere mistake in date of offense); *Germany v. State*, 62 Tex. Crim. 276, 137 S. W. 132, Ann. Cas. 1913C, 477 (variance between name of person signing complaint and recital in information as to such person not fatal); *Luna v. State* (Tex. Crim.), 70 S. W. 89 (variance in name "Colster" and "Colsten" immaterial); *Shinner v. State* (Tex. Crim.), 65 S. W. 1073; *Howard v. State* (Tex. Crim.), 65 S. W. 519; *Hardy v. State* (Tex. App.), 13 S. W. 1008; *Roberson v. State*, 10 Tex. App. 317.

[d] Where a complaint charged "that the defendant did unlawfully keep and exhibit, for the purpose of gaming, a gaming table and bank," whereas the information charged that he "did unlawfully exhibit for the purpose of gaming a gaming table and bank," there was no material variance due to the omission of the word "keep." *Baker v. State* (Tex. Crim.), 36 S. W. 659.

[b] Variance between averments, of matter not constituent element of offense, as contained in original complaint and the information, is not fatal. *Weatherholt v. State*, 9 Okla. Crim. 161, 131 Pac. 155.

[c] Though the complaint in a prosecution for falsely assuming or pre-

tending to be a deputy sheriff alleges that the accused did "unlawfully, willfully, and falsely assume and pretend," etc., while the information only alleges that he did "unlawfully and falsely assume and pretend," etc., omitting the word "willfully," a fatal variance is not created, for which the judgment should be arrested, since it was not necessary for either to charge that the act was wilfully done in order to constitute the offense. *Brown v. State* (Tex. Crim.), 170 S. W. 714.

[d] Addition of Name Under Alias. The fact that in the affidavit the defendant, besides his name, has an *alias* added, while in the information, the *alias* is omitted, does not constitute a fatal variance. *Harrison v. State*, 6 Tex. App. 256.

[e] Errors in Spelling.—Though the affidavit charges the defendant with the theft of seventy "ears of corn," and the information with seventy "years of corn," the variance is not fatal, since bad spelling, verbal or grammatical inaccuracies, which do not affect the sense, are not fatal to an indictment or information. *Stinson v. State*, 5 Tex. App. 31. As to effect of errors in spelling, etc., see *supra*, IX, C, 2, c.

[f] Illustrations of other immaterial variances may be found in the following cases: Cal.—*People v. Walker*, 144 Cal. 1, 77 Pac. 705; *People v. Price*, 143 Cal. 351, 77 Pac. 73 (as to place where burglary committed where it appears same house was attempted to be described in both complaint and information); *People v. Selfert*, 14 Cal. App. 102, 111 Pac. 270. Mo.—*State v. Nave*, 185 Mo. 125, 84 S. W. 1. N. D.—*State v. O'Neal*, 19 N. D. 426, 124 N. W. 68. Okla.—*Weatherholt v. State*, 9 Okla. Crim. 161, 131 Pac. 155. Tex.—*Moreno v. State*, 64 Tex. Crim. 660, 143 S. W. 159; *Stuart v. State*, 57 Tex. Crim. 592, 121 S. W. 656; *Skinner v. State* (Tex. Crim.), 65 S. W. 1073; *Huizar v. State* (Tex. Crim.), 63 S. W. 329; *Baker v. State* (Tex. Crim.), 35 S. W. 666; *Hardy v. State* (Tex. App.), 13 S. W. 1008.

the information may be rejected as surplusage, a variance as to such matter is immaterial and does not vitiate the information.²⁷

3. Necessity of Indictment Following Complaint or Information.²⁸ Where an indictment is founded upon a previous complaint or information, charges not included therein cannot be included in the indictment, without the official sanction of the prosecuting officer.²⁹

A bill of indictment sent to the grand jury by the prosecuting officer upon his official responsibility and by leave of court, however, cannot be quashed because the offense charged therein does not conform to that set forth in the original information.³⁰ Nor need the indictment in any case conform precisely with the phraseology of the information,³¹ provided the offense charged is the same in substance.³² The fact that the information does not contain as full and specific a statement of the offense as does the indictment, furnishes no ground for quashing the latter.³³

X. JOINDER OF PARTIES. — **A. WHO MAY BE JOINED.** — Where two or more persons join in the commission of an offense,³⁴ they may be

27. See *Sandolowski v. State* (Tex. Crim.), 143 S. W. 131; *Gentry v. State*, 62 Tex. Crim. 497, 137 S. W. 696.

[a] Though an affidavit charged a perjury to have been at the trial of a cause on the 26th of September, 1892, while the information charged that the cause, at the trial of which the perjury was committed, was pending on the 26th of September, 1889, and that the perjury was committed on the 26th of September, 1892, the information was held not to be invalid as against the objection of repugnancy between the affidavit and information, since the first date mentioned in the information might be omitted as surplusage, even were it repugnant to the fact alleged in connection with the second date. *Smith v. State*, 145 Ind. 176, 42 N. E. 1019.

28. As to necessity for preliminary complaint or information prior to indictment, see *supra*, this title, p. 322.

29. *Com. v. Simons*, 6 Phila. (Pa.) 167.

30. *Harrison v. Com.*, 123 Pa. 508, 515, 16 Atl. 611.

31. *Com. v. Gouger*, 21 Pa. Super. 217, 231. See *Com. v. Wohlgenuth*, 9 Phila. (Pa.) 582, 20 Leg. Int. 304.

32. *Com. v. Gouger*, 21 Pa. Super. 217, 231.

[a] There is no variance between an information charging the setting up

and maintenance of "a public or common nuisance in and upon a public highway," and an indictment charging the setting up and maintenance of a public and common nuisance "in a common road, or highway for all citizens of this commonwealth to go, pass or travel at their will." *Com. v. Mock*, 23 Pa. Super. 51.

33. *Com. v. Carson*, 166 Pa. 179, 30 Atl. 287; *Com. v. Gouger*, 21 Pa. Super. 217, 231.

34. **U. S.**—*New York, etc. R. Co. v. United States*, 212 U. S. 481, 29 Sup. Ct. 364, 53 L. ed. 613; *Wilson v. United States*, 199 Fed. 427, 111 C. C. A. 231; *United States v. Berry*, 96 Fed. 842; *United States v. O'Callahan*, 6 McLean 599, 27 Fed. Cas. No. 15,910; *United States v. McGinnis*, 1 Abb. 129, 26 Fed. Cas. No. 15,678; *United States v. Karinski*, 2 Spr. 7, 26 Fed. Cas. No. 15,568. **Ala.**—*Shipper v. State*, 144 Ala. 169, 42 So. 43; *Elliot v. State*, 26 Ala. 18; *State v. Pile*, 5 Ala. 72. **Ark.**—*Jones v. State*, 58 Ark. 390, 24 S. W. 1073; *Vollmer v. State*, 34 Ark. 487; *State v. Nail*, 19 Ark. 563; *Dennis v. State*, 5 Ark. 230. **Cal.**—*People v. Crydar*, 6 Cal. 23. **D. C.**—*Ainsworth v. United States*, 1 App. Cas. 518. **Fla.**—*Douglass v. State*, 13 Fla. 27, 41 So. 424. **Ga.**—*Rawlins v. State*, 124 Ga. 70, 52 S. E. 1; *Turner v. State*, 128 Ga. 30, 52 S. E. 1. *affirmed on other points*, 201 U. S. 638, 26 Sup. Ct. 509, 50 L.

indicted jointly, or separately; ³⁵ that all the perpetrators of a crime are not made defendants, does not defeat a prosecution of one or more

ed. 890; *Bishop v. State*, 118 Ga. 799, 45 S. E. 614; *Stone v. State*, 118 Ga. 705, 45 S. E. 630, 98 Am. St. Rep. 145; *Loyd v. State*, 45 Ga. 57, 70; *Norton v. State*, 5 Ga. App. 586, 63 S. E. 662. **Ill.**—*People v. Lucas*, 244 Ill. 603, 91 N. E. 659; *People v. Jordan*, 244 Ill. 388, 91 N. E. 482; *Lyman v. People*, 198 Ill. 544, 64 N. E. 974. **Ind.**—*State v. Winstanley*, 151 Ind. 316, 51 N. E. 92. **Ia.**—*State v. Comstock*, 46 Iowa 265. **Ky.**—*International H. Co. v. Com.*, 137 Ky. 668, 126 S. W. 352; *Travis v. Com.*, 96 Ky. 77, 27 S. W. 863; *Benge v. Com.*, 92 Ky. 1, 17 S. W. 146; *Com. v. McChord*, 2 Dana 212; *Hatfield v. Com.*, 21 Ky. L. Rep. 1461, 55 S. W. 672. **La.**—*State v. Mancuso*, 129 La. 58, 55 So. 709; *State v. Smith*, 129 La. 61, 55 So. 710; *State v. Adam*, 105 La. 737, 30 So. 101; *State v. Littell*, 45 La. Ann. 655, 12 So. 750; *State v. White*, 7 La. Ann. 531. **Me.**—*State v. Neddo*, 92 Me. 71, 42 Atl. 253; *State v. Ruby*, 68 Me. 543. **Mass.**—*Com. v. Kane*, 173 Mass. 477, 53 N. E. 919; *Com. v. Bakeman*, 131 Mass. 577, 41 Am. Rep. 248; *Com. v. Weatherhead*, 110 Mass. 175; *Com. v. Elwell*, 2 Met. 190, 191, 35 Am. Dec. 398; *Com. v. Knapp*, 10 Pick. 477, 20 Am. Dec. 534. **Mich.**—*Strang v. People*, 24 Mich. 1. **Minn.**—*State v. Johnson*, 37 Minn. 493, 35 N. W. 273. **Mo.**—*State v. Johns*, 259 Mo. 361, 168 S. W. 587; *State v. Lehman*, 182 Mo. 424, 81 S. W. 1118, 103 Am. St. Rep. 670, 66 L. R. A. 490; *State v. Harris*, 150 Mo. 56, 51 S. W. 481; *State v. Hopper*, 71 Mo. 425; *State v. Tayler*, 21 Mo. 477; *State v. Bentz*, 11 Mo. 27; *State v. Gay*, 10 Mo. 440; *State v. Ostman*, 147 Mo. App. 422, 126 S. W. 961. **Neb.**—*Johnson v. State*, 53 Neb. 103, 73 N. W. 463; *Wallbridge v. State*, 13 Neb. 236, 13 N. W. 209. **N. H.**—*State v. Fournier*, 65 N. H. 12, 17 Atl. 577. **N. J.**—*State v. Castle*, 75 N. J. L. 187, 66 Atl. 1032; *State v. Young* (N. J. L.), 56 Atl. 471. **N. Y.**—*People v. Menkin*, 183 N. Y. 214, 30 N. E. 828; *People v. Kraft*, 4 Donio 129; *Kane v. People*, 8 Wood. 203; *People v. Roof*, 135 App. Div. 603, 122 N. Y. Supp. 677; *People v. Coombs*, 36 App. Div. 284, 55 N. Y. Supp. 976. **N. C.**—*State v. McNamee*, 197 N. C. 885, 12 S. E. 83; *State v. Cox*, 4 N. C. 597. **Ohio.** *Hartshorn v. State*, 29 Ohio St. 635; *Hess v. State*, 5 Ohio 5, 22 Am. Dec. 767; *Jones v. State*, 7 Ohio C. D. 305, 14 Ohio C. C. 35; *Foster v. State*, 1 Ohio C. C. 467, 1 Ohio C. D. 261. **Pa.** *Com. v. Gillespie*, 7 Serg. & R. 469, 10 Am. Dec. 475; *Com. v. Casey*, 14 Pa. Co. Ct. 389. **R. I.**—*State v. O'Brien*, 18 R. I. 105, 25 Atl. 910. **S. C.**—*State v. Wade*, 95 S. C. 387, 79 S. E. 106; *State v. Atkinson*, 40 S. C. 363, 18 S. E. 1021, 42 Am. St. Rep. 877; *State v. Woodard*, 38 S. C. 353, 17 S. E. 135. **Tenn.**—*Fowler v. State*, 3 Heisk. 154. **Tex.**—*Lewellen v. State*, 18 Tex. 538; *Ledbetter v. State*, 21 Tex. App. 344, 17 S. W. 427; *Bell v. State*, 1 Tex. App. 598. **Va.**—*Williams v. Com.*, 111 Va. 870, 69 S. E. 1031; *Anthony v. Com.*, 88 Va. 847, 14 S. E. 834; *Hash v. Com.*, 88 Va. 172, 13 S. E. 398; *Hawley v. Com.*, 75 Va. 847; *Rasnick v. Com.*, 2 Va. Cas. 356. **Wash.**—*State v. Columbus*, 74 Wash. 290, 133 Pac. 455; *State v. Nelson*, 39 Wash. 221, 81 Pac. 721. **Eng.**—*Rex v. Hartall*, 7 Car. & P. 475, 32 E. C. L. 715; *Rex v. O'Brien*, 1 Den. C. C. 9; *Rex v. Benfield*, 2 Burr. 980, 97 Eng. Reprint 664.

35. **Conn.**—*State v. Hamlin*, 47 Conn. 95, 116, 36 Am. Rep. 54. **Ga.**—*Wasden v. State*, 18 Ga. 264. **Ill.**—*Lyman v. People*, 198 Ill. 544, 64 N. E. 974. **Ia.**—*State v. Dingee*, 17 Iowa 232. **Ky.** *International H. Co. v. Com.*, 137 Ky. 668, 126 S. W. 352. **Me.**—*State v. Ricker*, 29 Me. 84. **Mass.**—*Com. v. Glover*, 111 Mass. 395. **Mich.**—*People v. Lange*, 56 Mich. 549, 23 N. W. 217. **Mo.**—*State v. Uumble*, 115 Mo. 452, 22 S. W. 378. **Neb.**—*Johnson v. State*, 53 Neb. 103, 73 N. W. 463. **N. H.**—*State v. McGregor*, 41 N. H. 407, 408. **Pa.** *Com. v. Casey*, 14 Pa. Co. Ct. 389. **R. I.** *State v. Watson*, 20 R. I. 351, 39 Atl. 193, 78 Am. St. Rep. 871. **S. C.**—*State v. Hunter*, 79 S. C. 73, 60 S. E. 249. **Va.**—*Williams v. Com.*, 111 Va. 870, 69 S. E. 1031. **Wash.**—*State v. Nelson*, 39 Wash. 221, 81 Pac. 721. **W. Va.**—*State v. Roberts*, 50 W. Va. 422, 40 S. E. 484. **Eng.**—1 Chitty Crim. Law 260; 2 Hale P. C. 173, 174; *Reg. v. Crisham*, Car. & M. 187, 41 E. C. L. 106.

[a] The fact that several defend-

of them.³⁶ The fact that the offense is of such a nature that it cannot be committed by one person alone, does not, as a rule, make it necessary to join the offenders, although proper to do so, for they are still individually responsible.³⁷

It is proper to join in the same indictment a corporation and an individual,³⁸ several corporations,³⁹ public officials and private citizens,⁴⁰ as well as husband and wife,⁴¹ principal and accessory,⁴² and principals

ants were jointly charged before a magistrate with the crime of mayhem and together held over for trial does not render it mandatory upon the district attorney to file a joint information against all, but he may proceed separately against each of them. *People v. Plyler*, 121 Cal. 160, 53 Pac. 553.

In conspiracy cases, see 5 STANDARD PROC. 315.

[b] Even though the statute requires all persons concerned to be jointly indicted, a several indictment is not defective if all elements of the offense are alleged. *State v. Steptoe*, 65 Mo. 640, *affirmed* 1 Mo. App. 19; *State v. Morehead*, 17 Mo. App. 328; *State v. Davis*, 2 Sneed (Tenn.) 273.

36. *Johnson v. State*, 53 Neb. 103, 73 N. W. 463.

37. *U. S.—Clune v. United States*, 159 U. S. 599, 16 Sup. Ct. 125, 40 L. ed. 709; *Cohen v. United States*, 157 Fed. 631, 85 U. C. A. 113; *United States v. Miller*, 3 Hughes 553, 26 Fed. cas. No. 15,774. **Ala.**—*Robinson v. State*, 8 Ala. App. 435, 62 So. 372. **Cal.**—*People v. Richards*, 67 Cal. 412, 7 Pac. 828, 56 Am. Rep. 716; *People v. Sacramento Butchers' P. Assn.*, 12 Cal. App. 471, 197 Pac. 712. **Conn.**—*State v. Thompson*, 69 Conn. 729, 38 Atl. 898. **Ill.**—*People v. Smith*, 239 Ill. 91, 87 N. E. 885. **Ind.**—*People v. State*, 169 Ind. 488, 82 N. E. 1079. **Kan.**—*State v. Long*, 21 Kan. 647, 198 Pac. 782. **Ky.**—*International H. Co. v. State*, 137 Ky. 618, 126 S. W. 350. **La.**—*State v. State*, 106 La. 182, 30 So. 238. **N. Y.**—*People v. Reed*, 138 App. Div. 933, 122 N. Y. Supp. 977. **Ore.**—*State v. Naylor*, 68 Ore. 139, 130 Pac. 889, lascivious exhibition. **Pa.**—*Com. v. Deonnis*, 3 Clark 437, 6 Pa. L. J. 29. **R. I.**—*State v. Watson*, 20 R. I. 251, 39 Atl. 196, 78 Am. St. Rep. 871. **W. Va.**—*West Virginia Tansp. Co. v. Standard Oil Co.*, 50 W. Va. 611, 49

S. E. 591, 88 Am. St. Rep. 895, 56 L. R. A. 804.

[a] **Adultery.**—See 1 STANDARD PROC. 599.

[b] **Conspiracy.**—See 5 STANDARD PROC. 315.

[c] **Gaming.**—See 10 STANDARD PROC. 336.

[d] Joinder has been held necessary in making charge of (1) lascivious cohabitation (**Kan.**—*State v. Hook*, 4 Kan. App. 451, 46 Pac. 44. **Mich.**—*Dolaney v. People*, 10 Mich. 241. **Mo.**—*State v. Byron*, 20 Mo. 210), (2) exhibition of theatricals. *State v. Fox*, 15 Vt. 22.

38. **U. S.**—*New York Cent. & H. R. E. Co. v. United States*, 212 U. S. 481, 29 Sup. Ct. 304, 53 L. ed. 613; *United States v. MacAndrews*, 149 Fed. 823. **Colo.**—*Overland Cotton Mill Co. v. People*, 32 Colo. 263, 75 Pac. 924, 105 Am. St. Rep. 74. **Mich.**—*People v. Detroit White Lead Wks.*, 82 Mich. 471, 46 N. W. 725, 9 L. R. A. 722. **N. Y.**—*People v. Woodbury D. Inst.*, 192 N. Y. 454, 85 N. E. 697, *affirmed* 124 App. Div. 877, 109 N. Y. Supp. 578. **Tenn.**—*Banner Pub. Co. v. State*, 16 Lea 176, 97 Am. Rep. 214; *State v. Atchison*, 3 Lea 729, 31 Am. Rep. 663.

39. *International H. Co. v. Com.*, 137 Ky. 678, 126 S. W. 352.

40. See 5 STANDARD PROC. 316.

41. **Mass.**—*Com. v. Taves*, 29 Mass. 440. **Mo.**—*State v. Bodie*, 11 Mo. 37. **N. Y.**—*Goldstein v. State*, 82 N. Y. 231.

See the title "Husband and Wife."

42. See the following **U. S.**—*United States v. Berry*, 96 Fed. 842. **Ala.**—*State v. Jones*, 5 Ala. 660. **Ark.**—*Jones v. State*, 58 Ark. 360, 24 S. W. 1073. **Cal.**—*People v. Valencia*, 42 Cal. 552; *People v. Cryder*, 6 Cal. 23. **Conn.**—*State v. Hamden*, 47 Conn. 85, 116. **Fla.**—*Keech v. State*, 15 Fla. 332. **Ga.**—*Lacy v. State*, 45 Ga. 37; *Bullock v. State*, 10

in the first and second degrees.⁴³

B. WHO MAY NOT BE JOINED.—Where the offenses of the defendants are separate and distinct or arise out of separate or distinct agreements or transactions, the defendants cannot be joined in the same indictment or information.⁴⁴

An improper joinder may be cured by a nolle prosequi or dismissed as to either one.⁴⁵

Gal. 18, 34 Am. Dec. 302. Idaho.—Territory v. Guthrie, 2 Idaho 398, 17 Pac. 30. Ill.—People v. Jordan, 244 Ill. 386, 91 N. E. 482. Ky.—Mulligan v. Com., 84 Ky. 229, 1 S. W. 417. La.—State v. Travis, 39 La. Ann. 356, 1 So. 817. Me.—State v. Nodine, 99 Me. 71, 42 Atl. 233. State v. Carver, 49 Me. 588, 7 Am. Dec. 275. Mass.—Com. v. Davine, 155 Mass. 224, 29 N. E. 515. Mo.—State v. Hopper, 71 Mo. 427; State v. Ostman, 147 Mo. App. 422, 126 S. W. 961. Mont.—State v. King, 9 Mont. 445, 24 Pac. 295. Ohio.—Hartshorn v. State, 29 Ohio St. 375; Allen v. State, 10 Ohio St. 288. Pa.—Holmes v. Com., 25 Pa. 221. S. C.—State v. Atkinson, 40 S. C. 363, 18 S. E. 1021, 42 Am. St. Rep. 88. Va.—Hawley v. Com., 75 Va. 847. W. Va.—State v. Roberts 50 W. Va. 422, 40 S. E. 484.

See generally 1 STANDARD PROC. 112.

[a] **Felony or Misdemeanor.**—Where a statute makes the doing of an act a felony and the aiding and abetting thereof a misdemeanor, both the offender and aider and abettor are principals and may be charged in the same indictment. Capps v. Com., 87 Ky. 33, 7 S. W. 405.

In indictment for counterfeiting, see 6 STANDARD PROC. 17.

[b] **Joinder in the same count is allowable.** Ga.—Bishop v. State, 118 Ga. 799, 45 S. E. 634; Bellach v. State, 10 Ga. 40, 34 Am. Dec. 969. S. C.—State v. Atkinson, 40 S. C. 363, 18 S. E. 1021, 42 Am. St. Rep. 87. Va.—Hawley v. Com., 75 Va. 847.

13. Ala.—State v. Pile, 5 Ala. 72. Ark.—Deane v. State, 3 Ark. 230. Ill.—People v. Jordan, 244 Ill. 386, 91 N. E. 482. Ky.—Com. v. Hutton, 140 Ky. 229, 126 S. W. 1003; Halliwell v. Com., 55 S. W. 679. Me.—State v. Eddy, 68 Me. 643. Mich.—Com. v. People, 23 Mich. 1. Mo.—State v. Taylor, 21 Mo. 477. Mont.—Brath v. King, 9 Mont. 445, 24 Pac. 295. Neb.—Johnson v. State 33 Neb. 101, 75 N. W. 493. N. H.

State v. McGregor, 41 N. H. 407. Ohio.—Hartshorn v. State, 29 Ohio St. 635. Va.—Rasnick v. Com., 2 Va. Cas. 356. Eng.—Reg. v. Crisham, C. & M. 187, 41 E. C. L. 106; Rex v. Hargrave, 5 Car. & P. 170, 24 E. C. L. 509.

44. **U. S.**—United States v. Kazinski, 2 Spr. 7, 26 Fed. Cas. No. 15,508. Ala.—Townsend v. State, 137 Ala. 91, 34 So. 382; Cox v. State, 76 Ala. 66; Lindsey v. State, 48 Ala. 169; McGehee v. State, 58 Ala. 360; Elliot v. State, 26 Ala. 78. Ark.—State v. Wainwright, 60 Ark. 280, 29 S. W. 981; State v. Lancaster, 36 Ark. 55. Ga.—Drew v. State, 136 Ga. 658, 71 S. E. 1108. Ky.—Walker v. Com., 162 Ky. 111, 172 S. W. 109; Rutland v. Com., 160 Ky. 77, 169 S. W. 584 (conspiracy); Com. v. Patrick, 80 Ky. 605, 607; Com. v. Gest, 6 Ky. L. Rep. 307. Mo.—State v. Christian, 253 Mo. 382, 161 S. W. 736; State v. Lehman, 182 Mo. 424, 81 S. W. 1118, 103 Am. St. Rep. 670, 66 L. R. A. 490; State v. Edwards, 60 Mo. 490; State v. Bridges, 24 Mo. 353; Vaughn v. State, 4 Mo. 530. N. C.—State v. Hall, 97 N. C. 474, 1 S. E. 683; State v. Deaton, 92 N. C. 788. S. C.—State v. Nichols, 12 Rich. L. 672. Tenn.—State v. Wilson, 115 Tenn. 725, 91 S. W. 195; State v. Roulstone, 3 Sneed 107. Tex.—State v. Homan, 41 Tex. 155. Eng.—Rex v. Trafford, 1 B. & Ad. 873, 887, 109 Eng. Reprint 1011.

[a] Where the offense does not wholly arise from the joint act of the defendants but from some act joined with some personal and particular defect or omission without which it would be no offense, the indictment must charge the defendants severally and not jointly. Com. v. Miller, 2 Pars. Eq. Cas. (Pa.) 480.

[b] **Joint Indictment for Perjury.** See the title "Perjury."

[c] **Joint Indictment for Unlawful Sale of Intoxicating Liquor.**—See the title "Intoxicating Liquors."

45. Ind.—Baker v. State, 57 Ind.

C. RIGHT TO CONVICT LESSER NUMBER WHERE SEVERAL JOINTED. Offenses though committed jointly are in law several, and an indictment which charges that two or more persons committed a crime is equivalent to a charge that each committed it,⁴⁰ so that under a joint indictment some of the defendants may be convicted while others are acquitted,⁴¹ or found guilty of different offenses,⁴² except where because of the nature of the offense one cannot be convicted without the other.⁴³

XI. JOINDER OF OFFENSES. — A. DUPLICITY. — 1. General Rule. — In order to prevent useless prolixity and confusion in pleading and the multiplication of issues⁴⁴ subject to the qualifications and exceptions hereinafter stated,⁴⁵ the criminal law does not permit two or more distinct and substantive offenses to be joined in the same count of an indictment or information, as such joinder would render the indictment or information duplicitous,⁴⁶ though statutes sometimes

255. **Ky.**—*Rush v. Com.*, 20 Ky. L. Rep. 673, 47 S. W. 586; *Com. v. Gest*, 6 Ky. L. Rep. 367. **Mass.**—*Com. v. Brown*, 12 Gray 135. **N. J.**—*State v. Graham*, 41 N. J. L. 15.

But see the title "Nolle Prosequi."

46. **U. S.**—*United States v. Davenport*, Dundy 264, 25 Fed. Cas. No. 14,920. **Conn.**—*State v. Wadsworth*, 30 Conn. 55. **R. I.**—*State v. O'Brien*, 18 R. I. 105, 25 Atl. 910.

[a] The fact that A and C, copartners are charged as such does not make it an indictment against the firm, but it will be treated as a joint indictment against them as individuals. *State v. Powell*, 3 Lea (Tenn.) 164.

47. **Ky.**—*Shelbyville, etc. R. Co. v. Com.*, 9 Ky. L. Rep. 244. **Mass.**—*Com. v. Colton*, 11 Gray 1. **S. C.**—*State v. Wade*, 25 S. C. 387, 79 S. E. 147; *Bales v. State*, 2 McMull. 252; *State v. Clayton*, 11 Rich. L. 581. **Tenn.**—*Brown v. State*, 5 Yerg. 367. **Eng.**—*Rex v. Hempstead, Russ. & Ry.* 344.

48. **U. S.**—*United States v. Harding*, 1 Wall. Jr. 127, 26 Fed. Cas. No. 16,401. **Fla.**—*Green v. State*, 40 Fla. 191, 23 So. 851; *Savage v. State*, 18 Fla. 909. **Ill.**—*People v. Jordan*, 244 Ill. 386, 91 N. E. 482. **N. Y.**—*Klein v. People*, 31 N. Y. 229. **Pa.**—*Shouse v. Com.*, 5 Pa. 85. **Tex.**—*Red v. State*, 39 Tex. Crim. 667, 47 S. W. 1003, 73 Am. St. Rep. 905. **Eng.**—*Rex v. Butterworth, Russ. & Ry.* 529.

49. **Mass.**—*Com. v. Cook*, 12 Allen 542; *Com. v. Griffin*, 3 Cosh. 524; *Com. v. Wood*, 12 Mass. 313. **N. Y.**—*Klein*

v. People, 31 N. Y. 229; *People v. Raaf*, 138 App. Div. 633, 122 N. Y. Sapp. 677. **Ohio.**—*Stephens v. State*, 14 Ohio 380, 388.

In conspiracy cases, see 5 STANDARD PRACTICE, 319.

In cases of riot, see the title "Riot."

50. *Scruggs v. State*, 7 Baxt. (Tenn.) 28; *Sprouse v. Com.*, 81 Va. 374.

51. See the following sections.

52. **U. S.**—*United States v. Smith*, 152 Fed. 542; *United States v. Fero*, 18 Fed. 991; *United States v. Carbin*, 11 Fed. 238; *United States v. Nummasher*, 7 Biss. 129, 27 Fed. Cas. No. 15,993. **Ala.**—*Thomas v. State*, 111 Ala. 51, 20 So. 617; *Burgess v. State*, 44 Ala. 190; *Tornipseed v. State*, 6 Ala. 694; *Lewis v. State*, 4 Ala. App. 141, 65 S. 802; *Mitchell v. State*, 2 Ala. App. 137, 56 So. 56. **Ariz.**—*Gowell v. State*, 15 Ariz. 66, 136 Pac. 279. **Ark.**—*State v. St. Louis & S. F. R. Co.*, 82 Ark. 254, 103 S. W. 625; *Rowe v. State*, 85 Ark. 244, 103 S. W. 613. **Cal.**—*People v. Plath*, 166 Cal. 237, 125 Pac. 254; *People v. Quivse*, 56 Cal. 390; *People v. Shortwell*, 27 Cal. 394. **Fla.**—*Johnson v. State*, 51 Fla. 44, 40 So. 678; *McGaughey v. State*, 17 Fla. 607. **Ga.**—*Lampkin v. State*, 87 Ga. 516, 13 S. E. 523; *Williams v. State*, 60 Ga. 88. **Ind.**—*McCollough v. State*, 132 Ind. 427, 34 N. E. 1116; *Jeslyn v. State*, 128 Ind. 169, 27 N. E. 491, 25 Am. St. Rep. 625; *State v. Well*, 82 Ind. 289; *State v. Shields*, 8 Dm. Cr. 191. **Ia.**—*State v. Hull*, 83 Iowa 112, 48 N. W. 917; *State*

- v. Ridley*, 48 Iowa 370; *State v. McPherson*, 9 Iowa 53. **Kan.**—*State v. Wester*, 67 Kan. 810, 74 Pac. 269; *State v. Lund*, 49 Kan. 269, 30 Pac. 318; *State v. Hodges*, 35 Kan. 389, 26 Pac. 670; *State v. Goodwin*, 23 Kan. 228, 6 Pac. 800. **Ky.**—*Haselwood v. Com.*, 141 Ky. 232, 102 S. W. 567; *Alham v. Com.*, 110 K. C. 623, 122 S. W. 267; *Hawkins v. Com.*, 24 Ky. L. Rep. 1034, 70 S. W. 640; *Com. v. Powell*, 8 Bush 7. **La.**—*State v. Sturgeon*, 127 La. 459, 53 So. 700; *State v. Batson*, 108 La. 479, 32 So. 478; *State v. Robertson*, 48 La. Ann. 1024, 27 So. 167; *s. c.*, 48 La. Ann. 1026, 29 So. 290; *State v. Johns*, 32 La. Ann. 812; *State v. Adam*, 31 La. Ann. 715. **Me.**—*State v. Leavitt*, 87 Me. 72, 32 Atl. 787; *State v. Smith*, 61 Me. 386; *State v. Burgess*, 40 Me. 592; *State v. Palmer*, 33 Me. 9; *State v. Nelson*, 29 Me. 330. **Md.**—*Mahler v. State*, 120 Md. 373, 87 Atl. 671. **Mass.**—*Com. v. Fuller*, 163 Mass. 499, 40 N. E. 764; *Com. v. Jacobs*, 122 Mass. 276, 25 N. E. 408; *Com. v. Ryan*, 152 Mass. 283, 25 N. E. 405. **Mich.**—*Chase v. Van Buren*, 148 Mich. 149, 111 N. W. 750; *People v. Hamilton*, 101 Mich. 87, 59 N. W. 401; *People v. Keefe*, 97 Mich. 15, 56 N. W. 106; *People v. Parker*, 67 Mich. 192, 34 N. W. 750, 11 Am. St. Rep. 578; *People v. Van Matine*, 57 Mich. 69, 33 N. W. 594. **Minn.**—*State v. Com.*, 14 Minn. 125. **Miss.**—*Montgomery v. State*, 65 So. 372; *State v. Freeman*, 90 Miss. 315, 43 So. 289; *Breeland v. State*, 72 Miss. 527, 31 So. 104; *Miller v. State*, 5 How. 250. **Mo.**—*State v. Christian*, 253 Mo. 382, 161 S. W. 766; *State v. Fox*, 148 Mo. 517, 50 S. W. 98; *State v. Bridges*, 24 Mo. 559; *State v. Jablonsky*, 169 Mo. App. 208, 160 S. W. 390; *State v. Boyd*, 108 Mo. App. 518, 81 S. W. 191. **Neb.**—*Smith v. State*, 33 Neb. 105, 48 N. W. 822; *State v. Pichel*, 16 Neb. 490, 20 N. W. 848; *Dunham v. State*, 15 Neb. 128, 17 S. W. 343. **N. H.**—*State v. Garham*, 55 N. H. 1021; *State v. Smith*, 20 N. H. 298; *State v. Nelson*, 8 N. H. 169. **N. J.**—*Farrell v. State*, 54 N. J. L. 410, 23 Atl. 763. **N. Y.**—*People v. Allmon*, 187 N. Y. 473, 41 N. E. 189; *Woodford v. People*, 69 N. Y. 117, 38 Am. Rep. 164; *Nelson v. People*, 28 N. Y. 204; *People v. Wright*, 9 Wood. 100; *Esau v. People*, 9 Wood. 280; *People v. Schring*, 11 Misc. 21, 25 N. Y. Supp. 337; *Rummenauer v. People*, 7 Hun 236. **N. C.**—*State v. Hardy*, 100 N. C. 682, 11 S. E. 377; *State v. Cooper*, 101 N. C. 684, 8 S. E. 100. **N. D.**—*State v. Mattison*, 14 N. D. 391, 100 N. W. 1091; *State v. Marchis*, 3 N. D. 530, 28 N. W. 25; *State v. Smith*, 2 N. D. 515, 52 N. W. 275. **Ohio.**—*Myers v. State*, 4 Ohio C. C. 670. **Okla.**—*Kishorell v. State*, 7 Okla. Crim. 354, 123 Pac. 1027; *Grant v. State*, 6 Okla. Crim. 172, 117 Pac. 1100; *Geoffre v. State*, 4 Okla. Crim. 574, 110 Pac. 260; *Honlaur v. State*, 4 Okla. Crim. 354, 111 Pac. 980; *Wells v. Territory*, 1 Okla. Crim. 429, 98 Pac. 483. **Pa.**—*Pulmar v. Com.*, 97 Pa. 593; *Hutchinson v. Com.*, 82 Pa. 472; *Com. v. Hall*, 23 Pa. Super. 104. **B. I.**—*State v. Custer*, 28 R. I. 228, 60 Atl. 309. **S. C.**—*State v. Howe*, 1 Rich. L. 260. **Tenn.**—*State v. Ferris*, 8 Lea 709; *State v. Ferriss*, 3 Lea 709; *Greenlow v. State*, 4 Humph. 25; *Womack v. State*, 7 Coldw. 508; *Whiteside v. State*, 4 Coldw. 175. **Tex.**—*Harris v. State*, 55 Tex. Crim. 409, 117 S. W. 839; *Murdoch v. State*, 52 Tex. Crim. 262, 106 S. W. 374; *Crow v. State*, 49 Tex. Crim. 103, 90 S. W. 650; *Schulze v. State* (Tex. Crim.), 56 S. W. 918; *Wandell v. State* (Tex. Crim.), 25 S. W. 27; *Fisher v. State*, 34 Tex. 792; *State v. Dorsett*, 21 Tex. 656; *Nicholas v. State*, 23 Tex. App. 317, 5 S. W. 222; *Hickman v. State*, 22 Tex. App. 411, 2 S. W. 640; *Heineman v. State*, 22 Tex. App. 44, 2 S. W. 619; *Wentersby v. State*, 1 Tex. App. 613. **Utah.**—*State v. Anderson*, 35 Utah 490, 101 Pac. 385. **Va.**—*Sweeney v. Com.*, 81 Va. 374. **Wash.**—*State v. Townsend*, 7 Wash. 462, 35 Pac. 327. **W. Va.**—*State v. Gould*, 26 W. Va. 258. **Wis.**—*Kutschingham v. State*, 6 Wis. 470.
- See 2 STANDARD PROC. 5; 8 STANDARD PROC. 242; 10 STANDARD PROC. 336.
- [a] This strictness is necessary in order that the accused may not be in doubt as to the exact charge against which he is called to defend, and that the court may know what assistance to pronounce. *State v. Smith*, 61 Me. 386.
- [b] *Duplicity Defined.* The charging of two or more distinct offenses in the same count of an indictment or information is denominated duplicity. *State v. Hodges*, 35 Kan. 389, 26 Pac. 670. See also *Ala.*—*Tremplin v. State*, 139 Ala. 128, 18 So. 1027. *Fla.*—*Johnson v. State*, 51 Fla. 44, 40 So. 678, two distinct and independent offenses must be charged. *Ill.*—*Water v. State*,

permit such joinder in certain enumerated cases.⁵³

Some statutes provide that offenses of the same character and subject to the same punishment may be charged in the same count in the alternative,⁵⁴ but this does not permit the charging of separate and distinct offenses in a single count.⁵⁵ It is improper to charge in the same count a felony and a misdemeanor.⁵⁶

Neither an involved and complicated statement of the offense

104 Ill. 544, 545, to be implicitly there must be joined in the same count different, separate and distinct crimes committed at different times. Mo.—State v. Sherman, 137 Mo. App. 78, 115 S. W. 479. N. Y.—People v. Galtner, 70 Misc. 199, 128 N. Y. Supp. 479. Pa. Com. v. Shaffer, 45 Pa. Super. 699.

[c] Confusion and Uncertainty.—To render the indictment liable to the objection of implety, it must be such as to produce confusion and uncertainty as to what offense was really intended to be charged. State v. Smith, 24 Tex. 282; Beaumont v. State, 1 Tex. App. 595, 28 Am. Rep. 423.

[d] Duplicity Is Only a Fault in Form.—Sprouse v. Com., 81 Va. 274.

[e] "It is only when it appears by the indictment itself (1) that two or more distinct acts are involved in the commission of two or more crimes charged that an indictment or count therein charging two or more offenses is bad for duplicity. Carroll v. State, 104 Wis. 227, 232, 80 N. W. 143; Vogel v. State, 128 Wis. 216, 110 N. W. 108." State v. Heiber, 123 Wis. 316, 221 N. W. 128, (2) But, though the indictment is not defective on its face, if the proof offered to support it shows that two separate and distinct offenses were charged the defendant cannot be convicted of either, for he is not guilty as charged in the indictment. Thomas v. State, 111 Ala. 51, 20 So. 617.

[f] A substantive offense is one which is complete of itself, and is not dependent upon another. State v. Smith, 21 Mo. 340.

[g] More Liberal Rule in Misdemeanor Cases.—Ford v. State (Tex. Com.), 68 S. W. 660; Rice v. State, 14 Tex. App. 26; Gage v. State, 9 Tex. App. 259. See Sharra v. State, 2 Mo. 9; Mago v. Com., 7 Pa. 915. See also *infra*, XVI. But see Allison v. Com., 123 Ky. 699, 123 S. W. 267.

[h] Whether or not offenses are to be treated as distinct offenses depends upon whether or not they are embraced within the same general definition and punishable in the same manner. If they are, then they are not distinct offenses, and may be charged in a single count of the same indictment. Nicholas v. State, 14 Tex. App. 217, 18 S. W. 439, 249. See also State v. Callahan, 3 Laq. (Tenn.) 714; State v. Irvine, 2 Hawk. (Tenn.) 324; State v. Jording, 10 Humph. (Tenn.) 418; Greenlee v. State, 4 Humph. (Tenn.) 23. But see State v. Lamb, 81 N. J. L. 234, 80 Atl. 111.

53. See the statutes and Parry v. Com., 90 Ky. 637, 14 S. W. 681; Miller v. Com., 60 Ky. L. Rep. 1631, 10 S. W. 250.

54. Thomas v. State, 111 Ala. 51, 20 So. 617; Ramsey v. State, 2 Ala. App. 51, 64 So. 168; Allison v. State, 1 Ala. App. 265, 10 So. 257. See also State v. Hindman, 1 Mo. App. 582.

55. Thomas v. State, 111 Ala. 51, 20 So. 617 (culpable killing of cow and ox); Burgess v. State, 44 Ala. 180, (killing of mare and ox at different times. See also McGhee v. State, 58 Ala. 320).

[a] Conjunctive allegation not allowed under such statute. Thomas v. State, 111 Ala. 51, 20 So. 617.

[b] An election upon the part of the prosecution to try defendant for one of the offenses charged in the conjunctive will not abrogate the defect. Thomas v. State, 111 Ala. 51, 20 So. 617. See generally, *infra*, XVI.

56. U. S.—United States v. Sharp, Fed. C. v. 143, 27 Fed. Com. No. 16,064. Pa.—Com. v. Wood, 17 Pa. Cas. 240. Tex.—McKinney v. State (Tex. Com.), 68 S. W. 176; Samuels v. State (Tex. Com.), 23 S. W. 1079.

Compare Walters v. People, 104 Ill. 544, 545.

charged,⁵⁷ nor the statement of the essential ingredients of the crime, with unnecessary fullness,⁵⁸ or the charging of the offense in a more direct manner,⁵⁹ or the repetition of the same charge in the same or different language,⁶⁰ or the use of two or more synonymous terms or words⁶¹ will render the pleading duplicitous.

2. **Surplusage.**—Matters which may be regarded as surplusage will not render a pleading double.⁶² Under this rule matters of evidence not essential to the charge,⁶³ or the allegation of legal con-

57. **Ariz.**—*Ortega v. Territory*, 8 Ariz. 37, 68 Pac. 544. **Ind.**—*Surber v. State*, 99 Ind. 71. **N. Y.**—*People v. Wicks*, 42 N. Y. Supp. 630. **N. D.** *State v. Mareks*, 3 N. D. 532, 58 N. W. 25. **Tex.**—*State v. Edmondson*, 43 Tex. 162. **Va.**—*Com. v. Tiernan*, 4 Gratt. 545.

[a] A statement of the wrongful effect produced by the acts of defendant set forth in the indictment does not render the indictment duplicitous. *State v. June*, 62 Kan. 866, 64 Pac. 804.

58. *State v. June*, 62 Kan. 866, 61 Pac. 804; *Van Syoc v. State*, 69 Neb. 520, 96 N. W. 266.

59. *Traylor v. State*, 101 Ind. 65, wherein concluding paragraph charged death resulted from certain acts of defendant to procure her miscarriage.

60. **Ark.**—*Storms v. State*, 81 Ark. 25, 98 S. W. 678. **Cal.**—*People v. Montelo*, 18 Cal. 38. **Conn.**—*State v. Teahau*, 59 Conn. 92. **Ky.**—*Wright v. Com.*, 155 Ky. 750, 160 S. W. 476, warehouse and tobacco house. **Mass.**—*Com. v. Farren*, 9 Allen 489; *Com. v. Brown*, 14 Gray 419. **Mo.**—*State v. Jones*, 106 Mo. 302, 17 S. W. 366.

61. **Ariz.**—*Tribolet v. United States*, 11 Ariz. 436, 95 Pac. 85, 16 L. R. A. (N. S.) 223. **Kan.**—*State v. Tulip*, 9 Kan. App. 454, 60 Pac. 659. **Ky.**—*Saylor v. Com.*, 22 Ky. L. Rep. 472, 57 S. W. 614. **La.**—*State v. Thibodeaux*, 127 La. 332, 53 So. 582, charging crime against nature and "sodomy." **Mo.**—*See State v. Keithley*, 142 Mo. App. 417, 127 S. W. 406. **N. Y.**—*People v. McLaughlin*, 33 Misc. 691, 68 N. Y. Supp. 1108.

[a] One Expression Embraced Within the Other.—*Quertermous v. State*, 95 Ark. 48, 127 S. W. 951.

[b] To charge keeping of "house, store and shop" (1) for purpose of

selling wines (*Rawson v. State*, 19 Conn. 292), (2) or selling spirituous liquors without license at his "store house and dwelling house" (*Conley v. State*, 5 W. Va. 522), does not render the indictment duplicitous as these terms are used to designate the same place.

62. **Ark.**—*State v. Horn*, 19 Ark. 578. **Ga.**—*Dobbs v. State*, 8 Ga. App. 731, 70 S. E. 101. **Ind.**—*Henry v. State*, 113 Ind. 304, 15 N. E. 593; *State v. Hutzell*, 53 Ind. 160. **Kan.**—*State v. Hodges*, 45 Kan. 389, 26 Pac. 676. **Mass.** *Com. v. Ellis*, 207 Mass. 572, 93 N. E. 823; *Com. v. Bellow*, 124 Mass. 28; *Com. v. Brown*, 14 Gray 419. **Minn.**—*State v. Comings*, 54 Minn. 359, 56 N. W. 50. **Mo.**—*State v. Flanders*, 118 Mo. 227, 23 S. W. 1086. **Neb.**—*Johnson v. State*, 88 Neb. 328, 129 N. W. 281. **Pa.** *Hutchison v. Com.*, 82 Pa. 472; *Com. v. Frey*, 50 Pa. 245. **S. C.**—*State v. Crawford*, 38 S. C. 330, 17 S. E. 36. **S. D.**—*State v. Allen*, 21 S. D. 121, 110 N. W. 92. **Tenn.**—*State v. Brown*, 8 Humph. 89. **Tex.**—*Herrington v. State* (Tex. Crim.), 166 S. W. 721; *Loicano v. State*, 72 Tex. Crim. 518, 163 S. W. 64.

[a] Where a general state law makes it unlawful to sell liquor in a certain county, and the charter of a town in such county also makes it illegal to sell liquor except for sacramental purposes, an indictment charging a sale in such town and alleging that it was not for sacramental purposes, is not duplicitous, since the latter allegation is immaterial because the state law governs the case. *Stone v. State* (Miss.), 7 So. 500.

Insufficient charge of second offense, see *infra*, XI, A, 6.

63. **Ark.**—*State v. Bledsoe*, 47 Ark. 233, 1 S. W. 149. **Cal.**—*People v. Driggs*, 12 Cal. App. 240, 108 Pac. 62, 64. **Ia.**—*State v. Hull*, 83 Iowa 112, 48

clusions not authorized by the facts stated as constituting the offense⁸⁸ do not render the indictment double.

3. Many Acts Constituting Offense.—When several acts together constitute but one offense, they may be charged in a single count where they are all part of the same transaction.⁸⁹ Thus is it proper to charge

N. W. 917; *State v. Hayden*, 45 Iowa 12, wherein larceny in commission of burglary was charged. **Utah.**—*People v. Hill*, 3 Utah 334, 3 Pac. 75.

64. *Com. v. Simpson*, 9 Mete. (Mass.) 138, 141; *State v. Wilson*, 143 Mo. 364, 44 S. W. 722; *State v. Olinore*, 110 Mo. 1, 19 S. W. 218; *State v. Adams*, 108 Mo. 208, 18 S. W. 1000; *State v. Manley*, 107 Mo. 364, 17 S. W. 800; *Hamel v. State*, 5 Mo. 261.

[a] **Incorrect Name of Offense.** Where the facts charged in an indictment show the defendant to be guilty of a specific offense, and the specific offense is incorrectly named elsewhere in the indictment, the name of the offense will be treated as surplusage and the indictment charges but one offense. *People v. Cuddehi*, 54 Cal. 53; *People v. Phipp*, 39 Cal. 326.

65. **U. S.**—*United States v. Cutajar*, 60 Fed. 744. **Ark.**—*Grant v. State*, 70 Ark. 290, 67 S. W. 397; *Bennett v. State*, 62 Ark. 516, 36 S. W. 947; *State v. Hester*, 48 Ark. 40, 2 S. W. 339. **Cal.** *People v. Eagan*, 116 Cal. 287, 48 Pac. 120. **Colo.**—*Adams v. People*, 25 Colo. 532, 55 Pac. 806. **Conn.**—*Barnes v. State*, 20 Conn. 232. **Ga.**—*Young v. State*, 4 Ga. App. 827, 62 S. E. 558. **Ill.**—*People v. Mackin*, 159 Ill. 419, 125. **Ind.**—*Stout v. State*, 93 Ind. 150; *Todd v. State*, 31 Ind. 514. **Ia.**—*State v. Yates*, 145 Iowa 332, 124 N. W. 174; *State v. Toombs*, 79 Iowa 741, 45 N. W. 300; *State v. McPherson*, 9 Iowa 53. **Ky.**—*Com. v. Kentucky Distilleries & W. Co.*, 154 Ky. 787, 159 S. W. 670; *Taylor v. Com.*, 25 Ky. L. Rep. 374, 75 S. W. 244; *Jackson v. Com.*, 13 Ky. L. Rep. 393, 17 S. W. 215; *Perry v. Com.*, 5 Ky. L. Rep. 611, 6 Ky. L. Rep. 134, suffering gaming. **La.**—*State v. Parker*, 42 La. Ann. 972, 8 So. 473. **Mass.**—*Com. v. Dolan*, 121 Mass. 374; *Com. v. Curran*, 119 Mass. 206; *Com. v. Brown*, 14 Gray 419. **Miss.**—*Clue v. State*, 78 Miss. 661, 29 So. 516, 84 Am. St. Rep. 643. **Mo.**—*State v. Murray*, 237 Mo. 158, 140 S. W. 899; *State v. Palmer*, 4 Mo. 453; *State v. Atkins*, 40 Mo. App.

344, charging several sales of intoxicating liquor at the same time. **N. J.** *Farrell v. State*, 54 N. J. L. 410, 14 Atl. 760; *Francisco v. State*, 34 N. J. L. 30, wherein assault, battery and false imprisonment were charged in one count. **N. Y.**—*People v. Altman*, 147 N. Y. 473, 42 N. E. 180; *Rand v. People*, 86 N. Y. 381; *Woodford v. People*, 69 N. Y. 117, 128, 20 Am. Rep. 464; *Osgood v. People*, 39 N. Y. 319, 431; *People v. Kane*, 43 App. Div. 472, 91 N. Y. Supp. 195, 639; *People v. Hartley*, 22 N. Y. Supp. 688; *People v. Harvey*, 7 N. Y. Supp. 773. **N. C.**—*State v. Osgood*, 117 N. C. 697, 23 S. E. 106. **Ohio.** *State v. Inskeep*, 49 Ohio St. 228, 34 N. E. 720; *Watson v. State*, 29 Ohio St. 123. **Okla.**—*State v. Lawrence*, 9 Okla. Crim. 16, 130 Pac. 508. **Ore.** *State v. Waymire*, 52 Ore. 281, 97 Pac. 46, 132 Am. St. Rep. 609, 21 L. R. A. (N. S.) 59. **S. C.**—*State v. Smalls*, 11 S. C. 262. **S. D.**—*State v. Carlisle*, 28 S. D. 199, 132 N. W. 950, App. Cas. 191413, 305. See *State v. McPherson*, 20 S. D. 347, 139 N. W. 308. **Tenn.** *McCommon v. State*, 130 Tenn. 1, 168 S. W. 781; *State v. Jopling*, 19 Harph. 418. **Tex.**—*Carl v. State* (Tex. Crim.), 145 S. W. 602 (charging all the slanderous words used in a conversation); *Segars v. State*, 35 Tex. Crim. 45, 31 S. W. 370. **Utah.**—*People v. Hill*, 3 Utah 334, 3 Pac. 75. **Vt.**—*State v. Haven*, 59 Vt. 399, 9 Atl. 841; *State v. Matthews*, 42 Vt. 542; *State v. Marten*, 27 Vt. 310, 65 Am. Dec. 201, forging, procuring or causing to be forged and aiding in forging. **Va.**—*Sprouse v. Com.*, 81 Va. 374. **Wash.**—*State v. McBride*, 72 Wash. 300, 130 Pac. 436, forging and uttering.

[a] If the whole be but parts of one fact or endeavor, all the parts may be stated together. *Sprouse v. Com.*, 81 Va. 374.

[b] Illustrations.—An accused might be charged with selling different kinds of liquor contrary to law; the sale of each kind would be an indictable offense, yet an indictment setting forth

in one count the different acts toward the perpetration of the offense, the completed offense merging all precedent acts."

4. Continuing Offenses.—When the offense charged consists of a series of acts which are not in themselves separate and distinct wrongs,⁶⁷ the fact that it is laid under a continuando, that is, that the indictment or information recites in the charging part the occurrence of such acts at different times, does not render the pleading bad for duplicity.⁶⁸ But on the other hand if the offense is not of a continuing

a violation of the law in selling all could not be said to charge several distinct offenses. A man may be indicted for the battery of two or more persons in the same count, yet the battery of each was an offense; yet they may be charged together, because they are but parts of one order—or the offense against the commonwealth being the breach of the peace. Or a libel upon two or more persons, when the publication is one single act, may be charged in one count without rendering it bad for duplicity; or in robbery, with having assaulted two persons, and stolen from one one sum of money, and from the other a different sum of money, if it was all one transaction. *Sprague v. Conn.*, 81 Va. 374.

[c] Obtaining goods from one person by the same false pretense twice repeated on different days is but one transaction and therefore but one offense. *Boakey v. State*, 59 Ala. 20.

[d] The running of six freight trains on Sunday was in *Westfall v. State*, 4 Ga. App. 824, 62 S. E. 528, held well treated as one offense and chargeable in one count.

[e] Escape.—(1) An indictment charging in one count aiding a prisoner to escape from the custody of an officer, when such prisoner was under arrest for a felony and a misdemeanor, is duplicitous where the statute makes aiding a prisoner charged with felony, to escape, a felony, but otherwise only a misdemeanor. *State v. Harrison*, 62 Mo. App. 322. (2) But an indictment charging the aiding of two persons to escape from jail where one was charged with a capital crime and the other for a lesser offense is not duplicitous and notwithstanding a statute provides a heavier penalty for aiding a person charged with a capital offense in escape. *Illiana v. State*, 39 Wis. 58.

66. U. S.—*United States v. Swift*,

188 Fed. 92; *United States v. Great Northern R. Co.*, 157 Fed. 288. Cal. *People v. Eagan*, 116 Cal. 287, 48 Pac. 120. Mo.—*State v. Hayes*, 78 Mo. 367.

67. *State v. Jamison*, 110 Iowa 337, 81 N. W. 594; *Barnhouse v. State*, 31 Ohio St. 39.

68. U. S.—*United States v. MacAndrews*, 149 Fed. 823. Ala.—*Willis v. State*, 134 Ala. 439, 33 So. 226. Conn. *State v. Bosworth*, 54 Conn. 1, 4 Atl. 248. Ga.—*Jackson v. State*, 76 Ga. 531. Ia.—*State v. King*, 37 Iowa 462; *Zumbell v. State*, 4 Grane 526. Kan. *State v. Barratary*, 93 Kan. 621, 144 Pac. 846; *State v. Shidler*, 93 Kan. 618, 144 Pac. 845; *State v. Giroux*, 75 Kan. 695, 90 Pac. 249. Ky. *Centred Ey. & E. Co. v. Com.*, 104 Ky. 726, 47 S. W. 877. La.—*State v. Belhan*, 113 La. 754, 37 So. 714. Me.—*State v. Chaspey*, 25 Me. 306; *State v. Silson*, 17 Me. 154. Mass.—*Com. v. Ellis*, 267 Mass. 579, 93 N. E. 823; *Com. v. Talbot*, 141 Mass. 199, 6 N. E. 217; *Com. v. Bang*, 111 Mass. 423; *Com. v. Woods*, 9 Gray 131; *Com. v. Pray*, 13 Pick. 359. Mo.—*State v. Morrey*, 257 Mo. 128, 140 S. W. 100; *State v. Fraser*, 161 Mo. App. 399, 143 S. W. 515; *State v. Adams*, 46 Mo. App. 344. N. H. *State v. Prescott*, 33 N. H. 212. N. J. *State v. Walde*, 82 N. J. L. 184, 82 Atl. 366. N. Y.—*People v. Firth*, 157 App. Div. 492, 142 N. Y. Supp. 611. N. C. *State v. Martin*, 82 N. C. 675. N. D. *State v. Leah* (N. D.), 135 N. W. 829; *State v. Brown*, 14 N. D. 520, 101 N. W. 1118. Ohio.—*Thayer v. State*, 99 Ohio St. C. 237. Okla.—*State v. Gayle*, 7 Okla. (Crim. 39), 123 Pac. 842, 862. Pa.—*Com. v. Price*, 3 Pa. Co. Ct. 476. S. C.—*State v. Anderson*, 8 Dick. L. 173. Tex.—*Neely v. State*, 84 Tex. Crim. 462, 139 S. W. 100. W. Va.—*State v. Wetzel*, 35 S. E. 66.

See 8 STANDARD PACE, 242; and also the title "Gambling."

character, and the indictment charges the commission of certain acts with a continuando, it is objectionable for duplicity.⁷⁰

Thus, in accordance with the general rule, where the offense charged consists in retailing liquors "at divers times, to divers persons" but a single offense is charged, the retailing of liquors.⁷¹ The statute, however, may make each sale of liquor a separate wrong, in which case the indictment must charge each sale separately or be bad for duplicity,⁷² though in some jurisdictions where one sale is sufficiently charged, allegations in the nature of a continuando will not affect the validity of the pleading.⁷³

To charge the defendant with cruelty to animals, extending over a considerable period of time, is to charge him with but a single offense.⁷⁴ So, also, when the offense is embezzlement the charging of several acts of the same character which, taken as a whole, constitute the crime charged,⁷⁵ or in the case of keeping a gaming house, charging that it was kept on divers days,⁷⁶ does not make the pleading duplicitous.

5. Series of Acts Which Singly or Together Constitute Offense.

a. *In General.*—When a statute denounces a series of acts, either of which separately, or all together may constitute the offense, all of such acts may be charged in a single count, for the reason that, notwithstanding each act may by itself constitute the offense, all of them together do no more and likewise constitute but one offense.⁷⁷ Or where

69. U. S.—United States v. Patty, 2 Fed. 664, mailing lottery circulars. Ia. State v. Jamison, 119 Iowa 347, 81 N. W. 594; the use of false weights. Mich. People v. Hamilton, 191 Mich. 87, 59 N. W. 401. Neb.—State v. Dennison, 60 Neb. 192, 82 N. W. 628 (conducting a lottery); Wendell v. State, 46 Neb. 823, 65 N. W. 884; Smith v. State, 32 Neb. 105, 48 N. W. 823; Statler v. Schell, 16 Neb. 490, 20 N. W. 848, 21 N. W. 468. Ohio.—Barnhouse v. State, 31 Ohio St. 39, incest. Tex.—Seales v. State, 46 Tex. Crim. 296, 81 S. W. 947, 108 Am. St. Rep. 1014, 66 L. R. A. 739, Fortune telling. Vt.—State v. Temple, 38 Vt. 27, incest. Wash.—State v. Hoffman, 56 Wash. 622, 106 Pac. 139.

Raf. See Com. v. Ellis, 207 Mass. 572, 93 N. E. 822.

70. Ia.—State v. King, 37 Iowa 469; Zankoff v. State, 4 Overton 520. Kan. State v. Rustatory, 96 Kan. 431, 134 Pac. 840; State v. Shiffer, 93 Kan. 618, 134 Pac. 845. Mo.—State v. Pruss, 101 Mo. App. 223, 142 S. W. 135; State v. Athies, 40 Mo. App. 344, N. J.—State v. Wable, 82 N. J. L. 184, 10 Atl. 309. N. D.—State v. Losh, 155 N. D. 829.

See the title "Intoxicating Liquors."

71. People v. Hamilton, 161 Mich. 87, 59 N. W. 401. See the title "Intoxicating Liquors."

72. U. S.—Endleman v. U. S., 86 Fed. 456, 30 C. C. A. 186, under the Oregon code in force in Alaska. Ia. State v. King, 37 Iowa 469. Minn. State v. Kohn, 26 Minn. 148, 1 N. W. 1054. Mo.—State v. Findley, 77 Mo. 648. N. Y.—Osgood v. People, 30 N. Y. 449; People v. Adams, 17 Wend. 475. S. D.—State v. Baugner, 5 S. D. 461, 40 N. W. 726.

See generally the title "Intoxicating Liquors."

73. State v. Bosworth, 54 Conn. 1. 74. Ala.—Willis v. State, 134 Ala. 329, 23 So. 226. Ga.—Jackson v. State, 78 Ga. 531. Wash.—State v. Dix, 27 Wash. 105, 73 Pac. 579. W. Va.—State v. Wetzel, 83 S. E. 68.

See also 8 STANDARD PROC. 225, 242. 75. State v. Prescott, 33 N. H. 312. See the title "Gaming."

76. Cal.—People v. Plath, 106 Cal. 257, 145 Pac. 934; People v. Gusti, 118 Cal. 177, 45 Pac. 223; People v. Lashon, 108 Cal. 440, 41 Pac. 480; People

a statute makes two or more distinct acts connected with the same general offense and subject to the same degree of punishment indictable separately as distinct crimes when committed by different persons or at different times, they may when committed by the same person at the same time be pleaded in one count as constituting one offense.⁷⁷

v. Gosset, 93 Cal. 641, 29 Pac. 246; *People v. Harrold*, 84 Cal. 567, 24 Pac. 106; *People v. De La Guerra*, 31 Cal. 459; *People v. Frank*, 28 Cal. 507; *People v. Shotwell*, 27 Cal. 394; *People v. Swaile*, 12 Cal. App. 192, 107 Pac. 134; *Ex parte Johnson* (Cal. App.), 97 Pac. 199; *People v. Bunks*, 2 Cal. App. 197, 84 Pac. 364, 370. **Conn.**—*State v. Burns*, 44 Conn. 149. **Ill.**—*Uzzell v. People*, 173 Ill. App. 257. **Ind.**—*Kreamer v. State*, 106 Ind. 192, 6 N. E. 341; *Davis v. State*, 100 Ind. 154; *Sowle v. State*, 11 Ind. 492. **Ind. Ter.**—*Stanceliff v. United States*, 5 Ind. Ter. 486, 82 S. W. 882. **Ia.**—*State v. Feuerhaken*, 96 Iowa 299, 65 N. W. 299; *State v. Lewis*, 96 Iowa 286, 65 N. W. 295; *State v. Phipps*, 95 Iowa 491, 64 N. W. 411. **Kan.**—*State v. Schweitzer*, 27 Kan. 499. **Ky.**—*Hinkle v. Com.*, 4 Dana 518; *Miller v. Com.*, 25 Ky. L. Rep. 1931, 79 S. W. 250. **Md.**—*Mohler v. State*, 120 Md. 325, 87 Atl. 671. **Mich.**—*People v. Aldrich*, 104 Mich. 455, 62 N. W. 570; *People v. Keefer*, 97 Mich. 15, 56 N. W. 105. **Minn.**—*State v. McGinnis*, 30 Minn. 52, 14 N. W. 258; *State v. Gray*, 29 Minn. 142, 12 N. W. 455. **Mont.**—*State v. Marion*, 14 Mont. 458, 36 Pac. 1044; *State v. McGinnis*, 14 Mont. 462, 36 Pac. 1046. **N. Y.**—*People v. Kane*, 43 App. Div. 472, 61 N. Y. Supp. 195, 632, 14 N. Y. Crim. 305; *People v. Gagliardi*, 59 Misc. 652, 111 N. Y. Supp. 395. **Pa.**—*Com. v. Sober*, 15 Pa. Super. 520; *Com. v. Kolb*, 13 Pa. Super. 347. **Va.**—*Morganstern v. Com.*, 94 Va. 787, 26 S. E. 402; *Com. v. Tiernan*, 4 Gratt. 545. **Wis.**—*Clifford v. State*, 29 Wis. 327; *State v. Bielby*, 21 Wis. 204.

See § STANDARD PROC. 242.

[a] While as a matter of public policy by statute each act has been individualized and made to amount to the full and complete offense, the statute has not changed and could not change the nature of the acts as possible parts

of the same transaction. *Com. v. Mentzer*, 162 Pa. 646, 29 Atl. 720.

[b] Where an offense is charged in the language of the statute, and the statute enumerates but a single offense, although the conjunctive is used, the indictment states but a single offense. *People v. Paquin*, 74 Mich. 34, 41 N. W. 852.

[c] Although the indictment or information contains different dates for the different acts, if the subsequent act is but a continuation of the previous one, the rule still applies. *People v. Leyshon*, 108 Cal. 440, 41 Pac. 480, forging note on one day and uttering it on another.

77. **U. S.**—*United States v. Fero*, 18 Fed. 901; *United States v. Nunne Macher*, 7 Biss. 129, 27 Fed. Cas. No. 15,903. **Cal.**—*People v. De La Guerra*, 31 Cal. 459. **Fla.**—*Irvin v. State*, 52 Fla. 51, 41 So. 785; *Bradley v. State*, 20 Fla. 738. **Ill.**—*People v. Machin*, 159 Ill. App. 125. **Ind.**—*Mergentheim v. State*, 107 Ind. 567, 8 N. E. 568; *Fahnestock v. State*, 102 Ind. 156, 1 N. E. 372; *Davis v. State*, 100 Ind. 154. **Kan.**—*State v. Sherman*, 81 Kan. 874, 107 Pac. 33, 135 Am. St. Rep. 403; *State v. Bush*, 70 Kan. 739, 79 Pac. 657; *State v. Dunn*, 66 Kan. 483, 71 Pac. 811; *State v. Meade*, 56 Kan. 690, 44 Pac. 619; *State v. Schweitzer*, 27 Kan. 499. **Ky.**—*Hinkle v. Com.*, 4 Dana 518. **Mass.**—*Com. v. Tuttle*, 12 Cush. 505. **Mo.**—*Storrs v. State*, 3 Mo. 7. **N. Y.**—*Boland v. People*, 25 Hun 423. **Va.**—*Com. v. Mentzer*, 162 Pa. 646, 29 Atl. 720; *Com. v. Miller*, 107 Pa. 276; *Com. v. Hall*, 23 Pa. Super. 104. **R. I.**—*State v. Nolan*, 15 R. I. 529, 9 Atl. 481. **Tex.**—*Beaumont v. State*, 1 Tex. App. 533, 23 Am. Rep. 424. **Va.**—*Morganstern v. Com.*, 94 Va. 787, 26 S. E. 402. **Wis.**—*Boldt v. State*, 72 Wis. 7, 38 N. W. 177; *State v. Geemmer*, 22 Wis. 442; *State v. Bielby*, 21 Wis. 205; *Byrne v. State*, 12 Wis. 519.

b. *Statute Punishing Several Acts Disjunctively.*—Where a statute forbids several acts disjunctively, all of which are punished after a violation of all may be alleged in one count if alleged conjunctively.

78. **U. S.**—*Ackley v. United States*, 299 Fed. 217, 118 C. C. A. 403; *United States v. Delaware, L. & W. R. Co.*, 152 Fed. 269; *United States v. Bernard*, 81 Fed. 634; *United States v. Jewett*, 81 Fed. 112; *United States v. Sander*, 6 McLean 598, 27 Fed. Cas. No. 16,219; *United States v. Hall*, 26 Fed. Cas. No. 15,282; *United States v. Armstrong*, 29 Leg. Int. 212, 24 Fed. Cas. No. 14,168. **Ala.**—*Wickard v. State*, 109 Ala. 45, 19 So. 491; *Turnipseed v. State*, 6 Ala. 664 (indiction of cruel and unusual punishment); *State v. Whitted*, 3 Ala. 102. **Ark.**—*Grant v. State*, 70 Ark. 290, 67 S. W. 397; *Koon v. State*, 64 Ark. 231, 41 S. W. 808; *Davis v. State*, 50 Ark. 17, 6 S. W. 388; *Slicker v. State*, 13 Ark. 397. **Cal.**—*People v. Gosset*, 93 Cal. 641, 29 Pac. 246; *People v. Tomlinson*, 35 Cal. 503; *People v. Hatch*, 13 Cal. App. 521, 109 Pac. 1097; *People v. Bunkers*, 2 Cal. App. 197, 84 Pac. 364, 370. **Colo.**—*People v. Fitzgerald*, 51 Colo. 175, 117 Pac. 135; *Kingsbury v. People*, 44 Colo. 453, 99 Pac. 61. **Conn.**—*State v. Burns*, 44 Conn. 149. **Fla.**—*Irvin v. State*, 52 Fla. 51, 41 So. 785; *Bradley v. State*, 20 Fla. 738. **Ga.**—*Kemp v. State*, 120 Ga. 157, 47 S. E. 548; *Cody v. State*, 118 Ga. 784, 45 S. E. 622; *Lepinsky v. State*, 7 Ga. App. 285, 66 S. E. 965. **Ill.**—*Blemer v. People*, 76 Ill. 265; *City of Chicago v. Hiltwein*, 161 Ill. App. 32. **Ind.**—*Wilson v. State*, 156 Ind. 417, 59 N. E. 1941; *Ferris v. State*, 156 Ind. 224, 59 N. E. 475; *State v. Sarlls*, 135 Ind. 195, 24 N. E. 1129; *Hobbs v. State*, 133 Ind. 404, 32 N. E. 1019, 18 L. R. A. 774; *Marshall v. State*, 123 Ind. 128, 23 N. E. 1141; *State v. Stout*, 112 Ind. 245, 13 N. E. 710; *Palmestock v. State*, 102 Ind. 156, 1 N. E. 372; *Davis v. State*, 100 Ind. 154; *Lohman v. State*, 81 Ind. 15; *Bickel v. State*, 32 Ind. App. 650, 70 N. E. 548. **Ind. Ter.**—*Stancliff v. United States*, 5 Ind. Ter. 486, 82 S. W. 882. **Ia.**—*State v. Corwin*, 151 Iowa 420, 131 N. W. 659; *State v. Yates*, 145 Iowa 332, 124 N. W. 174; *State v. Dvorack*, 140 Iowa 266, 118 N. W. 399; *State v. Des Moines Union R. Co.*, 137 Iowa 579, 115 N. W. 232; *State v. Lewis*, 96 Iowa 286, 65 N. W. 295; *State v. Phipps*, 95 Iowa 421, 64 N. W. 411; *State v. Paul*, 81 Iowa 596, 47 N. W. 773; *State v. Coester*, 16 Iowa 453. **Kan.**—*State v. Taylor*, 90 Kan. 438, 133 Pac. 861; *State v. Labaree*, 89 Kan. 664, 103 Pac. 106; *State v. Proctor*, 53 Kan. 657, 37 Pac. 109; *State v. Schweitzer*, 27 Kan. 429. **Ky.**—*James v. Com.*, 104 Ky. 468, 47 S. W. 238; *Jackson v. Com.*, 90 Ky. 488, 14 S. W. 102; *Hinkle v. Com.*, 4 Dana 518; *Com. v. Varnell*, 24 Ky. L. Rep. 144, 68 S. W. 136; *Perry v. Com.*, 5 Ky. L. Rep. 611. **La.**—*State v. Bohan*, 113 La. 734, 37 So. 714; *State v. Richards*, 33 La. App. 1294; *State v. Adam*, 31 La. App. 717; *State v. Markham*, 15 La. App. 408; *State v. Banton*, 4 La. App. 31. **Me.**—*State v. Hashell*, 76 Me. 309; *State v. Burgess*, 40 Me. 592; *State v. Churchill*, 25 Me. 206. **Mass.**—*Com. v. Dulan*, 121 Mass. 374; *Com. v. Nichols*, 10 Allen 199; *Com. v. Harris*, 13 Allen 534; *Com. v. Curtis*, 9 Allen 266; *Com. v. Wilcox*, 1 Cush. 503; *Com. v. Stowell*, 9 Mete. 569; *Stevens v. Com.*, 6 Mete. 241; *com. v. Eaton*, 15 Pick. 273; *Com. v. Johnson*, Thach. Cr. Cas. 284. **Mich.**—*People v. Clarke*, 105 Mich. 169, 69 N. W. 1117; *People v. Aldrich*, 104 Mich. 455, 62 N. W. 570; *People v. Keeler*, 97 Mich. 15, 56 N. W. 165. **Miss.**—*State v. Clark*, 97 Miss. 806, 52 So. 691; *Lee v. State*, 64 Miss. 201, 1 So. 51; *Miller v. State*, 5 How. 259. **Mo.**—*State v. Fournier*, 225 Mo. 642, 649, 125 S. W. 461; *State v. Grossman*, 214 Mo. 233, 113 S. W. 197; *State v. Fialder*, 210 Mo. 188, 109 S. W. 580; *State v. Mangumery*, 109 Mo. 645, 19 S. W. 221, 22 Am. St. Rep. 684; *State v. Manley*, 107 Mo. 364, 17 S. W. 800; *State v. Jones*, 106 Mo. 302, 17 S. W. 306; *State v. Findley*, 77 Mo. 238; *State v. Hunt*, 62 Mo. 393; *State v. McCollum*, 44 Mo. 243; *State v. Pittsingsous*, 30 Mo. 246; *State v. Ames*, 10 Mo. 740; *State v. McWilliams*, 7 Mo. App. 99. **Mont.**—*State v. McGinnis*, 14 Mont. 462, 36 Pac. 1046; *State v. Marion*, 14 Mont. 458, 36 Pac. 1044. **Neb.**—*Union Pacific R. Co. v. State*, 88 Neb. 547, 139 N. W. 277, Ann. Cas. 1911B, 292. **N. H.**—*State v. Perkins*, 42 N. H. 464. **N. J.**—*State v. Quinlan* (N. J. L.), 91 Atl. 111; *State v. Bartholomew*, 69 N. J. L. 160, 54 Atl. 241. **N. M.**—*Territory v. Harrington*, 17 N. M. 62, 161 Pac.

unless the indictment is thereby rendered repugnant.⁷⁹ Upon the same principle it is proper to conjunctively aver the commission of the

618. **N. Y.**—*People v. Kane*, 161 N. Y. 280, 30 N. E. 940; *Peak v. People*, 91 N. Y. 7; *People v. Davis*, 16 N. Y. 96; *People v. Schlosser*, 127 App. Div. 510, 112 N. Y. Supp. 45; *People v. Corbals*, 86 App. Div. 581, 83 N. Y. Supp. 782; *People v. Gagliardi*, 59 Misc. 652, 111 N. Y. Supp. 395. **N. C.**—*State v. Wyams*, 118 N. C. 1200, 24 S. E. 216. **N. D.**—*State v. Tolley*, 23 N. D. 284, 123 N. W. 784; *State v. Korn*, 3 N. D. 52, 18 N. W. 27. **Ohio.**—*Hale v. State*, 58 Ohio St. 676, 51 N. E. 154; *State v. Canner*, 39 Ohio St. 405. **Okl.**—*State v. Brown*, 10 Okla. Crim. 52, 133 Pac. 1143; *Antonoff v. State*, 3 Okla. Crim. 58, 107 Pac. 951. **Ore.**—*State v. White*, 48 Ore. 416, 87 Pac. 137; *State v. Dale*, 8 Ore. 299. **Pa.**—*Com. v. Carson*, 6 Phila. 381, 24 Leg. Int. 396; *United States v. Armstrong*, 5 Phila. 273. **R. I.**—*State v. Smith*, 29 R. I. 512, 72 Atl. 719; *State v. Providence Gas Co.*, 27 R. I. 142, 61 Atl. 41; *State v. Brady*, 16 R. I. 51, 12 Atl. 238; *State v. Nolan*, 15 R. I. 529, 9 Atl. 481; *State v. Wood*, 14 R. I. 151. **S. C.**—*State v. Beekroge*, 49 S. C. 484, 27 S. E. 658; *State v. Poser*, 7 Rich. L. 404. **S. D.**—*State v. Purkey*, 22 S. D. 550, 118 N. W. 1012; *State v. Donaldson*, 12 S. D. 259, 81 N. W. 299. **Tenn.**—*Wilcox v. State*, 3 Heisk. 110. **Tex.**—*Andrada v. State* (Tex. Crim.), 152 S. W. 910; *Willis v. State*, 34 Tex. Crim. 143, 29 S. W. 787; *Lancaster v. State*, 43 Tex. 519; *State v. Randle*, 41 Tex. 292; *Comer v. State*, 26 Tex. App. 509, 16 S. W. 106; *Nichols v. State*, 23 Tex. App. 317, 5 S. W. 239. **Vt.**—*State v. Matthews*, 42 Vt. 542; *State v. Brown*, 36 Vt. 560; *State v. Vermont, etc. R. Co.*, 28 Vt. 793; *State v. Woodward*, 25 Vt. 616. **Va.**—*Maryannson v. Com.*, 94 Va. 787, 20 S. E. 462; *Garraux v. Com.*, 81 Va. 224. **Wash.**—*State v. Pettit*, 74 Wash. 510, 123 Pac. 1014; *State v. Wappenstein*, 67 Wash. 302, 121 Pac. 989; *State v. Odegaard*, 15 Wash. 443, 46 Pac. 652. **Wis.**—*Johnson v. State*, 103 Wis. 553, 79 N. W. 700; *Bald v. State*, 72 Wis. 7, 18 N. W. 171. **Clifford v. State, 29 Wis. 137; *State v. Rieby*, 21 Wis. 301.**

[c] Where a statute makes it a crime to do this or that, or the other, mentioning several things disjunctively, all of which are punished alike, it is a

general rule that the whole may be charged conjunctively in a single count, as constituting but a single offense.⁷⁹ *Clifford v. State*, 29 Wis. 327. See also: **Colo.**—*Kingsbury v. People*, 44 Colo. 403, 99 Pac. 61. **Miss.**—*Coleman v. State*, 94 Miss. 860, 48 So. 181. **Neb.**—*Union Pacific R. Co. v. State*, 88 Neb. 547, 130 N. W. 277, Ann. Cas. 1912B, 936.

[b] Stating the successive gradations of statutory offenses, conjunctively when they are not repugnant is allowed. *State v. Pryor*, 53 Kan. 657, 37 Pac. 169.

[c] Where the statute makes indictable two or more distinct acts connected with the same transaction each of which may be considered as representing a phase of the same event, they may be coupled in the same count. **Ga.**—*Wingard v. State*, 13 Ga. 396. **Mass.**—*Com. v. Tobias*, 141 Mass. 129, 6 N. E. 217. **Miss.**—*Lea v. State*, 64 Miss. 201, 1 So. 51; *Murphy v. State*, 28 Miss. 637. **Pa.**—*Com. v. Miller*, 107 Pa. 276. **Tenn.**—*State v. Ailey*, 3 Heisk. 8; *State v. Irvine*, 3 Heisk. 155; *State v. Jopling*, 10 Humph. 418.

[d] That the charge seems to describe the crime under several sections of the code which define the one crime is no different than it would be where a number of different acts are described in a single section. *People v. Fisher*, 16 Cal. App. 271, 116 Pac. 688.

79. **Ia.**—*State v. Corwin*, 151 Iowa 420, 131 N. W. 659; *State v. Des Moines Union Ry. Co.*, 137 Iowa 570, 115 N. W. 232. **Mo.**—*State v. Flint*, 62 Mo. 393; *State v. Clarkson*, 59 Mo. 149. **N. M.**—*Territory v. Harrington*, 17 N. M. 62, 121 Pac. 613. **Vt.**—*State v. Woodward*, 25 Vt. 616.

[a] If the repugnant expression does not enter into the substance of the offense, and the indictment would be good without it, the repugnant expression will be rejected as surplusage. *State v. Flint*, 62 Mo. 393, 397.

[b] Repugnancy in the case of charging an offense by different means, exists where the proof of the commission by one of the means disproves the other. *State v. Pettit*, 74 Wash. 510, 123 Pac. 1014.

offense in the several different ways," or upon or with respect to the various things or properties enumerated disjunctively in the statute." Likewise where the statute enumerates disjunctively the different intents necessary to constitute the different offenses named, the intents, following the general rule, may be charged cumulatively," unless the different intents mentioned in the statute, render the defendant subject to different punishments.⁸¹

Where, however, the statute makes the offenses therein described, apparently as distinct and independent as if it had been enacted in separate sections, the different offenses cannot be included in the same count but they should be joined in different counts in such a way as to show that they all relate to the same act and transaction.⁸⁴

80. **Ala.**—*Johnson v. State*, 32 Ala. 583, 584; *Turnipseed v. State*, 6 Ala. 664, indicting cruel and unusual punishment. **Ia.**—*State v. Browning*, 155 Iowa 37, 133 N. W. 330. **Me.**—*State v. Willis*, 78 Me. 70, 2 Atl. 848; *State v. Long*, 63 Me. 215. **Mass.**—*Com. v. Moody*, 143 Mass. 177, 9 N. E. 511; *Com. v. Harris*, 13 Allen 534, 539. **Okla.** *Flohr v. Territory*, 14 Okla. 477, 78 Pac. 565. **Tex.**—*Murdock v. State*, 52 Tex. Crim. 262, 106 S. W. 374. **Vt.**—*State v. Haven*, 59 Vt. 399, 9 Atl. 841; *State v. Clark*, 44 Vt. 636; *State v. Mathews*, 42 Vt. 542; *State v. Morton*, 27 Vt. 310, 65 Am. Dec. 201.

81. **Cal.**—*People v. Henry*, 77 Cal. 445, 19 Pac. 830, burglarious entry of a house, room, apartment, tenement, shop, warehouse, store and building. **Mass.**—*Com. v. Gray*, 2 Gray 592, selling "spirited and intoxicating liquor." **R. I.**—*State v. Brady*, 16 R. I. 51, 12 Atl. 238, grogshop, tippling shop, or building, place or tenement. **Tex.**—*Morris v. State*, 57 Tex. Crim. 103, 121 S. W. 1412, keeping and exhibiting a gambling table and bank. **W. Va.**—*State v. Calhoun*, 67 W. Va. 666, 69 S. E. 1098, sell, offer and expose for sale wine, porter, ale, beer, drinks of like nature.

82. **Ala.**—*Turnipseed v. State*, 6 Ala. 664. **Cal.**—*People v. Ah Woo*, 28 Cal. 296; *People v. Barnovich*, 16 Cal. App. 427, 117 Pac. 572; *People v. Swails*, 12 Cal. App. 122, 107 Pac. 124. **Conn.** *State v. Falk*, 66 Conn. 250, 33 Atl. 913; *State v. Bosworth*, 51 Conn. 1, 4 Atl. 248; *State v. Burns*, 41 Conn. 149. **Fla.**—*King v. State*, 17 Fla. 183, 186. **Ky.**—*Miller v. Com.*, 13 Bush 731. **La.** *State v. Nicholson*, 45 La. Ann. 1172, 14 So. 132; *State v. Adam*, 31 La. Ann.

717; *State v. Banton*, 4 La. Ann. 32. **Me.**—*State v. Burgess*, 40 Me. 392. **Mass.**—*Com. v. Igo*, 158 Mass. 109, 33 N. E. 529; *Com. v. Clancy*, 153 Mass. 128, 27 N. E. 1001; *Com. v. Moody*, 143 Mass. 177, 9 N. E. 511. **Miss.**—*State v. Clark*, 97 Miss. 806, 52 So. 691. **N. J.** *Francisco v. State*, 24 N. J. L. 30. **Ohio.** *Linder v. State*, 9 Ohio C. C. (N. S.) 177. **Okla.**—*Childs v. State*, 4 Okla. Crim. 174, 113 Pac. 545, 33 L. R. A. (N. S.) 563; *Flohr v. Territory*, 14 Okla. 477, 78 Pac. 565. **Tenn.**—*Robeson v. State*, 3 Hols. 266. **Wash.**—*State v. Townsend*, 7 Wash. 462, 35 Pac. 367, 367.

See also *Woodford v. People*, 62 N. Y. 117, 20 Am. Rep. 464; *Griffin v. State*, 109 Tenn. 17, 70 S. W. 61.

83. *Woodford v. People*, 62 N. Y. 117, 20 Am. Rep. 464; *State v. Dorsett*, 21 Tex. 656.

84. **U. S.**—*United States v. American Naval Stores Co.*, 186 Fed. 592. **Ark.** *State v. St. Louis & S. F. R. Co.*, 82 Ark. 254, 103 S. W. 625; *State v. St. Louis & S. F. R. Co.*, 82 Ark. 249, 103 S. W. 623. **Cal.**—*People v. Plath*, 166 Cal. 227, 125 Pac. 954; *People v. Lee*, 107 Cal. 477, 480, 40 Pac. 754. **Kan.** *State v. Goodwin*, 33 Kan. 538, 6 Pac. 829. **Mich.**—*Chase v. Van Buren Chm. Judge*, 148 Mich. 149, 111 N. W. 769. **Miss.**—*Miller v. State*, 5 How. 260. **Mo.**—*State v. Adams*, 179 Mo. 394, 78 S. W. 788; *State v. Gibson*, 111 Mo. 92, 19 S. W. 980; *State v. Sherman*, 157 Mo. App. 79, 119 S. W. 479; *State v. Nicholas*, 124 Mo. App. 330, 101 S. W. 618. **Neb.**—See *State v. Dannison*, 66 Neb. 192, 82 N. W. 628. **Okla.**—See *Milton v. State*, 4 Okla. Crim. 372, 111 Pac. 654. **Vt.**—*State v. Haven*, 59 Vt. 399, 9 Atl. 841.

6. **Insufficient Charge of Second Offense.**—*a. In General.*—To render the indictment bad for duplicity it is necessary that two or more offenses be pleaded in such a manner as to sufficiently charge the commission of both offenses,⁸⁵ for all defective or insufficient charges will be treated as surplusage and rejected,⁸⁶ and if, after all insufficient charges have been thus rejected, there remains but one adequately charged offense, the pleading is not invalidated by their inclusion therein.⁸⁷ However, no offense which is sufficiently alleged can be rejected as surplusage.⁸⁸

b. Incidental Reference to Other Offense.—When the language of the indictment describes another offense, without seeking a conviction thereon,⁸⁹ which offense is referred to merely by way of explanation,⁹⁰

85. **U. S.**—United States *v.* Patty, 9 Biss. 429, 2 Fed. 664. **Ark.**—Fox *v.* State, 102 Ark. 451, 145 S. W. 228. **Conn.**—State *v.* Corrigan, 24 Conn. 286. **Ind.**—Stewart *v.* State, 111 Ind. 554, 13 N. E. 59; State *v.* Smith, 85 Ind. 553; Herron *v.* State, 17 Ind. App. 161, 46 N. E. 549. **Ia.**—State *v.* Madden, 148 N. W. 295; State *v.* Edmunds, 127 Iowa 333, 161 N. W. 431; State *v.* Smouse, 59 Iowa 43; State *v.* McClintock, 8 Iowa 203. **Kan.**—State *v.* Appleby, 66 Kan. 451, 71 Pac. 847; State *v.* Lillie, 24 Kan. 523. **Ky.**—Jackson *v.* Com., 17 S. W. 213; South *v.* Com., 79 Ky. 493; Com. *v.* Powell, 8 Bush 7. **La.**—State *v.* Desroche, 47 La. Ann. 651, 17 So. 299; State *v.* Taylor, 35 La. Ann. 825. **Me.**—State *v.* Leavitt, 87 Me. 73, 32 Atl. 787; State *v.* Haskell, 76 Me. 399; State *v.* Palmer, 35 Me. 9. **Mass.**—Com. *v.* Hart, 10 Gray 465; Larned *v.* Com., 12 Mete. 240, 245; Com. *v.* Stowell, 9 Mete. 569; Com. *v.* Tuck, 20 Pick. 356; Com. *v.* Bolkom, 3 Pick. 281. **Minn.**—State *v.* Grimes, 59 Minn. 123, 52 N. W. 275; State *v.* Henn, 39 Minn. 464, 46 N. W. 594; State *v.* Kobe, 26 Minn. 148, 1 N. W. 1054. **Miss.**—Stone *v.* State, 7 So. 500. **Mo.**—State *v.* Knoek, 142 Mo. 515, 44 S. W. 235; State *v.* Maufen, 57 Mo. 205. **Neb.**—State *v.* Hall, 27 Neb. 601, 43 N. W. 298. **Nov.**—State *v.* Lawry, 4 Nov. 161. **N. H.**—State *v.* Rollins, 55 N. H. 101. **N. J.**—State *v.* Middlesex & S. Tract. Co., 67 N. J. L. 14, 59 Atl. 354. **N. Y.**—Pellusky *v.* People, 73 N. Y. 65; Dawson *v.* State, 15 N. Y. 309; People *v.* Kane, 43 App. Div. 473, 61 N. Y. Supp. 195, 632; People *v.* Willis, 24 Misc. 537, 54 N. Y. Supp. 129. **N. C.**—State *v.* Harris, 106 N. C. 383, 11 S. E. 377. **Okl.**—Guthrie *v.* Territory, 2 Okla. 523, 37 Pac. 839. **Ore.**—Borchard *v.* State,

2 Ore. 78. **Pa.**—Hutchison *v.* Com., 82 Pa. 472; Jillard *v.* Com., 26 Pa. 169; Com. *v.* Rogers, 1 Serg. & R. 124. **Tex.**—Crow *v.* State, 41 Tex. 468; State *v.* Coffey, 41 Tex. 46; Thompson *v.* State, 30 Tex. 356; Dunham *v.* State, 9 Tex. App. 330; Henderson *v.* State, 2 Tex. App. 88. **Utah.**—State *v.* Thompson, 31 Utah 228, 87 Pac. 709. **Wis.**—McKinney *v.* State, 25 Wis. 378.

[a] **Added matter which standing alone does not charge an offense will not vitiate the indictment.** State *v.* Mitten, 36 Mont. 376, 92 Pac. 969; State *v.* Merchant, 48 Wash. 69, 92 Pac. 890.

86. **Ark.**—State *v.* Bledsoe, 47 Ark. 233, 1 S. W. 149. **Ia.**—State *v.* Hull, 83 Iowa 112, 48 N. W. 917. **Miss.**—Stone *v.* State, 7 So. 500. **N. Y.**—People *v.* Kane, 43 App. Div. 472, 61 N. Y. Supp. 195. **Tex.**—Herrington *v.* State (Tex. Crim.), 166 S. W. 721. **Utah.**—State *v.* Thompson, 31 Utah 228, 87 Pac. 709.

See *supra*, IX, J, 1, b; XI, A, 2.

87. State *v.* Frutiger (Iowa), 149 N. W. 634; State *v.* Pedigo (Mo. App.), 176 S. W. 556.

88. **U. S.**—State *v.* Patty, 2 Fed. 664. **Ind.**—State *v.* Weil, 89 Ind. 286. **Ia.**—State *v.* Osborne, 96 Iowa 281, 65 N. W. 159. **Ky.**—Com. *v.* Powell, 8 Bush 7. **Mo.**—State *v.* Palmer, 35 Me. 9. **Mass.**—Com. *v.* Atwood, 11 Mass. 92. **Mo.**—State *v.* Bach, 25 Mo. App. 554. **N. D.**—State *v.* Mattison, 13 N. D. 391, 100 N. W. 1091; State *v.* Marks, 3 N. D. 532, 58 N. W. 25. **Tex.**—Beaumont *v.* State, 1 Tex. App. 523, 28 Am. Rep. 424.

89. United States *v.* Davis, 103 Fed. 457.

90. **Ark.**—State *v.* Hester, 48 Ark. 40, 2 S. W. 339; State *v.* Bledsoe, 47

description,"⁹¹ or aggravation,"⁹² the indictment is not duplicitous. Likewise an offense pleaded merely by way of indictment or introduction will not render the pleading double.⁹³ Upon the same principle if a second offense is pleaded merely as illustrative of the intent with which the main offense was committed and not with the intention of charging a distinct offense, there is no duplicity.⁹⁴

Ark. 233, 1 S. W. 146; *State v. Horn*, 19 Ark. 178. Cal.—*People v. Boyle*, 63 Cal. 153, 28 Pac. 232; *People v. An Own*, 39 Cal. 604, assault and battery as mode of executing a forcible arrest. Ind.—*Super v. State*, 99 Ind. 71; *State v. Pansake*, 74 Ind. 15. Ia.—*State v. Osborne*, 96 Iowa 281, 65 N. W. 129; *State v. Grossheim*, 79 Iowa 75, 41 N. W. 541 (charging statutory rape and alleging that the act was done forcibly and against the will of the female); *State v. Hull*, 83 Iowa 112, 48 N. W. 917; *State v. Hayden*, 45 Iowa 11; *State v. Newton*, 44 Iowa 45. Me.—*State v. Trowbridge*, 112 Me. 16, 90 Atl. 494, statement of several reasons why certain property is a nuisance. Mass.—*Com. v. Holmes*, 165 Mass. 437, 43 N. E. 189; *Com. v. Darling*, 129 Mass. 112; *Com. v. Brown*, 14 Gray 419; *Com. v. Halbert*, 12 Met. 446; *Com. v. Harnoy*, 10 Mete. 422. Mich.—See *People v. Wade*, 101 Mich. 89, 59 N. W. 428. Mo.—*State v. Wilson*, 143 Mo. 324, 41 S. W. 722; *State v. Adams*, 108 Mo. 298, 18 S. W. 1060. Neb.—*Deuman v. State*, 15 Neb. 138, 17 N. W. 347. N. H.—*State v. Gorham*, 55 N. H. 152. N. J.—*State v. Kelsey*, 80 N. J. L. 641, 77 Atl. 1028. Ore.—*State v. Ryan*, 15 Ore. 372, 16 Pac. 417. Tex.—*Thompson v. State*, 36 Tex. 350. Vt.—*State v. Farcy*, 61 Vt. 624, 18 Acl. 451, impeding an officer by assaulting him. Wash.—*State v. Townsend*, 7 Wash. 402, 35 Pac. 367.

91. Cal.—*People v. Baum*, 66 Cal. 394, 5 Pac. 677. Conn.—*Rawson v. State*, 19 Conn. 292. Ky.—*Johnson v. Com.*, 90 Ky. 488, 14 S. W. 422; *Rawlins v. Com.*, 7 Ky. L. Rep. 535. Me.—*State v. Trowbridge*, 112 Me. 16, 90 Atl. 494. Mass.—*Com. v. Bailon*, 124 Mass. 26. Mich.—*People v. Scott*, 99 Mich. 376, 51 N. W. 520; *Lotou v. Circuit Judge*, 69 Mich. 610, 37 N. W. 701. Tex.—*Segars v. State*, 35 Tex. Cyle, 43, 31 S. W. 376.

92. Ia.—*State v. Grant*, 82 Iowa 216, 63 N. W. 120; *State v. Ormiston*,

66 Iowa 143, 23 N. W. 370. Md.—*State v. Buchanan*, 5 Har. & J. 317, 2 Am. Ins. 334. Mass.—*Com. v. Clarke*, 108 Mass. 405, 39 N. E. 280; *Com. v. Powers*, 113 Mass. 387; *Com. v. Judd*, 9 Mass. 329, 3 Am. Dec. 51. Mich.—*People v. Aldrich*, 104 Mich. 425, 65 N. W. 379. Mo.—*State v. Flanders*, 118 Mo. 267, 23 S. W. 1086. Pa.—*Com. v. Lewis*, 140 Pa. 561, 21 Acl. 501 (allegation of rape and birth of child); *Queman v. Com.*, 124 Pa. 536, 17 Atl. 26 (adultery and bastardy); *Hunter v. Com.*, 79 Pa. 508, felonious assault with intent to murder. Tex.—*Beaumont v. State*, 1 Tex. App. 533, 28 Am. Rep. 594. Vt.—*State v. Noyes*, 25 Vt. 415.

[a] An allegation of former conviction by way of aggravation does not render the indictment objectionable as being duplicitous. Cal.—*People v. Boyle*, 64 Cal. 153, 28 Pac. 232. Mo.—*State v. Moore*, 121 Mo. 514, 26 S. W. 846; *State v. Austin*, 113 Mo. 538, 21 S. W. 31. Eng.—*Reg. v. Clark*, 6 Cox C. C. 210.

93. *Com. v. Ressemer & L. E. R. Co.*, 36 Pa. Super. 540.

94. Ala.—*Welch v. State*, 156 Ala. 112, 46 So. 850; *Bailey v. State*, 116 Ala. 437, 22 So. 918; *Walker v. State*, 97 Ala. 85, 12 So. 83. Cal.—*People v. Hatch*, 13 Cal. App. 521, 169 Pac. 1097. Ga.—*Berry v. State*, 124 Ga. 825, 73 S. E. 316. Ind.—*Nazel v. State*, 170 Ind. 525, 84 N. E. 972; *Reed v. State*, 147 Ind. 41, 46 N. E. 125. Ia.—*State v. Osborne*, 96 Iowa 281, 65 N. W. 129. Ky.—*Parris v. Com.*, 90 Ky. 637, 14 S. W. 681; *Olive v. Com.*, 5 Bush 376. La.—*State v. Lewis*, 129 La. 800, 52 So. 803. Mich.—*People v. Van Alstede*, 27 Mich. 69, 23 N. W. 594. N. Y.—*People v. Gallagher*, 58 Misc. 512, 131 N. Y. Supp. 473. Ore.—*State v. Atwood*, 34 Ore. 229, 162 Pac. 295, 194 Pac. 106. W. Va.—*State v. Grove*, 61 W. Va. 609, 67 S. E. 290.

[b] As indictment charging the breaking and entering of a car, and after breaking and entering, the steal-

However, in all such cases, if the offense mentioned is itself fully and sufficiently charged, it will render the pleading defective for duplicity.⁹⁵

7. Same Act Affecting Different Persons and Things.—In the case of offenses denominated, by some courts, compound offenses, where in the same transaction more than one offense has been committed, the indictment may in one count charge the several offenses without offending the rule against duplicity.⁹⁶ But if the act or transaction is

ing therefrom, is not double, for the allegation of stealing is made simply to illustrate the intent of the accused at the time of the breaking and entry. *Berry v. State*, 124 Ga. 825, 53 S. E. 316. See also *State v. Shaffer*, 59 Iowa 290, 13 N. W. 306; *State v. Hayden*, 45 Iowa 11, wherein it is held that the stealing in such case is mere evidence and surplusage.

95. *State v. Mattison*, 13 N. D. 391, 109 N. W. 1091. See *supra*, XI, A. 6, a.

96. **U. S.**—*Anderson v. United States*, 170 U. S. 481, 18 Sup. Ct. 689, 42 L. ed. 1116; *Dunlop v. United States*, 165 U. S. 486, 17 Sup. Ct. 375, 41 L. ed. 799; *Clark v. United States*, 211 Fed. 916, 128 C. C. A. 294 (leaving for transportation several obscene books addressed to different persons. Compare *United States v. Clark*, 125 Fed. 92); *Lee v. United States*, 156 Fed. 948, 84 C. C. A. 448; *United States v. Scott*, 74 Fed. 213; *United States v. Patty*, 2 Fed. 624. **Ala.**—*Crittenden v. State*, 134 Ala. 145, 32 So. 273; *Ben v. State*, 22 Ala. 9, 58 Am. Dec. 234. **Cal.**—*People v. De La Guerra*, 31 Cal. 459. **Fla.**—*Davis v. State*, 46 Fla. 137, 35 So. 76. **Ga.**—See *Mitchell v. State*, 6 Ga. App. 554, 65 S. E. 326. **Ind.**—*Clem v. State*, 42 Ind. 420, 13 Am. Rep. 369; *Todd v. State*, 31 Ind. 514. **Ia.**—*State v. Ashpole*, 127 Iowa 689, 104 N. W. 281; *State v. Ridley*, 48 Iowa 370; *State v. McPherson*, 9 Iowa 53; *State v. Barrett*, 8 Iowa 586; *State v. McClintock*, 8 Iowa 203. **Kan.**—*State v. Johnson*, 70 Kan. 861, 79 Pac. 732; *State v. Dunn*, 66 Kan. 483, 71 Pac. 811; *State v. Mende*, 56 Kan. 600, 44 Pac. 619. **Ky.**—*Tracy v. Com.*, 87 Ky. 578, 9 S. W. 822; *Com. v. Duff*, 87 Ky. 586, 9 S. W. 816. **La.**—*State v. Estren*, 108 La. 479, 32 So. 478. **Mass.**—*Com. v. O'Brien*, 107 Mass. 208; *Com. v. McLaughlin*, 12 Cuth. 415; *Com. v. Tamora*, 10 Gray 483. **Mich.**—*People v. Ellsworth*, 90 Mich. 442, 51 N. W. 531. **Miss.**—*Wil-*

kinson v. State, 77 Miss. 705, 27 So. 639. **Mo.**—*State v. Jackson*, 242 Mo. 410, 146 S. W. 1166, keeping several gambling houses. **Neb.**—*Lawhead v. State*, 46 Neb. 607, 65 N. W. 779; *Aiken v. State*, 41 Neb. 263, 59 N. W. 888. **N. Y.**—*Woodford v. People*, 62 N. Y. 117, 20 Am. Rep. 464; *Boland v. People*, 25 Hun 423. **Okla.**—*De Graff v. State*, 2 Okla. Crim. 519, 103 Pac. 538. **Pa.**—*Hutchinson v. Com.*, 82 Pa. 472; *Com. v. Ault*, 10 Pa. Super. 651. **R. I.**—*Kenney v. State*, 5 R. I. 385. **Tenn.**—*Forrest v. State*, 13 Lea 193; *Kannon v. State*, 10 Lea 386; *Womack v. State*, 7 Coldw. 508; *Cornell v. State*, 7 Baxt. 520; *Fowler v. State*, 3 Heisk. 154. **Tex.**—*Scott v. State*, 46 Tex. Crim. 305, 81 S. W. 950 (assault with intent to murder two persons); *State v. Bradley*, 34 Tex. 95; *Clark v. State*, 28 Tex. App. 189, 12 S. W. 729, 19 Am. St. Rep. 817; *Chivarrio v. State*, 15 Tex. App. 330; *Rucker v. State*, 7 Tex. App. 549. **Utah.**—*State v. Anderson*, 35 Utah 496, 101 Pac. 385. **Va.**—*Benton v. Com.*, 91 Va. 782, 21 S. E. 495. **Wis.**—*Cornell v. State*, 104 Wis. 527, 80 N. W. 745; *McKinney v. State*, 25 Wis. 373.

[a] **Test for Determining Whether Offense Is Single or Double.**—To hold the shooting of two mules, to be but one offense it is not requisite that the places be identical and the time be precisely the same, nor that each animal be wounded by the same bullet; but there must be such immediate relation between the two acts of shooting as that the last can be said to be in a train of continuation of the first, actuated by a purpose which is common to both and continuing accompanied by effort to effectuate it from and covering the first act to and embracing the second act, as where a person whose crops are being depredated upon by two mules shoots one of them and immediately pursues the other in

broken up by extrinsic action the offenses become distinct and a joinder would render the indictment duplicious.⁸⁷ And if, in the pursuit of a single criminal enterprise, two or more offenses are committed which are independent of each other, both cannot be charged in the same count.⁸⁸ Applying the general rule, however, the offense may be considered single although it affect several persons⁸⁹ or several

its flight and shoots it also when he comes up with it. (*Busby v. State*, 77 Ala. 681, in which the interval of time between the two shootings was such a space as permitted one, walking rapidly, to go about a quarter of a mile,—perhaps three minutes). But where one of the animals is shot at one time and place, and they both then disappear, leaving the premises and the person firing the shot then desists from further effort toward them and returns to his work, and they subsequently are again found in another field, or another part of his field, and he again comes upon them incidentally and shoots the other, the offenses are as distinct as if a day or three days instead of an half hour had intervened. (*Meadows v. State*, 136 Ala. 67, 34 So. 183. See also *Waters v. People*, 194 Ill. 544, 545; *State v. Nieuhaus*, 217 Mo. 332, 117 S. W. 73.

[b] **Murder by poisoning several persons by one and the same act.** *Ben v. State*, 22 Ala. 2, 58 Am. Dec. 234. *Contra*, *People v. Alibez*, 49 Cal. 452, 1 Ann. Crim. Rep. 345. *Compare* *State v. Cooper*, 13 N. J. L. 361, 25 Am. Dec. 390.

97. *Ala.*—See *Meadows v. State*, 136 Ala. 67, 34 So. 183. *S. C.*—*State v. Thurston*, 2 McMull. 382. *Tenn.*—*State v. Phillips*, 85 Tenn. 551, 3 S. W. 434.

98. *Ala.*—*State v. Standifer*, 5 Port. 523. *Cal.*—*People v. De Coursey*, 61 Cal. 134; *People v. Alibez*, 49 Cal. 252, 1 Ann. Crim. Rep. 345; *People v. Garnett*, 29 Cal. 622. *Ia.*—*State v. Ridley*, 48 Iowa 370. *N. D.*—*State v. Smith*, 2 N. D. 515, 52 N. W. 320.

[a] **Robbery of different individuals on a stage although committed in the same place and in rapid succession constitute separate offenses.** *La re Allison*, 13 Cal. 565, 22 Pac. 820, 16 Am. St. Rep. 224, 10 L. R. A. 790.

[b] **Murder and rape although part of same transaction, cannot be joined in one count, nor can burglary with unlawful intent, and larceny.** *State v. Ridley*, 48 Iowa 370.

[c] **Receiving stolen goods belonging to two different persons constitutes two offenses and cannot be charged in one count.** *Kilrow v. Com.*, 89 Pa. 480. See *Com. v. Andrews*, 2 Mass. 499; and the title "Receiving Stolen Goods." *Compare* *State v. Nelson*, 29 Me. 329.

[d] **Mere Contemporaneity Insufficient.**—Malicious wounding of two persons, although contemporaneous, should not be charged in one indictment. *Campbell v. Com.*, 3 Ky. L. Rep. 625.

[e] **Something more than the felonious killing on the same occasion, or in the same affray is necessary to make two acts of killing one offense.** If the physical acts of assault and killing are distinct, and the intention to kill one is an intention formed, and existing distinct from and independently of the intention to kill the other, the two acts cannot constitute the single offense of murder. *Womack v. State*, 7 Coldw. (Tenn.) 508.

99. *U. S.*—*Neall v. United States*, 118 Fed. 699, 56 C. C. A. 31; *United States v. Westman*, 182 Fed. 1017. *Ga.* *Smith v. State*, 63 Ga. 168. *Ind.*—*State v. Sittason*, 179 Ind. 573, 101 N. E. 1010; *State v. Paris*, 179 Ind. 703, 101 N. E. 1005; *Joslyn v. State*, 128 Ind. 160, 27 N. E. 492, 25 Am. St. Rep. 425; *Henry v. State*, 113 Ind. 304, 15 N. E. 593. *Ia.*—*State v. Pierce*, 77 Iowa 245, 42 N. W. 181; *State v. O'Mally*, 48 Iowa 501. *Kan.*—*State v. Johnson*, 79 Kan. 861, 79 Pac. 732. *Ky.*—*Tracy v. Com.*, 6 Ky. L. Rep. 419, libel of two persons. *La.*—*State v. Batson*, 108 La. 479, 32 So. 478. *Mich.*—*People v. Durham*, 170 Mich. 598, 136 N. W. 431. *Minn.*—*State v. Ames*, 91 Minn. 365, 28 N. W. 190, receiving bribe from several persons. *Miss.*—*Wilkinson v. State*, 77 Miss. 705, 27 So. 639. *Neb.*—*Goodard v. State*, 73 Neb. 739, 103 N. W. 443. *Okla.*—*Shuford v. State*, 4 Okla. Crim. 513, 113 Pac. 211. *Ore.*—*State v. Hosmer*, 142 Pac. 581, libel against a convent and mother superior. *Pa.* *Fulmer v. Com.*, 97 Pa. 503, 506. *R. I.*

articles or properties.¹ Accordingly, if by the same transaction different articles are stolen, whether or not they belong to the same or different persons, the whole may be charged as one offense, the reason being that the gist of the offense is the felonious taking of property of another, and the ownership of the property is not charged to give char-

Kenney v. State, 5 R. I. 385. *Tex.* *Roberts v. State*, 51 *Tex. Crim.* 27, 100 S. W. 150; *Scott v. State*, 46 *Tex. Crim.* 305, 81 S. W. 959; *Wallace v. State* (*Tex. Crim.*), 40 S. W. 305; *Thompson v. State*, 35 *Tex. Crim.* 511, 34 S. W. 629; *State v. Edmondson*, 43 *Tex.* 162 (libel of different persons in one article); *State v. Bradley*, 34 *Tex.* 95; *Chivarrío v. State*, 15 *Tex. App.* 339; *Rucker v. State*, 7 *Tex. App.* 549. *Vt.* *State v. Stevens*, 81 *Vt.* 454, 70 *Atl.* 1060; *State v. Newton*, 42 *Vt.* 537; *State v. Damon*, 2 *Tyler* 387. *Va.* *Sprouse v. Com.*, 81 *Va.* 374. *Wash.* *State v. McCormick*, 56 *Wash.* 469, 105 *Pac.* 1037, selling liquor to several minors. *Wis.*—*Cornell v. State*, 104 *Wis.* 527, 80 N. W. 745. *Eng.*—*Rex v. Jenour*, 7 *Mod.* 490, 87 *Eng. Reprint* 1318. Libel of different persons in one article.

See generally the titles "Assault and Battery;" "Larceny;" "Libel and Slander;" "Robbery;" and other titles treating crimes which may be committed against several persons at the same time.

[a] §1024, U. S. Rev. St., providing: "When there are several charges against any person for the same act or transaction or for two or more acts or transactions connected together or for two or more acts or transactions for the same class of crimes or offenses which may properly be joined instead of having several indictments, the whole may be joined in one indictment in separate counts," does not affect right of a prosecutor to treat as one offense a single act involving several different and similar violations of the law. *United States v. Scott*, 74 *Fed.* 213.

[b] An assault upon two or more persons at the same time. *Mich.*—*People v. Ellsworth*, 96 *Mich.* 442, 59 N. W. 521. *Mo.*—*State v. Rambo*, 95 *Mo.* 402, 8 S. W. 305, assault by four different persons with intent to kill nine different persons. *Tenn.*—*Fowler v. State*, 3 *Hobk.* 154; *State v. Williams*, 19 *Humph.* 101; *Womack v. State*, 7 *Coldw.* 598.

[c] The charge of the discharging a firearm with intent to kill two persons may be properly made in separate counts, but the charge in one count is not such a defect of form as prejudices the substantial rights of the defendant upon the merits. *People v. Rockhill*, 74 *Hun* 241, 26 *N. Y. Supp.* 222.

[d] An indictment charging two persons with receiving the earnings of a prostitute is not duplicitous. *State v. Columbus*, 74 *Wash.* 290, 133 *Pac.* 455.

[e] An attempt to take and entice away two children with intent to conceal and detain them, is a single offense and the allegation of the intent to injure two persons does not make the pleading duplicitous. "It was the attempt for which the defendant was prosecuted, not the consummation. The attempt was but a single fact, though it may have embraced several steps and may have included in its object more than one person." *People v. Milne*, 60 *Cal.* 71.

1. *Ala.*—*Busby v. State*, 77 *Ala.* 66. *Cal.*—*People v. Phipp*, 39 *Cal.* 326, arson of two buildings. *Ga.*—*Young v. State*, 4 *Ga. App.* 827, 62 S. E. 558. *Ind.* *Hayworth v. State*, 14 *Ind.* 590. *Ia.* *State v. Paul*, 81 *Iowa* 596, 47 N. W. 773 (cutting trees on different sections of land not contiguous, held to be but one offense if in point of time and circumstances the cutting was done as a single act); *State v. Pierce*, 77 *Iowa* 245, 42 N. W. 181. *Kan.*—*State v. Meade*, 56 *Kan.* 690, 44 *Pac.* 619. *Ky.* *Lisle v. Com.*, 82 *Ky.* 250. *Miss.*—*Clue v. State*, 78 *Miss.* 661, 29 *So.* 516, 84 *Am. St. Rep.* 643. *Nev.*—*State v. Ward*, 19 *Nev.* 297, 10 *Pac.* 133. *N. J.* *State v. Castle*, 75 *N. J. L.* 187, 66 *Atl.* 1059, failure of police to suppress many houses. *N. Y.*—*Coats v. People*, 4 *Park. Crim.* 662. *Tex.*—*Thompson v. State*, 35 *Tex. Crim.* 511, 34 S. W. 629. *Utah.* *People v. Hill*, 3 *Utah* 334, 3 *Pac.* 75. *Vt.*—*State v. Stevens*, 81 *Vt.* 454, 70 *Atl.* 1060.

See § STANDARD PROC. 242.

acter to the act of taking but merely by way of description."

8. Greater and Lesser Included Offenses.—The charge of an offense and an included offense in the same count is not duplicative.

2. U. S.—United States v. Scott, 74 Fed. 213; United States v. Beerman, 5 Cranch C. C. 412, 24 Fed. Cas. No. 14,560. D. C.—Holles v. United States, 2 MacArthur 370, 36 Am. Rep. 196. Ga.—Lowe v. State, 57 Ga. 171; Dean v. State, 9 Ga. App. 571, 71 S. E. 932. Ill.—Waters v. People, 104 Ill. 544. Ind.—Furnace v. State, 153 Ind. 93, 54 N. E. 441. See Joslyn v. State, 128 Ind. 160, 27 N. E. 492, 25 Am. St. Rep. 425. Ia.—State v. Congrove, 109 Iowa 66, 80 N. W. 227; State v. Larson, 85 Iowa 659, 52 N. W. 539; State v. Paul, 81 Iowa 596, 47 N. W. 773. Ky.—Nichols v. Com., 78 Ky. 189. La.—State v. Faulkner, 32 La. Ann. 725. Me.—State v. Nelson, 29 Me. 329. Md.—State v. Warren, 77 Md. 121, 26 Atl. 509, 39 Am. St. Rep. 401. Mass.—Com. v. Parker, 145 Mass. 524, 43 N. E. 432; Bush v. Com., 118 Mass. 507; Com. v. Sullivan, 104 Mass. 312. Mich.—People v. Johnson, 81 Mich. 373, 45 N. W. 1112. Mo.—State v. Wagner, 118 Mo. 629, 24 S. W. 219; State v. Morphin, 37 Mo. 376; State v. Daniels, 22 Mo. 568; Lorton v. State, 7 Mo. 55, 37 Am. Dec. 179. Mont.—State v. Mjolda, 29 Mont. 499, 75 Pac. 87. Nev.—State v. Douglas, 24 Nev. 196, 45 Pac. 802, 99 Am. St. Rep. 688; State v. Ward, 19 Nev. 297, 10 Pac. 123. N. H.—State v. Snyder, 50 N. H. 150; State v. Merrill, 44 N. H. 624. N. C.—State v. Darden, 117 N. C. 637, 23 S. E. 109; State v. Martin, 52 N. C. 672. Ohio.—State v. Hennessy, 23 Ohio St. 339, 13 Am. Rep. 253; State v. Smith, 16 Ohio Dec. (Reprint) 682. Ore.—State v. Clark, 46 Ore. 140, 80 Pac. 101; State v. McCormack, 8 Ore. 236. Pa.—Palmer v. Com., 97 Pa. 503; Com. v. Ault, 10 Pa. Super. 651. S. C.—State v. Holland, 5 Rich. L. 512; State v. Thurston, 2 McMull, 382; State v. Johnson, 3 Hill 1. S. D.—State v. Kieffer, 17 S. D. 67, 55 N. W. 280. Tenn.—Kelly v. State, 7 East. 323; Womack v. State, 7 Caldwell, 508; State v. Williams, 10 Humph. 101, stealing different articles at same time. Tex.—Wilson v. State, 45 Tex. 76, 23 Am. Rep. 622; Long v. State, 43 Tex. 467; Hudson v. State, 9 Tex. App. 151, 23 Am. Rep. 732; Addison v. State, 3 Tex. App. 40. Vt.—State v. Newton,

42 Vt. 537; State v. Cameron, 40 Vt. 555; State v. Nattage, 16 Vt. 561. Va.—Alexander v. Com., 30 Va. 882, 29 S. E. 782. Wash.—State v. Makovsky, 67 Wash. 7, 120 Pac. 513; State v. Laws, 61 Wash. 533, 112 Pac. 483; State v. Bliss, 27 Wash. 462, 68 Pac. 87; State v. Ratts, 42 Wash. 432, 83 Pac. 36; Washington Ter. v. Heywood, 2 Wash. Ter. 189, 2 Pac. 189.

See the title "Larceny."

[a] It is an elementary rule in criminal law that the theft of several articles at one and the same time and place and by one and the same act constitutes but one indivisible crime. State v. Emery, 68 Vt. 169, 24 Atl. 452, 54 Am. St. Rep. 878.

[b] Larceny of property of several persons contained within one bundle is but a single crime, and chargeable as such. Ala.—Don v. State, 22 Ala. 9, 58 Am. Dec. 234. Ga.—Dean v. State, 9 Ga. App. 571, 71 S. E. 932. Ind.—Clem v. State, 42 Ind. 420, 13 Am. Rep. 369. Me.—State v. Nelson, 29 Me. 329.

[c] That statute provides a different punishment for stealing some of the articles does not affect the rule. Kelly v. State, 7 East. (Tenn.) 323.

[d] The fact that the larceny of certain of the articles would constitute grand larceny and the larceny of others but petit larceny is immaterial, for if all were taken in one united indivisible act the larceny of all could be alleged in one count. Waters v. People, 104 Ill. 545. But generally a misdemeanor and felony cannot be joined in the same count. See *supra*, XI, A, 1.

[e] The indictment must show the articles were taken in the same transaction, at the same time and place. These matters will not be presumed. Peak v. State, 54 Tex. Crim. 81, 111 S. W. 1019.

[f] Larceny of Property of Distinct Owners Held Distinct Offenses. N. H.—State v. Nelson, 8 N. H. 163. S. C.—State v. Thurston, 2 McMull, 382. Tenn.—Phillips v. State, 55 Tenn. 331, 3 S. W. 434; Morton v. State, 1 Lea 498.

3. U. S.—May v. United States, 129 Fed. 53, 117 C. C. A. 431, offense and

9. Different Means or Methods of Committing Same Offense.

When a single offense may be committed by several means or in several ways, all of such means or ways of committing the offense may be charged in a single count in the conjunctive,⁴ provided always that

attempt charged. **Ala.**—*Robinson v. State*, 34 Ala. 424, 4 So. 774; *Ward v. State*, 22 Ala. 10. **Ark.**—*Cole v. State*, 10 Ark. 318, wherein assault with intent to kill, and battery (stabbing) was alleged. **Cal.**—*People v. Ah Owe*, 39 Cal. 204; *People v. Pia*, 14 Cal. App. 181, 111 Pac. 105. **Ga.**—*Long v. State*, 12 Ga. 203; *Mitchell v. State*, 6 Ga. App. 554, 65 S. E. 326, lower degree. **Ill.**—*Love v. People*, 160 Ill. 501, 43 N. E. 710, 22 L. R. A. 139. **Ind.**—*Clark v. State*, 85 N. E. 779; *Henry v. State*, 113 Ind. 294, 15 N. E. 593; *Siebert v. State*, 95 Ind. 471; *Dickinson v. State*, 70 Ind. 247; *Crawford v. State*, 23 Ind. 304 (keeping and suffering to be used); *Smith v. State*, 11 Ind. 492. **Ia.**—*State v. Heft*, 148 Iowa 617, 127 N. W. 52; *State v. Ormiston*, 66 Iowa 143, 23 N. W. 370; *State v. Riley*, 48 Iowa 370. **Kan.**—*State v. Parkhurst*, 74 Kan. 672, 87 Pac. 703; *State v. Hodges*, 45 Kan. 389, 26 Pac. 676; *State v. Emmons*, 45 Kan. 397, 26 Pac. 679; *State v. Lillie*, 21 Kan. 523; *State v. Huber*, 8 Kan. 447; *State v. Braudon*, 7 Kan. 106. **Ky.**—*Miller v. Com.*, 13 Bush 731. **La.**—*State v. Young*, 104 La. 201, 28 So. 984 (wherein assault by shooting at, and assault with intent to kill was charged); *State v. Devine*, 51 La. Ann. 1239, 23 So. 105; *State v. Robins*, 45 La. Ann. 581, 19 So. 669; *State v. Packer*, 42 La. Ann. 972, 8 So. 473. **Mo.**—*State v. Waters*, 39 Mo. 54; *State v. Cobb*, 71 Mo. 198, 206; *State v. Leavitt*, 87 Mo. 72, 32 Atl. 789. **Mass.** *Com. v. Carraro*, 110 Mass. 290; *Com. v. Bolan*, 121 Mass. 374; *Com. v. Squires*, 97 Mass. 59; *Com. v. Poes*, 14 Gray 50 (keeping and selling); *Com. v. Twitchell*, 4 Cuth. 74 (arresting up and promotion of exhibition); *Com. v. Hursey*, 10 Mit. 422; *Com. v. Eaton*, 15 Pick. 275, selling and offering to sell. **Neb.**—*Dennan v. State*, 15 Neb. 138, 17 N. W. 347. **N. H.**—*Gray v. Garham*, 55 N. H. 152. **N. Y.**—*People v. Burns*, 53 Hun 274, 6 N. Y. Supp. 611; *Boland v. People*, 35 Hun 122; *People v. Farling*, 127 N. Y. Supp. 123. **N. D.**—*State v. Wambell*, 22 N. D. 230, 132 N. W. 1003.

Ore.—*State v. Branton*, 49 Ore. 86, 87 Pac. 535. **R. I.**—*State v. Nolan*, 15 R. I. 529, 9 Atl. 481, selling and offering to sell. **Tex.**—*State v. Edmondson*, 43 Tex. 162; *State v. Bradley*, 34 Tex. 95; *Akin v. State* (Tex. App.), 12 S. W. 1101; *Beaumont v. State*, 1 Tex. App. 533, 28 Am. Rep. 424. **Wash.** *State v. Lillie*, 60 Wash. 200, 110 Pac. 801; *State v. Michel*, 20 Wash. 162, 54 Pac. 995. **W. Va.**—*State v. Williams*, 40 W. Va. 268, 21 S. E. 721.

[a] Assault and battery and false imprisonment are but one offense, for the seizure and forcible detention of a person illegally is technically such an assault and battery. *Francisco v. State*, 24 N. J. L. 30.

[b] A count containing a charge of actual embezzlement and a charge that defendant made away with the same property and secreted it with intent to embezzle and convert the same to his own use is not duplicitous. *State v. Hodges*, 45 Kan. 389, 26 Pac. 676.

Charging burglary and larceny in one count. 4 STANDARD PROC. 604.

Charging Larceny and Embezzlement. 8 STANDARD PROC. 243.

[c] Different grades of the same offense may be charged in a single count of an indictment. *Lampkin v. State*, 87 Ga. 516, 13 S. E. 523; *Long v. State*, 12 Ga. 293.

4. **U. S.**—*United States v. Gordon*, 22 Fed. 250; *United States v. Hall*, 3 Chi. Leg. News 260, 26 Fed. Cas. No. 15,282. **Ala.**—*Hinspatrick v. State*, 169 Ala. 1, 53 So. 1021; *Coleman v. State*, 151 Ala. 20, 44 So. 184; *Smith v. State*, 142 Ala. 14, 39 So. 329; *King v. State*, 137 Ala. 47, 34 So. 683; *Hornsby v. State*, 94 Ala. 55, 10 So. 522; *Wilson v. State*, 84 Ala. 426, 4 So. 383. **Ark.** *Peerce v. State*, 97 Ark. 5, 132 S. W. 986. **Colo.**—*Howard v. People*, 27 Colo. 336, 61 Pac. 595. **Fla.**—*Bradley v. State*, 20 Fla. 738. **Ga.**—*Cody v. State*, 118 Ga. 784, 45 S. E. 622; *Lampkin v. State*, 87 Ga. 516, 13 S. E. 523; *Hall v. State*, 8 Ga. App. 747, 70 S. E. 241; *Lapinsky v. State*, 7 Ga. App. 285, 66 S. E. 965.

the different means and ways alleged are not repugnant to each other.⁴ By statute in some jurisdictions it is permissible to allege such means or methods in the alternative.⁵

10. **Charging Defendant in Different Capacities.**—A single count which charges the defendant with having committed the offense in different capacities,⁶ as for instance, as principal and accessory,⁷ is duplicitous, unless it merely follows the statute prescribing several ways in which the offense may be committed.⁸

Ill.—*Blamer v. People*, 76 Ill. 255. **Ia.** *State v. Spurbush*, 44 Iowa 607. **Kan.** *State v. Justus*, 86 Kan. 848, 129 Pac. 877; *State v. Johnson*, 70 Kan. 861, 79 Pac. 732; *State v. Kirby*, 62 Kan. 439, 63 Pac. 752; *State v. Hewes*, 69 Kan. 765, 57 Pac. 979; *State v. O'Neil*, 51 Kan. 651, 33 Pac. 287, 24 L. R. A. 555. **Ky.**—*Greenwell v. Com.*, 39 Ky. L. Rep. 1282, 199 S. W. 852; *Com. v. Yarnell*, 24 Ky. L. Rep. 144, 68 S. W. 136. **La.**—*State v. Buford*, 52 La. Ann. 539, 26 So. 991; *State v. Banton*, 4 La. Ann. 31. **Me.**—*State v. Cates*, 99 Me. 68, 58 Atl. 238; *State v. Willis*, 78 Me. 70, 2 Atl. 848; *State v. Haskell*, 76 Mo. 399. **Mass.**—*Com. v. Coleman*, 184 Mass. 198, 68 N. E. 229; *Com. v. Nichols*, 10 Allen 199; *Com. v. Larkin*, 7 Allen 579; *Com. v. Brown*, 14 Gray 419. **Miss.** *Donaldson v. State*, 102 Miss. 246, 79 So. 99. **Mo.**—*State v. Flynn*, 238 Mo. 211, 167 S. W. 516; *State v. Nienhaus*, 217 Mo. 232, 117 S. W. 73; *State v. Panther*, 71 Mo. 460; *State v. Pissimmons*, 30 Mo. 236. **N. H.**—*State v. Perkins*, 42 N. H. 464. **N. J.**—*State v. Middlesex & S. Trust Co.*, 67 N. J. L. 14, 59 Atl. 354. **N. Y.**—*People v. Young*, 267 N. Y. 522, 191 N. E. 451; *Bark v. People*, 91 N. Y. 5; *Read v. People*, 86 N. Y. 281; *People v. Davis*, 56 N. Y. 95; *People v. Schlessel*, 22 N. Y. Crim. 542, 112 N. Y. Supp. 45. **Ohio.**—*Hale v. State*, 58 Ohio St. 679, 51 N. E. 154; *State v. Bauer*, 1 Ohio N. P. 103. **S. D.** *State v. Hall*, 14 S. D. 161, 84 N. W. 766. **Tenn.**—*State v. Ailey*, 3 Heisk. 8. **Tex.**—*Stevens v. State*, 70 Tex. Crim. 505, 159 S. W. 505; *Ray v. State*, 71 Tex. Crim. 268, 158 S. W. 807; *Goodwin v. State* (Tex. Crim.), 158 S. W. 274; *Wright v. State*, 79 Tex. Crim. 74, 156 S. W. 634; *Stevens v. State* (Tex. Crim.), 159 S. W. 944; *Outley v. State* (Tex. Crim.), 99 S. W. 95; *Young v. State* (Tex. Crim.), 60 S. W. 767; *Hurt v. State*, 38 Tex. Crim. 297, 40 S. W. 1699, 43 S. W. 344, 39 L. R. A. 263; *Alphin v. State* (Tex. Crim.), 33 S. W.

237; *Thomas v. State* (Tex. Crim.), 26 S. W. 724; *Cramer v. State*, 70 Tex. App. 509, 10 S. W. 100. **Utah.**—*State v. Livingston*, 15 Utah 489, 39 Pac. 526. **Vt.**—*State v. Haven*, 39 Vt. 399, 2 Atl. 841. **Wash.**—*State v. Pettit*, 74 Wash. 510, 119 Pac. 1014; *State v. McBride*, 73 Wash. 790, 129 Pac. 489; *State v. Clifford*, 61 Wash. 229, 95 Pac. 539. **Wis.**—*Clifford v. State*, 99 Wis. 397; *State v. Doherty*, 21 Wis. 294.

See *supra*, this title, p. 334; and 1 STANDARD PRAC. 991, 11 STANDARD PRAC. 591. See also *supra*, XI, A, 5.

5. **Ga.**—*Cady v. State*, 118 Ga. 781, 45 S. E. 699. **Kan.**—*State v. Jueros*, 86 Kan. 848, 129 Pac. 877. **N. Y.**—*People v. Kane*, 43 App. Div. 475, 41 N. Y. Supp. 105, 922, 44 N. Y. Crim. 205. **Wash.**—*State v. Pettit*, 74 Wash. 510, 119 Pac. 1014.

[6] **When Repugnant.**—The varying means by which a crime may be committed are not repugnant to each other unless the proof of one will disprove the other. *State v. Pettit*, 74 Wash. 510, 119 Pac. 1014.

6. See *supra*, this title, p. 339.

7. An indictment charging defendants with embezzlement as "trustees and agents" is duplicitous, but a charge of larceny by "bailees and agents" is not, for the reason there is no such offense as "larceny by agents," so that the word "agents" may be rejected as surplusage. *Hutchinson v. Com.*, 52 Pa. 472. Compare *State v. Egan*, 62 N. J. L. 317, 85 Atl. 230.

8. 1 STANDARD PRAC. 161.

9. **U. S.**—*Craig v. United States*, 182 U. S. 583, 16 Sup. Ct. 663, 49 L. ed. 1007; *United States v. James*, 74 Fed. 845. **Ala.**—*Hen v. State*, 22 Ala. R. 58 288, Dec. 234. **Cal.**—*People v. Owen*, 113 Cal. 177, 45 Pac. 790. **Ind.** *Stooder v. State*, 128 Ind. 139, 27 N. E. 885, 25 Am. B. Rep. 329; *Harwell v. State*, 8 Ind. 492. **Kan.**—*State v. Bush*,

11. **Doing and Causing an Offense To Be Done.** — It is not duplicity to charge in the same count the causing an offense to be committed and the commission of the offense, where they are both merely different methods or means of committing one and the same offense.¹⁰ But the rule is otherwise where the doing and the causing of the offense constitute distinct offenses.¹¹

12. **Construction of Pleadings.** — To determine whether the pleading is duplicitous, the averments in question must be construed according to the context,¹² and must receive a fair interpretation. If from such a reading but one offense is charged it is good although another interpretation would render it duplicitous.¹³ The fact that

79 Kan. 729, 79 Pac. 657, maintaining and assisting in maintaining a nuisance. **Ky.**—*Metler v. Com.*, 13 Bush 731. **Mo.**—*State v. Hayes*, 78 Mo. 307; *State v. Maupin*, 57 Mo. 205. **N. C.**—*State v. Morgan*, 19 N. C. 348. **S. C.**—*State v. Houseal*, 2 Brev. 219. **Tex.**—See *Cabiness v. State* (Tex. Crim.), 146 S. W. 934, keeping and being concerned with keeping bawdy house. **Vt.**—*State v. Morton*, 27 Vt. 310, 65 Am. Dec. 201. **Va.**—*Rasnick v. Com.*, 2 Va. Cas. 356.

See 1 STANDARD PROC. 151; and *supra*, XI, A, 5; XI, A, 9; *infra*, XI, A, 11.

[a] **By Himself and by an Agent.** *Barnes v. State*, 20 Conn. 232; *Stevens v. State*, 70 Tex. Crim. 565, 159 S. W. 505.

10. **U. S.**—*Crain v. United States*, 162 U. S. 625, 16 Sup. Ct. 952, 40 L. ed. 1097; *United States v. Purvis*, 195 Fed. 618; *United States v. Jones*, 74 Fed. 545; *United States v. Hull*, 14 Fed. 324. **Ala.**—*Ben v. State*, 22 Ala. 9, 58 Am. Dec. 234. **Ariz.**—*Qualey v. Territory*, 8 Ariz. 45, 68 Pac. 546. **Cal.**—*People v. Gosti*, 113 Cal. 177, 45 Pac. 263. **Ind.**—*Boswell v. State*, 8 Ind. 499; *State v. Shorum*, 8 Blackf. 315; *State v. Kous*, 5 Blackf. 314. **La.**—*State v. Sturgeon*, 127 La. 459, 53 So. 703. **Mo.**—*State v. Hayes*, 78 Mo. 307; *State v. Maupin*, 57 Mo. 205, holding the words "caused to be" might be rejected as surplusage. **N. J.**—*State v. Price*, 11 N. J. L. 208. **N. Y.**—*La Beau v. People*, 33 How. Pr. 66; *People v. Martin*, 77 App. Div. 326, 79 N. Y. Supp. 349. **Pa.**—*State v. Scheenhut*, 3 Phila. 29. **S. C.**—*State v. Houseal*, 2 Brev. 219. **Vt.**—*State v. Morton*, 27 Vt. 310, 65 Am. Dec. 201.

See 1 STANDARD PROC. 151, note 7.

[a] **Aiding and abetting an offense and committing the offense may be**

charged in one count where classified by the legislature as one offense. *Prettyman v. United States*, 180 Fed. 30, 103 C. C. A. 384; *State v. Behan*, 113 La. 754, 37 So. 714. See 1 STANDARD PROC. 151.

[b] **An allegation in the disjunctive of doing or causing the commission of the offense would be bad.** *People v. Hood*, 6 Cal. 236. But see *United States v. Potter*, 6 McLean C. C. 186.

11. **Where the doing and the causing of the offense to be done are distinct offenses which can be committed only by separate and distinct acts, although committed on the same occasion, as in the case of signing a false certificate with intent that it be issued and used and causing it to be signed and used, an indictment charging both would be duplicitous.** *State v. Haven*, 59 Vt. 399, 9 Atl. 841. See *Goldsmith v. State*, 32 Ohio C. C. 160.

[a] **Forging and procuring an instrument to be forged.** *People v. Sebring*, 14 Misc. 31, 35 N. Y. Supp. 237. But see 8 STANDARD PROC. 1177, et seq. and the cases cited in note preceding.

12. **The words in an indictment should be construed according to their context.** Thus a writing and affidavit may mean two documents, or it may mean one, a writing called or known as an affidavit. Standing alone such language might be ambiguous, but where the writing and affidavit is recited in the indictment, it is shown clearly to be but one instrument, an affidavit, a writing called an affidavit, and, the indictment, therefore charges but one offense. *United States v. Corbin*, 11 Fed. 238.

13. **Cal.**—*People v. Treadwell*, 69 Cal. 226, 10 Pac. 502. **Ia.**—*State v. Wood*, 112 Iowa 411, 84 N. W. 520;

but a single offense is named in the indictment, does not make it single, if from a reading it can be seen that two offenses are charged.¹²

Incorrect punctuation will not render an indictment or information double.¹³

B. BY MEANS OF SEPARATE COUNTS. — 1. In General. — Generally speaking a defendant cannot be charged in the same indictment, even under separate counts, with distinct and separate offenses.¹⁴ Indeed, statutes sometimes provide that, with certain exceptions, an indictment shall charge but one offense.¹⁵ On the other hand, however, by statute in some jurisdictions, it is provided that certain enumerated

State *v.* Osborne, 96 Iowa 281, 65 N. W. 159; State *v.* Montgomery, 79 Iowa 737, 45 N. W. 292; State *v.* Franks, 64 Iowa 39, 19 N. W. 822 (felonious entering a house and burglary); State *v.* King, 37 Iowa 462, did unlawfully sell beer to persons unknown held to charge one sale to several persons jointly. Kan. State *v.* Lillie, 21 Kan. 523 (embezzlement as agent, servant, employee and bailee charges the crime of embezzlement alone); State *v.* Tulip, 9 Kan. App. 454, 60 Pac. 659. Ky.—Louisville & N. R. Co. *v.* Com., 104 Ky. 226, 40 S. W. 767. La.—State *v.* Flint, 33 La. Ann. 1288. Mich.—Luton *v.* Palmer, 69 Mich. 610, 37 N. W. 791. Minn.—State *v.* Grimes, 50 Minn. 123, 52 N. W. 275. N. Y.—People *v.* Adams, 17 Wend. 475. N. D.—State *v.* Mareks, 3 N. D. 532, 58 N. W. 25. Ohio.—Watson *v.* State, 39 Ohio St. 123. Tex.—Beaumont *v.* State, 1 Tex. App. 533. W. Va.—Conley *v.* State, 5 W. Va. 522.

14. Messer *v.* Com., 26 Ky. L. Rep. 40, 80 S. W. 489.

15. State *v.* Wood, 112 Iowa 411, 84 N. W. 520.

16. U. S.—McElroy *v.* United States, 164 U. S. 76, 17 Sup. Ct. 31, 41 L. ed. 355; Pointer *v.* United States, 151 U. S. 396, 14 Sup. Ct. 410, 38 L. ed. 208; United States *v.* Nye, 4 Fed. 888. Ala. Butler *v.* State, 91 Ala. 87, 9 So. 191. Tex.—Crawford *v.* State, 31 Tex. Crim. 51, 19 S. W. 766.

[a] For, if several offenses could be charged in the same indictment, a man could be crushed by accumulating charges, or injured by their salient presentation to the jury. Crawford *v.* State, 31 Tex. Crim. 51, 19 S. W. 766.

[b] But the mere fact that there are several counts in an indictment does not indicate that separate offenses are charged therein. McGregg *v.* State, 4 Blackf. (Ind.) 101.

[c] Nor can two offenses be carried out of the same act and as such be charged in several counts. Lapan *v.* United States, 123 Fed. 291, 59 O. C. A. 476.

That separate and distinct offenses cannot be charged in the same count of an indictment or information, see *supra*, XI, A.

17. See the statutes and the following: U. S.—Summers *v.* United States, 231 U. S. 92, 34 Sup. Ct. 38, 58 L. ed. 137. Ariz.—Territory *v.* Duffield, 1 Ariz. 58, 25 Pac. 476. Ark.—Ball *v.* State, 48 Ark. 94, 2 S. W. 402; State *v.* Rhos, 38 Ark. 555; State *v.* Brower, 23 Ark. 176; State *v.* Jourdan, 32 Ark. 203. Cal.—People *v.* Jaillies, 146 Cal. 301, 79 Pac. 245; People *v.* De Coursey, 63 Cal. 194; People *v.* Johnson, 22 Cal. App. 292, 154 Pac. 339; People *v.* Miles, 19 Cal. App. 223, 125 Pac. 250. Idaho. Territory *v.* Guthrie, 2 Idaho 432, 17 Pac. 39. Ia.—State *v.* Elkhorn, 70 Iowa 511, 31 N. W. 66. Ky.—Allison *v.* Com., 135 Ky. 603, 123 S. W. 297 (under §109, Code Crim. Proc.); Com. *v.* Bradley, 112 Ky. 512, 119 S. W. 761. Mont. State *v.* Milton, 37 Mont. 396, 96 Pac. 226, 127 Am. St. Rep. 737. N. Y.—People *v.* Sullivan, 374 N. Y. 122, 65 N. E. 980, 93 Am. St. Rep. 282; People *v.* Kellerg, 105 App. Div. 505, 94 N. Y. Supp. 617; People *v.* O'Malley, 52 App. Div. 46, 64 N. Y. Supp. 843. Okla. Clark *v.* State, 5 Okla. Crim. 704, 115 Pac. 377.

These statutes generally provide for the charging of such offense in different ways, however, in separate counts of the indictment. See *infra*, XI, B, 3.

[a] In Kentucky, "the only exception to the rule denying the right of the commonwealth to charge more than one offense in the indictment is in that class of cases where it is frequently quite difficult to distinguish one offense

offenses may be joined in different counts of the same indictment.¹⁸ Even in the absence of statute, however, the rule that different offenses may not be joined in the same indictment, even in separate counts

from another and under section 127 of the Civil (Criminal) Code of Practice certain of these offenses last referred to may be charged in one indictment, to-wit, larceny and knowingly receiving stolen property, larceny and obtaining money or property on false pretenses, larceny and embezzlement, robbery and burglary, robbery and assault with intent to rob, and passing or attempting to pass counterfeit money or United States currency or bank notes, knowing them to be such, and having in possession counterfeit money or United States currency or bank notes, knowing them to be such, with the intention of circulating the same. These latter offenses are the only ones which, under our present code provision, may be united in one indictment. All other offenses, whether of the same grade or not, must, under section 126 of the Civil (Criminal) Code of Practice, be stated in separate indictments." *Allison v. Com.*, 135 Ky. 693, 123 S. W. 267.

18. See generally the statutes, and the following: **U. S.**—Rev. St., §1024 (providing that "when there are several charges against any person for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offenses, which may be properly joined, instead of having several indictments, the whole may be joined in one indictment in separate counts"); *Summer v. United States*, 231 U. S. 92, 34 Sup. Ct. 38, 58 L. ed. 137; *Ingraham v. United States*, 155 U. S. 434, 15 Sup. Ct. 148, 39 L. ed. 213; *Rooney v. United States*, 203 Fed. 928, 122 C. C. A. 230; *Brimie v. United States*, 200 Fed. 726, 119 C. C. A. 170; *Etheredge v. United States*, 186 Fed. 434, 108 C. C. A. 259; *Dillard v. United States*, 141 Fed. 303, 72 C. C. A. 451; *McGregor v. United States*, 134 Fed. 187, 69 C. C. A. 477; *United States v. Ridgway*, 199 Fed. 286; *United State v. Spintz*, 18 Fed. 377. **Ark.**—*Godard v. State*, 100 Ark. 149, 139 S. W. 1131, under Kirby's Dig., §2231. **D. C.**—*Lee v. United States*, 37 App. Cas. 442, under Rev. St., §1024. **Ind.**—*Burns' Ann. St.*, 1914, §2053, et

seq. **Ky.**—*Com. v. Bradley*, 132 Ky. 512, 116 S. W. 761 (under Code Crim. Proc., §127); *Johnson v. Com.*, 90 Ky. 488, 14 S. W. 492; *Miller v. Com.*, 25 Ky. L. Rep. 1931, 79 S. W. 250. **Mo.**—*State v. Christian*, 253 Mo. 382, 392, 161 S. W. 736. **N. Y.**—*People v. Trainor*, 57 App. Div. 422, 68 N. Y. Supp. 263. **Okla.**—*Martin v. Territory*, 4 Okla. 105, 43 Pac. 1067. **Utah.**—*United States v. West*, 7 Utah 437, 27 Pac. 84, under U. S. Rev. St., §1024. **Eng.**—*Rex v. Fallon*, 32 L. J. M. C. 66; *Richards v. Reg.*, 66 L. J. Q. B. 459, under 46 & 47 Vict., ch. 3, §7; 24 & 25 Vict., ch. 96, §§56, 59.

Thus, statutes provide for the joinder of separate offenses arising out of or relating to the same transaction (see *infra*, XI, B, 2, d); for the joinder of offenses of the same nature (see *infra*, XI, B, 2, e), as well as for the joinder of specific offenses. See Kirby's Ark. Dig. (1907), §2231, and *infra*, XI, B, 2, f.

[a] The provisions of U. S. Rev. St., §1024, that "when there are several charges against any person for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offenses, *which may be properly joined*, instead of having several indictments the whole may be joined in one indictment in separate counts," are not qualified or limited by the clause in italics, so as to require a reference to the common law to ascertain whether the joinder is proper or not. *Dolan v. United States*, 133 Fed. 440, 446, 69 C. C. A. 274.

[b] Though a statute provides that not more than a designated number of counts may be joined in the same indictment for separate offenses committed within a designated period, the inclusion of more than such number of counts in the same indictment does not vitiate it as an entirety; such statute relates merely to procedure. *Etheredge v. United States*, 186 Fed. 434, 108 C. C. A. 356, wherein the court said: "Neither the reason nor the letter of the statute requires the court to hold that all good counts in such an indict-

thereof, is not without its exceptions.¹⁶ The court should not permit joinder of offenses where such joinder would embarrass the defendant in interposing his defense, however.¹⁷

Informations.—Where a prosecution is carried on by information, the information may contain separate counts the same as an indictment.¹⁸ Indeed, statutes sometimes expressly provide that different offenses and different degrees of the same offense may be joined in

ment are rendered bad merely because the indictment contains counts in excess of the number which the statute permits to be joined in the same indictment. . . . It is doubtful, to say the very least of it, whether more than three counts which differ from each other as here only in varying descriptions of the same offense fall within the reason of the rule forbidding the joinder of more than three distinct offenses in the same indictment. It is not perceived how the mere joinder of more than three offenses could so prejudice the defendant that he ought not to be tried on the indictment at all. If, however, that were made to appear, the court could quash the indictment. Ordinarily, all the rights of the defendant will be amply safeguarded by directing the prosecution before entering upon the trial to not, *pross.* all the counts in excess of three, or, if the court be of opinion that the several counts are merely varied descriptions of the same offense, it can allow the trial to proceed on the indictment until the prosecutor's evidence manifests a election as to the three counts upon which he will proceed, and then compel him to abandon the other counts."

19. Thus, even at common law, separate and distinct misdemeanors may be joined in separate counts of the same indictment. See *infra*, XI, B, 2, c. So too, it has been held permissible to join in separate counts of the same indictment, a misdemeanor and a felony (see *infra*, XI, B, 2, a); and distinct felonies. See *infra*, XI, B, 2, n.

20. *Williams v. United States*, 108 U. S. 242, 291, 18 Sup. Ct. 92, 42 L. ed. 709; *McIlroy v. United States*, 104 U. S. 76, 17 Sup. Ct. 31, 41 L. ed. 255; *Baskin v. United States*, 150 U. S. 682, 16 Sup. Ct. 182, 40 L. ed. 403; *Connors v. United States*, 178 U. S. 405, 15 Sup. Ct. 921, 39 L. ed. 1039; *Pointer v. United States*, 151 U. S. 396, 400, 14 Sup. Ct. 410, 38 L. ed. 208; *Itaney v. United States*, 203 Fed. 229, 122 C.

C. A. 235; *United States v. Bennett*, 17 Blatchf. 257, 24 Fed. Cas. No. 14,672.

[a] The principle, that the court must not permit the defendant to be embarrassed in his defense by a multiplicity of charges embraced in one indictment and to be tried by one jury, is recognized as fundamental. *Pointer v. United States*, 151 U. S. 396, 400, 14 Sup. Ct. 410, 38 L. ed. 208.

[b] In Florida it is provided (Rev. St. 4282), that no indictment shall be quashed on account of misjoinder of offenses unless the court shall be of the opinion that the indictment is so vague, indistinct and indefinite as to embarrass the accused and embarrass him in his defense or expose him after conviction or acquittal to substantial danger of a new prosecution for the same offense. *Long v. State*, 42 Fla. 529, 28 So. 776.

[c] **Statute Permitting Joinder Does Not Change Rule.**—If it be discovered at any time during a trial that the substantial rights of the accused may be prejudiced by a submission to the same jury of more than one distinct charge of felony among two or more of the same class, the court, according to the established principles of criminal law, can compel an election by the prosecutor. That discretion has not been taken away by section 1093 of the Revised Statutes. On the contrary, that section is consistent with the settled rule that the court, in its discretion, may compel an election when it appears from the indictment, or from the evidence, that the prisoner may be embarrassed in his defense, if that course be not pursued. *Pointer v. United States*, 151 U. S. 396, 402, 14 Sup. Ct. 410, 38 L. ed. 208. As to election between counts, see *infra*, XVI, B.

21. *People v. Johnson*, 63 Cal. App. 305, 124 Pae. 239; *Knox v. State*, 104 Ind. 226, 73 N. E. 255, 108 Am. St. Rep. 221.

one information, in all cases where the same might be joined by different counts in the same indictment.²²

2. *Distinct and Separate Offenses.*—a. *Felonies and Misdemeanors.*—"The common law did not permit the joinder of a felony with a misdemeanor in the same indictment, even in separate counts thereof."²³ The common-law rule has been greatly modified, however, by modern decisions,²⁴ under which the general rule now is, that felonies and misdemeanors forming part of the development of the same transaction, may be joined²⁵ in the same indictment in different counts

22. See the statutes of the several states and *Poath v. State*, 90 Wis. 557, 29 N. W. 1001, 18 Am. St. Rep. 324, 40 Fed. Rep. 81, 1878, 14620.

23. See the following: Ark.—*State v. Cryer*, 20 Ark. 54. MO.—*State v. State*, 2 Mo. 9. Pa.—*Harman v. Com.*, 42 Serg. & R. 98. R. I.—*State v. Fitzsimons*, 18 R. I. 220, 27 Atl. 146, 49 Am. St. Rep. 766. Va.—*Scott v. Com.*, 14 Gratt. 487. Eng.—*Kling v. Fuller*, 1 Bos. & P. 180; *Rex v. Bedford*, 2 Burr. 289; 2 Hale P. C. 173.

24. Reason—"The common-law rule that alone suffered to, that a felony and a misdemeanor should not be joined in the same indictment, was based upon substantially the same reason as the rule which prohibited the conviction for a misdemeanor under an indictment for a felony." *State v. Fitzsimons*, 18 R. I. 220, 27 Atl. 146, 49 Am. St. Rep. 766. As to conviction for a misdemeanor upon an indictment for a felony, see infra, XIII B.

25. *Harwood v. Com.*, 22 Pa. 424. And see *State v. Fitzsimons*, 18 R. I. 220, 27 Atl. 146, 49 Am. St. Rep. 766, wherein the court said: "Later English statutes and decisions have still further modified the rigor of the common law in regard to the matter now under consideration."

26. "The reasons upon which was based the English rule against joining felonies and misdemeanors in the same indictment have ceased to exist, and that rule, if now enforced, would be grossly inequitable and arbitrary, and would secure no useful or beneficial purpose, and its enforcement would be to embarrass, delay, and prevent the administration of justice. *Commonwealth v. Burt*, 100 Mass. 100. Besides this, the rule is inconsistent with the practice which has long and uniformly prevailed in this state of permitting, upon an indictment for felony, a conviction for

a misdemeanor which is included in the greater offense charged. It would be unreasonable to hold that upon an indictment for a felony a defendant may be convicted of a misdemeanor, these being no count specifically charging such misdemeanor, and yet hold that if there is such specific count there can be no such conviction." *Harman v. People*, 131 Ill. 204, 400, 22 N. E. 471, 9 L. R. A. 182. See also *State v. Cryer*, 20 Ark. 54.

27. U. S.—*United States v. Ridgway*, 190 Fed. 288. *United States v. Solata*, 18 Fed. 377. Ill.—*George v. People*, 167 Ill. 417, 47 N. E. 741; *Heermans v. People*, 131 Ill. 594, 22 N. E. 471, 9 L. R. A. 182, explaining *Barber v. People*, 99 Ill. 571, and *Lyons v. People*, 68 Ill. 378. See also *Thomas v. People*, 112 Ill. 334. La.—*For State v. Cameron*, 8 La. Ann. 108. Md.—*Stevens v. State*, 69 Md. 302, 7 Atl. 224. Mass.—*Com. v. Costello*, 120 Mass. 358; *Com. v. MacLaughlin*, 17 Cook. 312. N. H.—*State v. Lincoln*, 39 N. H. 364. N. Y.—*Hawker v. People*, 75 N. Y. 187, *People v. Lombardi*, 4 N. Y. Crim. 317, 327; *People ex rel. Heilich v. Foster*, 132 App. Div. 116, 110 N. Y. Supp. 336; *People v. Timmer*, 57 App. Div. 422, 68 N. Y. Supp. 369. Pa.—*Steiger v. Com.*, 103 Pa. 469; *Bunker v. Com.*, 70 Pa. 103, 21 Am. Rep. 81; *Storick v. Com.*, 18 Pa. 480; *Harman v. Com.*, 42 Serg. & R. 98; *Com. v. Clark*, 2 Pitts. Rep. 495; *Com. v. Worthing*, 13 Fane. Rep. 15. S. C.—*State v. Beckwith*, 49 S. C. 184, 27 S. E. 209; *State v. Strickland*, 40 S. C. 191; *State v. Davis*, 1 McMill. 182. Va.—*State v. Newman*, 24 Va. 378, 2 Atl. 239, 25 Am. Rep. 730; *State v. Hender*, 17 Va. 258. Wis.—*Poath v. State*, 90 Wis. 557, 29 N. W. 1001, 18 Am. St. Rep. 324. Eng.—*Rog v. Ferguson*, 9 Cox C. 434. *Greene v. C.*, 167; *Rog v. Wainwright*, 2 G. & D. 728, 11 L. J. M. C. 100.

thereof, except where the offences charged are repugnant to their nature and local incidents."

The rule is sometimes stated that a joinder of a count for misdemeanor with a count for felony is permissible where the offenses are cognate.¹¹ But in many jurisdictions the common-law rule still prevails and felonies and misdemeanors cannot be joined.¹²

[a]. Where the grand jury has jurisdiction to indict for a felony, it may include in the same indictment a count for a misdemeanor. People v. *Bedell & Foster*, 100 App. Div. 125, 310 N. Y. Supp. 2d, (2) In *State v. Rodriguez*, 80 S. C. 469, 27 S. E. 628, the court said that "the power to indict different offenses of different grades—felony on the one hand, and misdemeanor on the other—has been recognized by this state in a long line of cases, among which may be mentioned *State v. Nelson*, 14 Ark. 17; *State v. Scott*, 15 S. C. 434; *State v. Seaford*, 25 S. C. 678; *State v. Woodward*, 27 S. C.

151 "Palacios and micheneros forming a part of the development of the urban transformation may be stated." *Fourth & State, on Via 1st and 2d N. W.* 1001. 28 Am. 21 Dec. 1914.

[4] Under *HORN* of the Revised Statutes of the United States (U. S. Comp. St. 1901, p. 1291) which provides that "when there are several charges against any person for the same act or transaction, or for two or more acts or transactions connected together, or the two or more acts or transactions of the same class or series of offenses, which may be properly joined, instead of suing the several individuals the whole may be joined in one indictment in separate counts."

statement may be properly proved although one be for a misdemeanor and one be for a felony. *United States v. Bishop*, 108 Fed. 982 (United States v. Bishop, 108 Fed. 982 (United States v. Bishop, 108 Fed. 982)).

28. Hunter v. Com., 73 Pa. 207.
Hunt v. Com., 73 Pa. 209; Howard
v. Com., 73 Pa. 224.

4. In *State v. Fitzgerald*, 20 B. 3 230, 17 Feb 1900 20 Dec. St. Dec. for the court held in answering the question upon this point: "In examining one of the documents in issue under upon the question of the number of counts the Judge and the jury in the same indictment, shown that under there are no means uniform, and that

such function is generally allowable to all states "where the officers charged, are organized in their union and legal incidents, and the laws are judged so in accordance as to be in the interest of some legal advantage." *Howard v. The Commonwealth*, 10 Pa. 40, 41.

[10] Where there is a number of a study with a self-selection under a control, but only reporting different estimates to support the several changes but different point-estimates in case of correction, the manuscript is kept in a "Resubmit" category. The new's from same category are:

22. *Staph. v. Fittigheim*, 25 N. 1. 200.
 23. *Staph. v. Fittigheim*, 25 N. 1. 200.
 24. *Staph. v. Fittigheim*, 25 N. 1. 200.
 25. *Staph. v. Fittigheim*, 25 N. 1. 200.
 26. *Staph. v. Fittigheim*, 25 N. 1. 200.
 27. *Staph. v. Fittigheim*, 25 N. 1. 200.
 28. *Staph. v. Fittigheim*, 25 N. 1. 200.
 29. *Staph. v. Fittigheim*, 25 N. 1. 200.
 30. *Staph. v. Fittigheim*, 25 N. 1. 200.

[4] "Such as robbery and the carrying of stolen goods, and rape and an assault with intent to commit rape." *State v. Windham*, 18 W. 3, 100, 27 And. 447, 18 Am. St. Rep. 700.

Ill. Ala.—Droughton & Smith, 1893
Ann. 105, 16 Mo. 914; Jones & Smith,
1904. Ill. 20, 18 Mo. 94. Ga.—Davis &
Smith, 1904. Ill. 21; Fawcett, Smith, 1904.
No. 1, collected containing almost the
entirety and was for general and further
investigation. Ky.—Cox & Swallow, 1893
Mo. 172, 118 & 19. Mo.—Miller,
1893 & 1894; 2 Mo. 247. Tenn.—Hager
& French & Hensley, 1893. Tex.—Baker
& C. Smith (Tex. Coll.) 189 & 2
189. Whipple & Smith (Tex. Coll.), 189
& 2. W. 1898.

197. *Compositae*. *Wentworthia* L. *Stems*. I
Two. Six. With. Whence the most called
several variations from Whence, with
flowers by the light of, and numerous
by the standard of these authorities.
The individual in this case was not the
Eastern because it changed two petals
and distinct colors, in a single

b. *Felonies*.—At common law, there could properly be no joinder of separate and distinct felonies in the same indictment or information.²⁹ Yet it was never supposed, even at common law, that the joinder of several felonies entirely destroyed the validity of the indictment.³⁰ And so now, while regularly or usually an indictment should not include more than one felony,³¹ yet, according to the great weight of authority, a joinder in one indictment, in separate counts, of different felonies, at least of the same general nature and subject to the same punishment, is not necessarily fatal to the indictment or information.³² But felonies arising from distinct and separate transac-

and one a misdemeanor, in two separate and distinct counts. This court, however, takes occasion to express its disapprobation of such pleading when the same might be easily avoided by the pleader's acquainting himself, as he should always do, in advance of the preparation of the indictment, of the nature of the offense for which the accused should be indicted and tried."

[b] The reason is "that it would embarrass the defendant in the selection of a jury, for he might be willing that a juror should try him for the one offense, and not for the other." *Davis v. State*, 57 Ga. 66, 67.

[c] The charging of a capital offense with a misdemeanor is bad. *United States v. Sharp*, Pet. C. C. 131, 27 Fed. Cas. No. 16,265.

29. *United States v. Nye*, 4 Fed. 888, See 1 Chitty Crim. Law 252; and *supra*, XI, B, 1.

[a] "That was as well established, at one period at least of the administration of the criminal law, as if there had been an express statute forbidding the joinder of separate and distinct felonies in the same indictment." *United States v. Nye*, 4 Fed. 888.

[b] "The rule is thus stated by Archbold (*Crim. Pl. Pr.* 950, c. 3, 8th ed.): 'If different felonies or misdemeanors be stated in several counts of an indictment, no objection can be made to the indictment on that account in point of law. In cases of felony, indeed, the judge, in his discretion, may require the counsel for the prosecutor to select one only of the felonies, and confine himself to that. This is what is technically termed putting the prosecutor to his election. But this practice has never been extended to misdemeanors.' " *Pointer v. United States*, 151 U. S. 396, 402, 14 Sup. Ct. 410, 38 L. ed. 208.

30. *United States v. Nye*, 4 Fed. 888.

[a] "Both Chitty and Archbold, while they lay down the principle, that such joinder ought not to be allowed, also, state, that it is no objection in arrest of judgment, and so this court held in the case of *Wright v. The State*, 4 Humph. 195." *Cash v. State*, 10 Humph. (Tenn.) 111.

[b] "While the courts would not permit the party to be tried for two or more felonies in the same indictment, they would not quash the indictment but would compel the prosecutor to elect the felony he would proceed to trial upon. The rule is laid down in *Wharton*, §216." *United States v. Nye*, 4 Fed. 888. As to election, see *infra*, XVI, B.

31. *Pointer v. United States*, 151 U. S. 396, 14 Sup. Ct. 410, 38 L. ed. 208. And see: *Miss.—Strawhern v. State*, 37 Miss. 422, 428. *Tenn.—Cash v. State*, 10 Humph. 111. *Eng.—Castro v. Reg.*, 6 App. Cas. 229; *Rex v. Mitchell*, 6 St. Tri. (N. S.) 599.

[a] The practice of joining distinct felonies in the same indictment is not to be commended. *Strawhern v. State*, 37 Miss. 422, 428.

32. See the following cases: *U. S. Pointer v. United States*, 151 U. S. 396, 403, 14 Sup. Ct. 410, 38 L. ed. 208 ("upon demurrer or upon motion to quash or on motion in arrest of judgment"); *Etheredge v. United States*, 186 Fed. 434, 108 C. C. A. 356; *Gardes v. United States*, 87 Fed. 172, 30 C. C. A. 596; *United States v. Cardish*, 145 Fed. 217; *United States v. O'Callahan*, 6 McLean 596, 37 Fed. Cas. No. 15,910. *Ala.—McGhee v. State*, 171 Ala. 19, 55 So. 169; *Lowe v. State*, 134 Ala. 154, 37 So. 973; *Navill v. State*, 133 Ala. 99, 32 So. 596; *Washington v. State*, 68 Ala. 85; *Quinn v. State*, 49 Ala. 353; *Miller*

- v. State*, 45 Ala. 24; *Cawley v. State*, 37 Ala. 152; *Henry v. State*, 33 Ala. 389 (well settled rule); *Johnson v. State*, 20 Ala. 62, 65 Am. Dec. 383, Ark.—*Blanton v. State*, 4 Ark. 56. Cal.—*People v. Johnson*, 22 Cal. App. 303, 134 Pac. 332; *People v. Miles*, 19 Cal. App. 223, 123 Pac. 250. Colo.—*White v. People*, 8 Colo. App. 289, 45 Pac. 989. Conn.—*State v. Tully*, 34 Conn. 280, 299 D. C. Kidwell v. United States, 28 App. Cas. 503. Fla.—*Kennedy v. State*, 31 Fla. 423, 12 So. 878. Ga.—*Lascelles v. State*, 90 Ga. 347, 16 S. E. 637, 25 Am. St. Rep. 216; *Williams v. State*, 72 Ga. 189; *Davis v. State*, 57 Ga. 66, 97; *Stephon v. State*, 11 Ga. 273. See *Lapinsky v. State*, 7 Ga. App. 286, 66 S. E. 360. Ill.—*Looney v. People*, 31 Ill. App. 370. Ind.—*Merrick v. State*, 63 Ind. 317, 329; *Mershon v. State*, 51 Ind. 13; *McGregor v. State*, 16 Ind. 9; *Wintorpdin v. State*, 7 Blackf. 186; *Hudson v. State*, 1 Blackf. 317. Ia.—*State v. McCormack*, 56 Iowa 586, 9 N. W. 916. Kan.—*State v. Edmunds*, 45 Kan. 397, 26 Pac. 679; *State v. Hoiges*, 45 Kan. 382, 26 Pac. 679; *State v. Goodwin*, 33 Kan. 588, 9 Pac. 899. La.—*State v. Nafresse*, 133 La. 584, 63 So. 182; *State v. Jones*, 52 La. Ann. 211, 26 So. 782; *State v. De Pass*, 31 La. Ann. 487; *State v. Snow*, 30 La. Ann. 491; *State v. Canaan*, 8 La. Ann. 109, 114. Me.—*State v. Hood*, 71 Me. 363; *State v. Nelson*, 29 Me. 429. Md.—*Tomper v. State*, 112 Md. 285, 76 Atl. 118; *State v. Blatney*, 96 Md. 711, 54 Atl. 614; *State v. McNally*, 73 Md. 559. Mass.—*Com. v. Rosenthal*, 211 Mass. 59, 97 N. E. 699, Ann. Cas. 1913A, 1909, 47 L. R. A. (N. S.) 957; *Com. v. Hollander*, 200 Mass. 73, 87 N. E. 844; *Donson v. Com.*, 145 Mass. 164, 23 N. E. 384; *Com. v. Mullen*, 150 Mass. 324, 23 N. E. 31; *Com. v. Brown*, 133 Mass. 69; *Com. v. Hills*, 16 Cuss. 530. Mich.—*People v. Kemp*, 76 Mich. 416, 43 N. W. 479; *People v. McMillan*, 32 Mich. 627, 18 N. W. 399; *Hamilton v. People*, 30 Mich. 173. Minn.—*State v. Waud*, 13 Minn. 181. Miss.—*Tait v. State*, 57 Miss. 479, 24 Am. Rep. 708; *Stawhorn v. State*, 37 Miss. 427; *Smith v. State*, 28 Miss. 267, 61 Am. Dec. 744. Mo.—*State v. Carrigan*, 210 Mo. 311, 160 S. W. 523, 16 L. R. A. (N. S.) 561; *State v. Richmond*, 188 Mo. 71, 84 S. W. 880; *State v. Hous*, 109 Mo. 654, 19 S. W. 34, 42 Am. St. Rep. 680; *State v. Porter*, 26 Mo. 293; *State v. Ribby*, 7 Mo. 317; *Storrs v. State*, 3 Mo. 9; *State v. Outman*, 147 Mo. App. 417, 128 S. W. 261; *State v. Smith*, 70 Mo. App. 99. Neb.—*Blodgett v. State*, 20 Neb. 711, 63 N. W. 701; *Martin v. State*, 20 Neb. 507, 46 N. W. 423. N. Y.—*People v. Adler*, 140 N. Y. 441, 32 N. E. 844; *Kane v. People*, 8 Wend. 400; *People v. Baker*, 2 Hill 150; *People v. Johnson*, 2 Wheeler Cr. Cas. 781; *Conan v. People*, 4 Park. Crim. 607. N. C.—*State v. Rice*, 84 N. C. 707. Ohio.—*Berry v. State*, 3 Ohio St. 441. Pa.—*Com. v. Shurtle*, 100 Pa. 272, 18 Atl. 637, 17 Am. St. Rep. 719; *Com. v. Wilkes-Barre*, 3 Kulp 487. S. C.—*State v. Hunkelright*, 55 S. C. 358, 33 S. E. 411, 74 Am. St. Rep. 701; *State v. Smith*, 15 S. C. 414; *State v. Nelson*, 14 Rich. L. 169, 172. Tenn.—*Barton v. State*, 16 Lea 61; *Ponte v. State*, 16 Lea 116; *Tucker v. State*, 8 Lea 644; *Cash v. State*, 10 Humph. 111; *Mitchell v. State*, 5 Coldw. 53; *Ayers v. State*, 5 Coldw. 26. Tex.—*Golden v. State*, 72 Tex. Crim. 19, 160 S. W. 971; *Whitlow v. State*, 47 Tex. Crim. 348, 84 S. W. 821; *Tusano v. State*, 34 Tex. Crim. 63, 20 S. W. 42; *Crawford v. State*, 31 Tex. Crim. 71, 19 S. W. 760; *Wellhausen v. State*, 30 Tex. App. 623, 18 S. W. 360; *Rengan v. State*, 28 Tex. App. 297, 12 S. W. 601, 19 Am. St. Rep. 830; *Dalton v. State*, 4 Tex. App. 433. Utah.—*United States v. West*, 7 Utah 437, 17 Pac. 84. Vt.—*State v. Lashwell*, 58 Vt. 378, 3 Atl. 529; *State v. Hoeller*, 17 Vt. 608. W. Va.—*State v. Shores*, 21 W. Va. 491, 7 S. E. 413, 14 Am. St. Rep. 876. Wis.—*Jackson v. State*, 91 Wis. 23, 24 N. W. 838; *Martin v. State*, 72 Wis. 165, 48 N. W. 119; *State v. Tye*, 19 Wis. 262, 305. Eng.—*Castro v. The Queen*, 6 App. Cas. 229; *Reg. v. Haywood*, 9 Cox C. C. 479; *Reg. v. Ferguson*, 6 Cox C. C. 454; *Young v. Rex*, 2 East P. C. 831. Can.—*Rex v. Hughes*, 22 Ont. L. R. 344.
- [a] Though such felonies were committed at different times. *Cash v. State*, 10 Humph. (Tenn.) 111.
- [b] It is well settled that a defendant may be charged with divers and distinct offenses whether felonies or misdemeanors, of a kindred nature and liable to punishments of the same general character by several counts in the same indictment. *Com. v. Rosenthal*, 211 Mass. 59, 97 N. E. 699, Ann. Cas. 1913A, 1909, 47 L. R. A. (N. S.) 957.
- [c] In *People v. Lashwell*, 4 N. Y. Crim. 317, 327, the court said: "Prior to the Code of Criminal Procedure, . . .

tions and in no way related cannot be joined in the same indictment, even in separate counts.³³

c. Misdemeanors.—Several distinct misdemeanors of the same class or of a kindred nature, and liable to punishment of the same general character, may be joined in different counts of the same indictment or information.³⁴ And the fact that different punishments may

it was held that separate and distinct felonies, involving different punishments, might be joined, so long as all the counts related to the same transaction; and that a count for burglary, with intent to commit larceny might properly be united with a count for larceny. Burglary and larceny, rape and assault with intent to commit rape, larceny and receiving stolen goods, assault with intent to kill and simple assault."

[d] While two or more felonies may, under proper circumstances, be joined in one indictment or information, they must, as a general rule, be in separate counts. *State v. Goodwin*, 33 Kan. 538, 6 Pac. 899.

[e] Although the joinder of distinct offences in the same indictment constitutes no legal ground for quashing the indictment, if objection, on that ground, be made before plea, the court, at its discretion, may order the indictment to be quashed, lest it should embarrass the prisoner in his defence, or prejudice him in his challenge to the jury. *Strawhorn v. State*, 37 Miss. 422. See also *State v. Rees*, 76 Miss. 435, 22 So. 823, wherein the court said: "The settled rule in this state is that it is bad practice to join in the same indictment counts for distinct felonies of differing degrees, differently punished, and that, if that be done, the court may, in its discretion, on timely and proper objection, quash the indictment."

As to method of reaching objections generally, see *infra*, XIV.

33. See the following: Ala.—*Mayo v. State*, 30 Ala. 32. Ark.—*State v. Lancaster*, 30 Ark. 33. Ill.—*Kotter v. People*, 150 Ill. 441, 37 N. E. 932; *West v. People*, 137 Ill. 189, 27 N. E. 34, 34 N. E. 274. Ind.—*State v. Smith*, 8 Blachf. 449. Ia.—*State v. Palment*, 35 Iowa 541. Kan.—*State v. Hodges*, 45 Kan. 289, 25 Pac. 676. Mich.—*People v. Aiken*, 66 Mich. 460, 33 N. W. 821, 11 Am. St. Rep. 512. Miss.—*Burges v. State*, 81 Miss. 482, 33 So. 129; *Hill v.*

State, 72 Miss. 527, 17 So. 375; *Teat v. State*, 53 Miss. 439, 24 Am. Rep. 703. Mo.—*State v. Christian*, 253 Mo. 382, 161 S. W. 736. Tenn.—See *Cash v. State*, 11 Humph. 111. Tex.—*McKenzie v. State*, 32 Tex. Crim. 568, 25 S. W. 426, 40 Am. St. Rep. 795.

[a] "In cases of felony, the multiplication of distinct charges has been considered so objectionable as tending to confound the accused in his defense, or to prejudice him as to his challenges, in the matter of being held out to be habitually criminal, in the distraction of the jury, or otherwise, that it is the settled rule in England and in many of our states, to confine the indictment to one distinct offence or restrict the evidence to one transaction." *McElroy v. United States*, 164 U. S. 76, 17 Sup. Ct. 31, 41 L. ed. 355.

34. See the following: U. S.—*Pointer v. United States*, 151 U. S. 396, 14 Sup. Ct. 410, 38 L. ed. 208; *United States v. Belvin*, 46 Fed. 381; *United States v. Nye*, 4 Fed. 888 (rule recognized in the statutes of the United States, §1024, Rev. St.); *United States v. Porter*, 2 Cranch C. C. 66, 27 Fed. Cas. No. 16,072; *United States v. Devlin*, 6 Blatchf. 71, 25 Fed. Cas. No. 14,955. Ala.—*Fitzpatrick v. State*, 169 Ala. 1, 53 So. 1021; *Burt v. State*, 159 Ala. 134, 48 So. 851; *Swanson v. State*, 120 Ala. 376, 25 So. 213; *Norvell v. State*, 50 Ala. 174; *Covey v. State*, 4 Port. 186; *Conner v. State*, 8 Ala. App. 361, 63 So. 33. Ark.—*Orr v. State*, 18 Ark. 540. Conn.—*Barnes v. State*, 19 Conn. 397, 398. Ga.—*Hathcock v. State*, 88 Ga. 91, 13 S. E. 959; *Tooke v. State*, 4 Ga. App. 495, 61 S. E. 917. Ill.—*Kroer v. People*, 78 Ill. 294; *Mullinix v. People*, 76 Ill. 211; *People v. Carter*, 171 Ill. App. 43. Ia.—*State v. Bitting*, 13 Iowa 606. Kan.—*State v. Goodwin*, 33 Kan. 538, 6 Pac. 899; *State v. Chandler*, 31 Kan. 201, 1 Pac. 787; *State v. Schweiter*, 27 Kan. 499. Ky.—*Com. v. McChord*, 2 Dana 242. La.—*State v. Mancuso*, 136 La. 910, 67 So. 955; *State v. John*, 129 La. 208, 55 So. 766;

be inflicted does not affect the right of joinder in some jurisdictions in the case of misdemeanors.³³ Nor is the right of joinder affected, even though one is an offense at common law and the other a statutory offense.³⁴

State v. Moeling, 129 La. 204, 55 So. 764. Md.—*Curry v. State*, 117 Md. 587, 83 Atl. 1030; *State v. Blakeney*, 96 Md. 711, 54 Atl. 614. Mass.—*Com. v. Rosenthal*, 211 Mass. 50, 97 N. E. 609, Ann. Cas. 1913A, 1003, 47 L. R. A. (N. S.) 955; *Com. v. Tuttle*, 12 Cash. 505; *Com. v. Dillane*, 11 Gray 67; *Com. v. Kimball*, 7 Gray 328, 330. Miss.—*Jonas v. State*, 67 Miss. 111, 7 So. 220. Mo.—*State v. Kibby*, 7 Mo. 317; *Storrs v. State*, 3 Mo. 8; *State v. Nicholas*, 124 Mo. App. 339, 191 S. W. 618; *State v. Boyer*, 70 Mo. App. 156. Neb.—*Little v. State*, 69 Neb. 749, 84 N. W. 248, 51 L. R. A. 717; *Martin v. State*, 39 Neb. 507, 46 N. W. 621; *Burrell v. State*, 25 Neb. 581, 41 N. W. 309. N. H.—*State v. Rust*, 35 N. H. 438, 441. N. J.—*Stephens v. State*, 53 N. J. L. 215, 21 Atl. 1038; *Stone v. State*, 20 N. J. L. 404. N. M.—*United States v. Vigil*, 7 N. M. 296, 34 Pac. 530. N. Y.—*Polinsky v. People*, 73 N. Y. 65, 69; *People v. Gates*, 13 Wend. 311; *Kane v. People*, 8 Wend. 293; *People v. Costello*, 1 Denio 83; *People v. Lenhardt*, 4 N. Y. Crim. 317, 327, permissible even prior to code of criminal procedure. N. C.—*State v. Morgan*, 133 N. C. 743, 45 S. E. 1033; *State v. Slagle*, 82 N. C. 653. Pa.—*Com. v. Schoon*, 25 Pa. Super. 211; *Com. v. Sylvester*, *Brightly N. P.* 331, 4 Clark 31, 6 Pa. L. J. 283; *Com. v. Bargar*, 2 Law T. (N. S.) 161. S. C.—*State v. Beckroge*, 49 S. C. 484, 27 S. E. 658; *State v. Thompson*, 2 Strobb. 12, 47 Am. Dec. 588. Tenn.—*Tillery v. State*, 10 Lea 35. Tex.—*Golden v. State*, 72 Tex. Crim. 19, 160 S. W. 957; *Roseboro v. State* (Tex. Crim.), 106 S. W. 124; *Floyd v. State* (Tex. Crim.), 68 S. W. 690; *Hall v. State*, 32 Tex. Crim. 474, 24 S. W. 407; *Stallins v. State*, 31 Tex. Crim. 294, 20 S. W. 552; *Alexander v. State*, 27 Tex. App. 533, 11 S. W. 628; *Day v. State*, 14 Tex. App. 30; *Gage v. State*, 2 Tex. App. 259; *Street v. State*, 7 Tex. App. 5; *Barwell v. State*, 1 Tex. App. 745; *Waddall v. State*, 1 Tex. App. 729. Vt.—*State v. Cretean*, 23 Vt. 14. Va.—*Mitchell v. Com.*, 93 Va. 775, 20 S. E. 892. Wis.—*State v. Gummer*, 22 Wis. 431. Eng.—*Rex v. Kingston*, 8 East 41, 103 Eng.

Reprint 259; *Castro v. Reg.*, 6 App. Cas. 269; *Rex v. Passell*, 6 St. Tr. (N. S.) 723.

[a] Several misdemeanors of a similar character may be joined in different counts of the same indictment, although they are created under different statutes. (*Com. v. Lichtren*, 1 Pearson (Pa.) 107.

[b] Such was the rule at common law. *United States v. Nye*, 4 Fed. 888, wherein the court said: "At common law it is admitted that several distinct offenses may be joined by different counts in an indictment; that is, where they are misdemeanors only. That is well settled by Wharton's Criminal Law, §433; Bishop's Criminal Law, §§201, 204; U. S. v. Callahan, decided in this court, 6 McLean, 96; . . ."

35. U. S.—*Harboan v. United States*, 168 Fed. 30, 94 O. C. A. 124. Ala.—*Swanson v. State*, 120 Ala. 376, 25 So. 213; *Wooster v. State*, 55 Ala. 217. Ill.—*Bensley v. People*, 89 Ill. 571.

[a] "The rule against the joinder of offenses in different counts in the same indictment, when the punishment is not of the same nature, does not apply to misdemeanors.—*Wooster v. State*, 55 Ala. 217." *Swanson v. State*, 120 Ala. 376, 25 So. 213. But see *Stone v. State*, 20 N. J. L. 404, wherein the court said: "Indictments for misdemeanors may contain several counts for different offenses, provided the judgment upon each be the same but not otherwise. . . . That is, as the rule is to be understood, necessarily different, the judgment being of a different character. . . . The offense charged in each count of this indictment is a misdemeanor, and the punishment in each case the same; that is to say of the same character, fine and imprisonment—and does not come within the rule with regard to different judgments. It is no objection to an indictment that the punishment for one of the offenses is positive and for the others discretionary."

36. *Com. v. Sylvester*, *Brightly N. P.* (Pa.) 331, 4 Clark 31, 6 Pa. L. J. 283; *State v. Thompson*, 2 Strobb. (S. C.) 12, 47 Am. Dec. 588.

d. *Arising Out of Same Transaction*.—It is a well established rule, embodied in the statute law of some states, that different offenses, relating to or arising out of the same act, transaction or event, may be charged in separate counts of the same indictment or information.³⁷

37. **U. S.**—*Summers v. United States*, 231 U. S. 92, 34 Sup. Ct. 38, 58 L. ed. 137; *Pierce v. United States*, 169 U. S. 355, 16 Sup. Ct. 321, 40 L. ed. 454; *Ingraham v. United States*, 155 U. S. 134, 15 Sup. Ct. 148, 39 L. ed. 213; *Pointer v. United States*, 151 U. S. 396, 14 Sup. Ct. 410, 38 L. ed. 208; *Rooney v. United States*, 203 Fed. 928, 930, 122 C. O. A. 230; *Dillard v. United States*, 141 Fed. 303, 72 C. C. A. 451; *McGingor v. United States*, 134 Fed. 187, 69 C. C. A. 477; *United States v. Paterson*, 201 Fed. 697, 726; *United States v. Clark*, 125 Fed. 92; *United States v. Jones*, 69 Fed. 673; *Ex parte Peters*, 12 Fed. 461; *United States v. McFarlane*, 1 Cranch C. C. 163, 26 Fed. Cas. No. 15,675. See also *Elliott v. United States*, 186 Fed. 434, 108 C. C. A. 356; *United States v. Loring*, 91 Fed. 881; *United States v. Nye*, 4 Fed. 888. **Ala.**—*Grimes v. State*, 105 Ala. 86, 17 So. 184; *Tanner v. State*, 92 Ala. 1, 9 So. 613; *Mayo v. State*, 30 Ala. 32; *Johnson v. State*, 1 Ala. App. 102, 55 So. 321. **Ark.**—*Ince v. State*, 77 Ark. 426, 93 S. W. 65. **Cal.** *Penal Code* 1954; *People v. Jailles*, 116 Cal. 301, 79 Pac. 965; *People v. Johnson*, 22 Cal. App. 362, 134 Pac. 339; *People v. Milos*, 19 Cal. App. 223, 125 Pac. 250; *People v. Danford*, 14 Cal. App. 412, 112 Pac. 474; *People v. Piner*, 11 Cal. App. 542, 105 Pac. 780. **D. C.**—*Hyde v. United States*, 27 App. Cas. 362; *Posey v. United States*, 26 App. Cas. 362; *Davis v. United States*, 18 App. Cas. 468. **Fla.**—*Probley v. State*, 61 Fla. 46, 54 So. 367. **Ga.**—*Williams v. State*, 72 Ga. 186; *Jones v. State*, 2 Ga. App. 433, 58 S. E. 550. **Ill.**—*People v. Mooler*, 290 Ill. 173, 103 N. E. 216; *People v. Gray*, 291 Ill. 131, 96 N. E. 268; *People v. Dougherty*, 246 Ill. 478, 92 N. E. 929; *Murphy v. People*, 194 Ill. 528. **Ind.**—*Cooper v. State*, 79 Ind. 266; *McGregor v. State*, 10 Ind. 9. **Ia.**—*State v. Yates*, 145 Iowa 332, 124 N. W. 174; *State v. Truitt*, 122 Iowa 82, 97 N. W. 989; *State v. McPherson*, 9 Iowa 53. **La.** *State v. Lewis*, 129 La. 809, 56 So. 893; *State v. Dugout*, 129 La. 752, 50 So. 601; *State v. Perry*, 116 La. 231, 40 So. 660; *State v. Jones*, 69 La. Ann. 211, 26 So. 162; *State v. Sholly*, 45 La. Ann. 1478, 21 So. 89; *State v. Huey*, 48 La. Ann. 1382, 20 So. 915; *State v. Wren*, 48 La. Ann. 803, 19 So. 745; *State v. Scott*, 48 La. Ann. 293, 19 So. 141; *State v. Cook*, 42 La. Ann. 85, 7 So. 64; *State v. McDonald*, 39 La. Ann. 959, 3 So. 92; *State v. Pierre*, 38 La. Ann. 91. **Md.**—*Toomer v. State*, 112 Md. 285, 76 Atl. 118. **Mich.**—*People v. Dupree*, 175 Mich. 632, 141 N. W. 672; *People v. Summers*, 115 Mich. 537, 73 N. W. 818; *People v. McDowell*, 63 Mich. 229, 30 N. W. 68; *People v. Sweeney*, 55 Mich. 586, 22 N. W. 50; *Van Sickle v. People*, 29 Mich. 61. **Mo.**—*State v. Tevis*, 234 Mo. 276, 136 S. W. 339; *State v. Carragin*, 210 Mo. 351, 366, 109 S. W. 553, 16 L. R. A. (N. S.) 561; *State v. Goodale*, 210 Mo. 275, 109 S. W. 9; *State v. Gilmore*, 110 Mo. 1, 19 S. W. 218; *State v. Houx*, 109 Mo. 654, 19 S. W. 35, 32 Am. St. Rep. 686. **Neb.**—*Brown v. State*, 88 Neb. 411, 129 N. W. 545; *Cohoe v. State*, 82 Neb. 744, 118 N. W. 1088; *Blodgett v. State*, 50 Neb. 121, 69 N. W. 751. **N. H.**—*State v. Lincoln*, 49 N. H. 464. **N. J.**—*Stephens v. State*, 53 N. J. L. 245, 21 Atl. 1038. **N. Y.** *People v. Young*, 207 N. Y. 522, 101 N. E. 451; *People v. Wright*, 136 N. Y. 625, 32 N. E. 629 (murder and killing in an attempt to commit rape); *Hawker v. People*, 75 N. Y. 487; *Counts v. People*, 4 Park. Crim. 662; *People v. Weiss*, 153 App. Div. 235, 142 N. Y. Supp. 1092; *People v. Trainor*, 57 App. Div. 422, 68 N. Y. Supp. 263; *People v. O'Malley*, 52 App. Div. 46, 64 N. Y. Supp. 843; *People v. Crotty*, 55 Hun 611, 9 N. Y. Supp. 937; *People v. Emerson*, 53 Hun 437, 6 N. Y. Supp. 274; *People v. Rose*, 52 Hun 33, 4 N. Y. Supp. 787; *People v. Callahan*, 29 Hun 580; *Cox v. People*, 19 Hun 430; *People v. Kelly*, 3 N. Y. Crim. 272. **N. C.**—*State v. Burnett*, 142 N. C. 577, 55 S. E. 72. **Ohio.** *State v. Bailey*, 59 Ohio St. 636, 36 N. E. 233. **Okla.**—*Cochran v. State*, 4 Okla. Crim. 379, 111 Pac. 974; *Sturgis v. State*, 3 Okla. Crim. 362, 102 Pac. 57; *Martin v. Territory*, 4 Okla. 105, 43 Pac. 1067. **Pa.**—*Com. v. Carson*, 166 Pa. 479, 30 Atl. 985; *Com. v. Lewis*, 140 Pa. 561, 21 Atl. 501; *Com. v. Shuttle*, 150 Pa. 272, 18 Atl. 635, 17 Am. St.

Rep. 779; *Hollister v. Com.*, 66 Pa. 102; *Com. v. March*, 1 Pa. Co. Ct. 81; *Com. v. Schuen*, 23 Pa. Super. 211; *Com. v. Church*, 17 Pa. Super. 39; *Com. v. Stahler*, 9 Pa. 187, 20 Leg. Int. 78; S. C. *State v. Burbage*, 31 S. C. 184, 18 S. E. 937; *State v. Scott*, 15 S. C. 434. *Tenn.* *Davis v. State*, 87 Tenn. 322, 3 S. W. 348; *Wright v. State*, 4 Humph. 194; *Foster v. State*, 16 La. 115; *Tilley v. State*, 10 La. 35. *Tex.*—*Day v. State*, 67 Tex. Crim. 307, 138 S. W. 123; *Hawthorn v. State*, 62 Tex. Crim. 114, 133 S. W. 779; *Johnson v. State*, 52 Tex. Crim. 103, 107 S. W. 53; *Wigglus v. State*, 47 Tex. Crim. 338, 84 S. W. 821; *Pizan v. State*, 47 Tex. Crim. 26, 83 S. W. 1006; *McVey v. State*, 41 Tex. Crim. 56, 31 S. W. 928; *Elliott v. State*, 38 Tex. Crim. 121, 41 S. W. 622 (theft, receiving stolen goods and for altering the brand on cattle); *Owens v. State*, 35 Tex. Crim. 345, 33 S. W. 875; *Welhausen v. State*, 30 Tex. App. 623, 18 S. W. 300. *Vt.*—*State v. Ward*, 61 Vt. 153, 17 Atl. 482. *Va.*—*Anthony v. Com.*, 88 Va. 847, 14 S. E. 834. *W. Va.*—*State v. Plannan*, 48 W. Va. 115, 35 S. E. 862. *Wis.* *Jackson v. State*, 21 Wis. 253, 61 N. W. 818; *Newman v. State*, 14 Wis. 323. *Wyo.*—*Asherman v. State*, 7 Wyo. 504, 54 Pac. 228.

[a] In Massachusetts (1) the statute provides that two or more counts describing different crimes which may depend upon the same facts or transactions may be set forth in the same indictment if it contains an averment that the different counts therein are different descriptions of the same acts. Pub. St., ch. 218, §45, formerly St., 1861, ch. 181; *Com. v. Jacobs*, 152 Mass. 276, 23 N. E. 403. (2) Such statute "was designed to enable the pleader to join several counts describing different offenses which could not be joined at common law, and not to restrict his right to set out the same offense by different descriptions in several counts, as has always been the practice in this Commonwealth." *Com. v. Andrews*, 132 Mass. 293. And see *Com. v. Thompson*, 159 Mass. 56, 33 N. E. 1111.

[b] Such statutes do not make it necessary, (1) however, to aver that the different counts are different descriptions of the same offense when the offenses intended to be charged are different and kindred thereof is permissible independent of such statute. *Com.*

v. Rogers, 181 Mass. 184, 63 N. E. 431. (2) It "was not intended for the case of merely slight verbal changes in the description of property stolen as joined, provided the substantial identity is not affected, but to prevent the joinder of misdemeanors where the description might at common law be open to that objection." *Com. v. Allen*, 128 Mass. 46, 25 Am. Rep. 366. See *Com. v. Jacobs*, 152 Mass. 276, 23 N. E. 403; *Bushman v. Com.*, 138 Mass. 507; *Com. v. Ismael*, 184 Mass. 291; *Com. v. Andrews*, 152 Mass. 268.

[c] The New York code provides that the indictment must charge but one crime and in but one form, except the crime may be charged in separate counts to have been committed in a different manner or by different means, and when the acts complained of may constitute different crimes, such crimes may be charged in separate counts (Code Crim. Proc., §§278, 279). "When the act complained of may constitute different offenses, such offenses may be charged in separate counts of the indictment." *People v. O'Donnell*, 46 Hun 358.

[d] It is only where the identical acts complained of may constitute either of different crimes that such crimes may be charged in separate counts of the same indictment. *People v. Foster*, 60 Misc. 3, 112 N. Y. Supp. 706.

[e] The words "same transaction" does not mean the same acts, but it means the same series of acts, which when completed culminate in the crime or crimes for which the indictment is found. *People v. Emerson*, 53 Hun 437, 6 N. Y. Supp. 274.

[f] Two kindred offenses growing out of the same transaction may be charged in one indictment or information. *State v. Sheppard*, 33 La. Ann. 1216; *State v. Malloy*, 30 La. Ann. 61.

[g] Distinct felonies may be joined in an indictment without rendering it amenable to demurrer or motion in arrest. If, however, they do not arise out of the same transaction and have no connection with each other, the judge should ex mero motu order the prosecuting attorney to elect as which he will proceed. *State v. Beckrope*, 40 S. C. 484, 27 S. E. 658; *State v. Woodard*, 38 S. C. 353, 47 S. E. 135; *State v. Scott*, 15 S. C. 433; *State v. Nelson*, 14 Ark. L. (S. C.) 169, 172. See *infra*, XVI.

It has been held that this rule is limited to offenses which arise out of the same transaction and are so far cognate as that an acquittal or conviction for one would be a bar to a trial for the other.³⁰

The general rule applies even though the punishment for the offenses is different,³¹ and though one offense is statutory and the other a common-law offense.³² Under this general rule it is proper to charge by means of separate counts, the commission of an offense and the offenses included within it,³³ as for example a completed offense and an attempt to commit it,³⁴ or assault with intent to commit it.³⁵

38. *State v. Christian*, 253 Mo. 382, 161 S. W. 726; *State v. Carragin*, 210 Mo. 351, 160 S. W. 553, 16 L. R. A. (N. S.) 561.

[a] In *State v. Christian*, 253 Mo. 382, 161 S. W. 726, the information charged C. and S. jointly with the crime of grand larceny in the first count, and in the second count it charged C. with the crime of being an accessory after the fact by assisting S. to escape. It was held that there was a misjoinder of counts because the offenses were not cognate and did not necessarily arise out of the same transaction. Besides a conviction of the larceny would not necessarily negative guilt as to the crime of being an accessory after the fact.

39. U. S.—*United States v. Jones*, 69 Fed. 973, 981. Ala.—*Lewis v. State*, 4 Ala. App. 141, 58 So. 802. Ark.—*Baker v. State*, 4 Ark. 56. Mich.—*People v. Sweeney*, 55 Mich. 586, 22 N. W. 59. N. Y.—*Hawker v. People*, 75 N. Y. 487; *People v. Rynders*, 12 Wend. 425, 427; *People v. Trainor*, 57 App. Div. 422, 68 N. Y. Supp. 263; *People v. Emerson*, 53 Hun 437, 6 N. Y. Supp. 274. S. C.—*State v. Pricaster*, 144 S. C. 103.

[a] Though the punishment be imprisonment of different lengths, larceny and receiving stolen goods may be joined in separate counts. But if the punishment for one were imprisonment and for the other whipping, as at common law, they could not be so joined. *State v. Lawrence*, 81 N. C. 522.

[b] In Mississippi it is bad practice to join felonies of differing degrees and with different punishments. If the court in its discretion quash the indictment therefore there is no error. *State v. Rice*, 76 Miss. 445, 22 So. 829.

40. Ala.—*Wentlar v. State*, 55 Ala. 217. Ky.—*Maylor v. Com.*, 15 Ky. L. Rep. 557, 24 S. W. 609. Mass.—*Com. v. Isenhardt*, 144 Mass. 201. Mich.—*People*

v. Sweeney, 55 Mich. 586, 22 N. W. 59. See *People v. McDowell*, 63 Mich. 229, 30 N. W. 68. N. Y.—*People v. Barnes*, 158 App. Div. 712, 143 N. Y. Supp. 885. N. C.—See *State v. Lawrence*, 81 N. C. 522. Pa.—*Hollister v. Com.*, 60 Pa. 103; *Com. v. Sylvester*, *Brightly N. P.* 331, 6 Pa. Law J. 283, 4 Clark 31. S. C.—*State v. Thompson*, 2 Strobb. 12, 47 Am. Dec. 588; *State v. Williams*, 2 McCord 301.

[a] Thus two counts are not necessarily inconsistent because the same act sometimes amounts to larceny at common law and also embezzlement under the statute. *People v. Barnes*, 158 App. Div. 712, 143 N. Y. Supp. 885.

41. Ala.—*State v. Hinton*, 6 Ala. 864. Ga.—*Harris v. State*, 1 Ga. App. 136, 57 S. E. 937. Pa.—*Com. v. Shutte*, 130 Pa. 272, 18 Atl. 635, 17 Am. St. Rep. 773. S. C.—*State v. Tidwell*, 5 Strobb. 1, assault and assault and battery. Tex.—*Garland v. State*, 51 Tex. Crim. 643, 104 S. W. 898.

42. Cal.—*People v. Danford*, 14 Cal. App. 442, 112 Pac. 474. Ga.—*Stephen v. State*, 11 Ga. 225. N. Y.—*People v. Adams*, 72 App. Div. 166, 76 N. Y. Supp. 361.

43. Cal.—*People v. Tyler*, 35 Cal. 553. Ind.—*McGregg v. State*, 4 Blackf. 101. Ky.—*Com. v. Bradley*, 132 Ky. 512, 116 S. W. 761, under Code Crim. Proc., §127. Md.—*Bark v. State*, 2 Har. & J. 426; *State v. Satten*, 4 Gill 494. Neb.—*Garrison v. People*, 6 Neb. 274. N. J.—*Cook v. State*, 24 N. J. L. 843. N. Y.—*Hawker v. People*, 75 N. Y. 487; *People v. Satterlee*, 5 Hun 167. Pa.—*Com. v. Shutte*, 130 Pa. 272, 18 Atl. 635; *Harman v. Com.*, 12 Serg. & R. 69; *Com. v. Stiver*, 1 Pa. Co. Ct. 526.

[a] There is, however, no necessity for the inclusion of a count charging a lower degree of the offense for the reason that an indictment for the highest degree includes all the lower de-

But charges of offenses occurring at different and distinct times and places must not be joined in the same pleading, even in separate counts thereof.⁴² Nor can inconsistent offenses be charged where the evidence of one would not support the other.⁴³ And where the statute provides that but one offense may be charged in an indictment, different offenses cannot be joined in the absence of statutory exceptions permitting the same.⁴⁴

c. *Of the Same Nature.*—Several distinct offenses of the same general nature, that is to say, requiring the same mode of trial and having punishments of like nature, may be charged in separate counts of the same indictment according to some authorities,⁴⁵ though they do not

gress. *Rhea v. Territory*, 2 Okla. Crim. 239, 105 Pac. 314. See *infra*, XIII.

44. U. S.—*McRory v. United States*, 164 U. S. 16, 31 Sup. Ct. 31, 41 L. ed. 512; *Ex parte Hilda*, 96 Fed. 421. Cal.—*Penal Code*, 4034; *People v. De Coursey*, 61 Cal. 139; *People v. Taggart*, 43 Cal. 81. *Thoughtful and breaking and entering dwelling house in daytime*; *People v. Hawkins*, 34 Cal. 181; *People v. Bailey*, 23 Cal. 377. D. C.—*Kotwell v. United States*, 38 App. Cas. 566. Minn.—*State v. Wood*, 13 Minn. 121. Miss.—*Burgess v. State*, 81 Miss. 482, 22 So. 499. Mo.—*State v. Christian*, 273 Mo. 387, 161 S. W. 796 (the larceny of a horse and adding a confederate to escape); *State v. Cartright*, 210 Mo. 351, 169 S. W. 233, 16 L. R. A. (N. S.) 361. Disapproving the dictum to the contrary in *State v. Porter*, 26 Mo. 201; *State v. Daubert*, 42 Mo. 242. N. Y.—*People v. Rensers*, 12 Wend. 426; *People v. O'Donnell*, 40 Hen 378. Okla.—*Clark v. State*, 5 Okla. Crim. 704, 115 Pac. 377; *Tunnard v. State*, 5 Okla. Crim. 229, 115 Pac. 603; *Shuford v. State*, 4 Okla. Crim. 513, 113 Pac. 311; *Donitzer v. State*, 4 Okla. Crim. 254, 111 Pac. 980. Pa.—*Com. v. Schoon*, 25 Pa. Super. 311. Tenn.—*Davis v. State*, 80 Tenn. 509, 3 S. W. 348. Tex.—*State v. Bradley*, 24 Tex. 95.

See *supra* XI. B. 2, a and b.

45. Ala.—*State v. Johnson*, 12 Ala. 840, 46 Am. Dec. 283. Ariz.—*Territory v. Duffield*, 1 Ariz. 58, 25 Pac. 479. Tenn.—*State v. Cherry*, 1 Swan 160. Tex.—See *Owens v. State*, 25 Tex. Crim. 345, 43 S. W. 376.

46. Ark.—*Dall v. State*, 48 Ark. 94, 2 S. W. 469; *State v. Lancaster*, 30 Ark. 65; *State v. Brewer*, 58 Ark. 176. Cal.—*People v. De Coursey*, 61 Cal. 134. Okla.

Clark v. State, 5 Okla. Crim. 704, 115 Pac. 377.

See *supra*, XI. B. 1.

47. U. S.—*Rev. St.* 43024; *Williams v. United States*, 168 U. S. 382, 18 Sup. Ct. 37, 37 L. ed. 709; *Ingram v. United States*, 155 U. S. 404, 15 Sup. Ct. 148, 39 L. ed. 219; *Pointier v. United States*, 151 U. S. 396, 14 Sup. Ct. 410, 33 L. ed. 508; *United States v. Wentworth*, 21 Fed. 22; *United States v. O'Callaghan*, 6 McLean 290, 27 Fed. Cas. No. 65910. Ala.—*McGuire v. State*, 171 Ala. 19, 55 So. 159; *Patriotick v. State*, 169 Ala. 3, 59 So. 1021; *Lowe v. State*, 174 Ala. 154, 52 So. 279; *Wooten v. State*, 25 Ala. 217; *Oliver v. State*, 27 Ala. 134; *Henry v. State*, 33 Ala. 189 (murder and manslaughter); *Johnson v. State*, 39 Ala. 62, 65 Am. Dec. 433; *Lewis v. State*, 4 Ala. App. 141, 28 So. 829. Ga.—*Lawelles v. State*, 90 Ga. 347, 16 S. E. 947, 95 Am. St. Rep. 219; *Williams v. State*, 72 Ga. 189; *Tucker v. State*, 4 Ga. App. 465, 61 S. E. 917; *Jones v. State*, 2 Ga. App. 434, 58 S. E. 559, "keeping and maintaining a lewd house" and the offense of "keeping a common, ill-governed and disorderly house" may be joined. Kan.—*State v. Warner*, 60 Kan. 93, 65 Pac. 342; *State v. Hodges*, 45 Kan. 389, 26 Pac. 679. La.—*State v. Green*, 37 La. Ann. 382; *State v. Orsby*, 4 La. Ann. 434. Me.—*State v. Francis*, 79 Me. 25, 8 Atl. 347; *State v. Burke*, 38 Me. 574; *State v. Ruby*, 63 Me. 433; *State v. Hood*, 51 Me. 303; *State v. Nelson*, 29 Me. 399. Mass.—*Com. v. Mullen*, 150 Mass. 494, 24 N. E. 54; *Com. v. Brews*, 121 Mass. 69; *Com. v. Costello*, 129 Mass. 378; *Com. v. Hillis*, 10 Crab. 589; *Carlton v. Com.*, 5 Max. 232. Mo.—*Fraser v. State*, 3 Mo. 536; *State v. Nitch*, 79 Mo. App. 39. Neb.—*Martin v. State*, 39 Neb. 507, 46 N. W. 621. N. C.—*State v. Kleg*, 84 N. C.

relate to or arise out of the same transaction,⁴⁸ but such joinder has

737. *Tenn.*—*Tucker v. State*, 8 Lea 633; *Cash v. State*, 10 Humph. 111. See also *Womack v. State*, 7 Galwey 508. *Tex.*—See *Irving v. State*, 8 Tex. App. 46; *Barnwell v. State*, 1 Tex. App. 715.

[a] In Arkansas such was the rule previous to statute providing that but one offense can be charged in an indictment or information. *Bell v. State*, 48 Ark. 94, 2 S. W. 402; *Daker v. State*, 4 Ark. 76.

[b] **Rule Applies to Both Felonies and Misdemeanors.**—*Com. v. Hills*, 10 Cosh. (Mass.) 230.

[c] **Offenses are not of the same class** so as to permit a joinder in one indictment under different counts which are "substantive offenses, separate and distinct, complete in themselves and independent of each other, committed at different times and not provable by the same evidence." *McElroy v. United States*, 164 U. S. 76, 17 Sup. Ct. 31, 41 L. ed. 305.

[d] **Where Punishments Are Alike in Kind Though Different in Degree.** *United States v. Barnett*, 17 Blatchf. 357, 34 Fed. Cas. No. 14,572.

[e] A judgment on an indictment charging offenses of same nature "will not be arrested as for a misjoinder, unless the offenses are of a nature and character radically different, as well as requiring different judgments, different in kind and not merely punishments differing in degree." *United States v. Peterson*, 1 Woodh. & M. 305, 27 Fed. Cas. No. 16,037. See also *United States v. Jones*, 39 Fed. 973; *Adams v. State*, 55 Ark. 147.

[f] **All the offenses prescribed by the oleomargarine act are statutory misdemeanors and may be joined under different counts as being "of the same class of crimes or offenses" within Rev. St., 11024 (U. S. Comp. St. 1901, p. 720).** The fact that one may be imprisoned in the penitentiary for one of the offenses does not necessarily designate that one is felony so as to take it out of the same class. *Meyers v. United States*, 161 Fed. 873, 88 C. C. A. 522.

[g] It is the practice in Massachusetts "to charge a defendant with various and distinct felonies in different counts of the same indictment, when they are of the same general nature and supported by similar evidence, and

where the punishments to be awarded are of the same character." *Com. v. Mullen*, 150 Mass. 394, 23 N. E. 51.

[h] In North Carolina, the court in the exercise of its discretion will on timely motion, either compel an election or quash an indictment charging distinct felonies of the same grade subject to the same punishment. *State v. Reel*, 80 N. C. 442.

48. **U. S.**—*McElroy v. United States*, 164 U. S. 76, 17 Sup. Ct. 31, 41 L. ed. 305; *Pointer v. United States*, 151 U. S. 396, 14 Sup. Ct. 410, 38 L. ed. 208. **Kan.**—*State v. Warner*, 60 Kan. 94, 55 Pac. 342, in which five separate and distinct transactions with different persons were charged, in that it was charged the defendants received deposits from different persons knowing the bank to be insolvent. **Tenn.**—*Cash v. State*, 10 Humph. 111.

See *United States v. Eastman*, 132 Fed. 551. But see *United States v. Peterson*, 1 Woodh. & M. 305, 27 Fed. Cas. No. 16,037.

[a] "For, in point of law" says Chitty, "there is no objection to the insertion of several distinct felonies of the same degree, though committed at different times, in the same indictment, against the same offender." 1 Chitty Crim. Law 253, quoted in *United States v. Wentworth*, 11 Fed. 52.

[b] **Whether such offenses may be joined under §1024, U. S. Rev. St.** is not answered by the statute but is left to the court to determine in a given case whether a joinder of two or more offenses in one indictment is consistent with the settled principles of criminal law. *Pointer v. United States*, 151 U. S. 396, 14 Sup. Ct. 410, 38 L. ed. 208; *McElroy v. United States*, 164 Fed. 76.

[c] In *Pointer v. United States*, 151 U. S. 396, 14 Sup. Ct. 410, 38 L. ed. 208, it was held that the accused was not prejudiced in his defense by the joinder in the same indictment of two offenses of murder which immediately followed one another. There was such close connection between the two killings in respect of time, place and occasion that it was difficult to separate the proof of one from the other.

[d] **Arson of Two Buildings.**—The indictment in *United States v. Cardish*, 145 Fed. 212, charged in different counts

been characterized in at least one jurisdiction, as bad practice.⁴⁸

f. *Specific Offenses Which May Be Joined.*—Under the foregoing rules, it is generally held that the offenses of larceny and burglary may be joined in one indictment under separate counts.⁴⁹ So also, separate

arson of the Girls' Building of the school and arson of the Boys' Building. "For aught that appears in the indictment, they may have been a mile apart. Therefore, for the purposes of the motion (to quash), it must be concluded that two distinct crimes are charged. The two offenses, however, are of the same nature, and punishable by the same penalties. The objection does not furnish ground for a demurrer. The remedy of the accused is by motion to compel the government to elect."

[c] *False Entries in Bank Books.* In *United States v. Berry*, 96 Fed. 882, it was held proper to join thirty-four false entries in the books of the bank by the same persons occurring at different times, for all were of the same grade, with the same punishment, and provable by the same evidence.

49. *Hill v. State*, 72 Miss. 539, 17 So. 375; *Teat v. State*, 53 Miss. 629, 24 Am. Rep. 798; *Strawhern v. State*, 37 Miss. 422.

50. See the following: U. S.—*Ex parte Peters*, 12 Fed. 461. Ala.—*Ross v. State*, 117 Ala. 77, 23 So. 638; *Orr v. State*, 107 Ala. 35, 18 So. 142; *Bowen v. State*, 106 Ala. 178, 17 So. 335; *Ardon v. State*, 6 Ala. App. 64, 69 So. 538; burglary and grand larceny. Cal.—*People v. Finer*, 11 Cal. App. 542, 195 Pac. 780. Colo.—*Parker v. People*, 13 Colo. 155, 21 Pac. 1120, 4 L. R. A. 803. D. C. *Davis v. United States*, 18 App. Cas. 468. Ga.—*Scott v. State*, 14 Ga. App. 806, 82 S. E. 376. Ill.—*People v. Gundwin*, 203 Ill. 99, 164 N. E. 1018; *People v. Moeller*, 299 Ill. 375, 103 N. E. 216; *Love v. People*, 199 Ill. 501, 43 N. E. 710; *Lyons v. People*, 68 Ill. 271. Ind. *Burns' Ann.* 84, 1914, §2566; *Reed v. State*, 147 Ind. 41, 46 N. E. 135; *McGillough v. State*, 132 Ind. 437, 21 N. E. 1116; *Short v. State*, 63 Ind. 376. La. *State v. Natessie*, 123 La. 184, 23 So. 182; *State v. Lewis*, 129 La. 890, 36 So. 893; *State v. Perry*, 116 La. 231, 40 So. 680; *State v. Hsey*, 48 La. Ann. 1889, 20 So. 915; *State v. Morgan*, 39 La. Ann. 214, 1 So. 476; *State v. Nishalls*, 37 La. Ann. 779; *State v. King*, 37 La. Ann. 662; *State v. Brown*, 35 La. Ann. 1008;

State v. Johnson, 24 La. Ann. 44; *State v. Duparc*, 31 La. Ann. 487. Mass. *Jesslyn v. Com.*, 6 Met. 236. Mo.—*Johnson*, 1890, 21891; *State v. Christian*, 222 Mo. 782, 195, 191 S. W. 629; *State v. Leasing*, 230 Mo. 707, 122 S. W. 602; *State v. Richmond*, 180 Mo. 77, 84 S. W. 880; *State v. Moore*, 121 Mo. 314, 26 S. W. 145, 41 Am. 88. Rep. 542. N. Y. *People v. Wilson*, 151 N. Y. 403, 43 N. E. 800; *Hawkes v. People*, 75 N. Y. 487; *People v. Ruse*, 15 N. Y. Supp. 815. N. C.—*State v. Lawrence*, 81 N. C. 522. Pa.—*Com. v. Shatto*, 130 Pa. 379, 18 Atl. 635, 17 Am. St. Rep. 773; *Com. v. Church*, 17 Pa. Super. 22. S. C.—*State v. Woodard*, 28 S. C. 223, 17 S. E. 107; *State v. Crawford*, 28 S. C. 320, 17 S. E. 41. S. D.—*State v. Nelson*, 14 Rich. L. 169. Tex.—*Miller v. State*, 16 Tex. App. 417. Va.—*Spencer v. Com.*, 17 Gratt. 579. W. Va.—*State v. Flanagan*, 48 W. Va. 119, 26 S. E. 502. Wyo.—*Asherman v. State*, 7 Wyo. 564, 34 Pac. 228.

And see 4 STANDARD PROC. 664.

[a] Under statutes providing that with certain exceptions only one offense shall be charged in an indictment, it is held, however, that such offenses cannot be joined, even in separate counts, there being no exception in favor thereof in such statutes. *Crook v. State*, 59 Ark. 329, 27 S. W. 369, overruling *Watkins v. State*, 37 Ark. 370; *Talliver v. State*, 35 Ark. 225; *Dodd v. State*, 23 Ark. 537 (holding under earlier statute that burglary and grand larceny, if the one was connected with the other, might be charged in one indictment); *State v. McFarland*, 38 Iowa 96. See also *State v. Smith*, 2 N. D. 515, 50 N. W. 120.

[b] Where, however, such statutes provide, as an exception to the rule that but one offense can be charged, that "where the acts complained of shall constitute different crimes, such crimes may be charged in separate counts" of the same indictment, separate counts for burglary and larceny may be joined when they are all founded upon the same transaction and the acts charged relate to the same property. *People v. Wilson*, 151 N. Y. 403, 43 N. E. 802, overruling 7 App. Div. 354, 40 N. Y. Supp. 197.

counts charging the offenses of larceny and receiving stolen goods,⁵¹ of larceny and embezzlement,⁵² of larceny and robbery,⁵³ of larceny and obtaining money or property under false pretenses,⁵⁴ of robbery

[c] Burglary and petit larceny cannot be joined where it is not permissible to join felonies and misdemeanors. *Adams v. State*, 55 Ala. 143. As to joinder of felonies and misdemeanors, see *supra*, XI, B. 2, a.

51. **U. S.**—*United States v. Prior*, 5 Cranch C. C. 37, 27 Fed. Cas. No. 16,692. **Ala.**—*Orr v. State*, 107 Ala. 35, 18 So. 142. **Cal.**—*People v. Miles*, 19 Cal. App. 223, 125 Pac. 250. **Colo.**—*Carl v. People*, 53 Colo. 578, 127 Pac. 951, Ann. Cas. 1914B, 171. **Ga.**—*Johnson v. State*, 61 Ga. 212; *State v. Hogan*, R. M. Charlt. 474. **Ill.**—*People v. Mueller*, 260 Ill. 375, 103 N. E. 216; *Andrews v. People*, 117 Ill. 109, 7 N. E. 265; *Bennett v. People*, 96 Ill. 602. **Ind.**—*Goodman v. State*, 141 Ind. 35, 39 N. E. 939; *Kinnegar v. State*, 120 Ind. 176, 21 N. E. 917; *Gundolph v. State*, 33 Ind. 439; *Keefer v. State*, 4 Ind. 246; *Maynard v. State*, 14 Ind. 427; *Redman v. State*, 1 Blackf. 429. **Kan.**—*State v. Blakeley*, 43 Kan. 250, 23 Pac. 570. **Ky.** *Code Crim. Proc.* §127; *Com. v. Bradley*, 132 Ky. 512, 116 S. W. 761; *Upton v. Com.*, 14 Ky. L. Rep. 165, 19 S. W. 744; *Sanderson v. Com.*, 11 Ky. L. Rep. 341, 12 S. W. 136. **La.**—*State v. Laque*, 37 La. Ann. 853; *State v. Moultrie*, 33 La. Ann. 1140; *State v. Crosby*, 4 La. Ann. 434; *State v. McLane*, 4 La. Ann. 435. **Me.**—*State v. Stimpson*, 45 Me. 698. **Mass.**—*Com. v. O'Connell*, 12 Allen 401. **Mich.**—*Howell's Ann. St.* §9546; *People v. Shaw*, 57 Mich. 403, 24 N. W. 121, 58 Am. Rep. 372. **Mo.** *State v. Richmond*, 186 Mo. 71, 84 S. W. 880; *State v. Sutton*, 44 Mo. 107; *State v. Daubert*, 40 Mo. 242; *State v. Gray*, 27 Mo. 164. **Neb.**—*Brown v. State*, 88 Neb. 411, 129 N. W. 545. **N. J.**—*State v. Braunschtein*, 84 N. J. L. 765, 87 Atl. 245. **N. Y.**—*Hawker v. People*, 75 N. Y. 487; *People v. Baker*, 3 Hill 159, counts for receiving stolen goods, burglary and grand larceny. **N. C.**—*State v. Jones*, 82 N. C. 635; *State v. Lawrence*, 81 N. C. 522; *State v. Baker*, 70 N. C. 720; *State v. Spaight*, 69 N. C. 72. **Ohio.**—*Whiting v. State*, 48 Ohio St. 229, 27 N. E. 90. **Pa.**—*Com. v. Quinn*, 42 Pa. Super. 490; *Com. v. Stahl*, 1 Pa. Super. 490. **S. C.**—*State v. Posey*, 7 Rich. L. 484; *State v. Boise*, 1

McMull. 189. **Tenn.**—*Chapple v. State*, 124 Tenn. 105, 111, 135 S. W. 321; *Burden v. State*, 16 Lea 61; *Foute v. State*, 15 Lea 715; *Hall v. State*, 3 Lea 552, 559; *Hampton v. State*, 8 Humph. 69, 47 Am. Dec. 599. **Tex.**—*Bynum v. State* (Tex. Crim.), 72 S. W. 844; *Houston v. State* (Tex. Crim.), 47 S. W. 468; *Sisk v. State* (Tex. Crim.), 42 S. W. 985; *Womack v. State* (Tex. Crim.), 25 S. W. 772. **Va.**—*Dowdy v. Com.*, 9 Gratt. 727, 60 Am. Dec. 314.

See generally the titles "Larceny;" "Receiving Stolen Goods."

52. **U. S.**—*United States v. Jones*, 69 Fed. 973; *United States v. O'Callahan*, 6 McLean 596, 27 Fed. Cas. No. 15,910. **Ala.**—*Orr v. State*, 107 Ala. 35, 18 So. 142; *Butler v. State*, 91 Ala. 87, 9 So. 191; *Mayo v. State*, 30 Ala. 32. **Cal.** *People v. Bogart*, 36 Cal. 245. **Colo.** *Carl v. People*, 53 Colo. 578, 127 Pac. 951, Ann. Cas. 1914B, 171. **D. C.**—*Davis v. United States*, 18 App. Cas. 463. **Ill.** *Murphy v. People*, 104 Ill. 528. **Ky.** *Code Crim. Proc.* §127; *Com. v. Bradley*, 132 Ky. 512, 116 S. W. 761. **Mich.** *Howell's Ann. St.* §9546; *People v. Shaw*, 57 Mich. 403, 24 N. W. 121, 58 Am. Rep. 372. **Mo.**—*Rev. St.* 1899, §1891; *State v. Carragin*, 210 Mo. 351, 109 S. W. 553, 16 L. R. A. (N. S.) 561; *State v. Porter*, 26 Mo. 201. **Neb.**—*Cohoe v. State*, 82 Neb. 741, 118 N. W. 1088. **N. J.**—*Stephens v. State*, 53 N. J. L. 245, 21 Atl. 1038. **N. Y.**—*Coats v. People*, 4 Park. Crim. 602.

See generally 8 STANDARD PROC. 243, and the title "Larceny."

53. **N. Y.**—*People v. Rose*, 52 Hun 33, 42 N. Y. Supp. 787; *People v. Callahan*, 29 Hun 580. **Pa.**—*Com. v. Shutte*, 130 Pa. 372, 18 Atl. 635, 17 Am. St. Rep. 773. **Tex.**—*Mathews v. State*, 10 Tex. App. 279.

See generally the titles "Larceny;" "Robbery."

54. **Ala.**—*Johnson v. State*, 29 Ala. 62, 65 Am. Dec. 383. **Ky.**—*Code Crim. Proc.* §127; *Com. v. Bradley*, 132 Ky. 512, 116 S. W. 761. **Mich.**—*Howell's Ann. St.* §9546; *People v. Shaw*, 57 Mich. 403, 24 N. W. 121, 58 Am. Rep. 372. **Mo.**—*Rev. St.* 1899, §1891. **Pa.**—*Com. v. March*, 1 Pa. Co. Ct. 81. **Va.**—*Anthony v. Com.*, 88 Va. 547, 14 S. E. 834.

and burglary,⁵⁵ of robbery and assault with intent to rob,⁵⁶ of robbery and riot,⁵⁷ of burglary and receiving stolen goods,⁵⁸ or of the forging and uttering of the same instrument,⁵⁹ passing or attempting to pass counterfeit money, and having in possession counterfeit money, with the intention of circulating the same,⁶⁰ of perjury and subornation of perjury,⁶¹ of rape and incest,⁶² of rape and carnal knowledge⁶³ of a

See generally the titles "Larceny;" "Obtaining Property by False Pretenses."

55. *Com. v. Bradley*, 132 Ky. 512, 110 S. W. 761, under Code Crim. Proc. §127; *Ravencraft v. Com.*, 7 Ky. L. Rep. 826. See generally the title "Robbery."

56. *Com. v. Bradley*, 132 Ky. 512, 110 S. W. 761, under Code Crim. Proc. §127. See generally the title "Robbery."

57. *Cochran v. State*, 4 Okla. Crim. 279, 111 Pac. 974, provided the averments show that both counts are based on one and the same transaction. See generally the titles "Riot;" "Robbery."

58. *Parker v. People*, 13 Colo. 153, 21 Pac. 1120, 4 L. R. A. 803. See generally the title "Receiving Stolen Goods."

59. **U. S.**—*Dillard v. United States*, 141 Fed. 303, 72 C. C. A. 451. Ark.—*Kirby's Dig.*, §2231; *Gordon v. State*, 100 Ark. 149, 139 S. W. 1131; *Zachary v. State*, 97 Ark. 176, 133 S. W. 811; *Lawrence v. State*, 71 Ark. 82, 71 S. W. 263. Compare *Dall v. State*, 43 Ark. 94, 2 S. W. 462. Cal.—*People v. Ellenwood*, 119 Cal. 105, 51 Pac. 553. Ga.—*Sims v. State*, 110 Ga. 290, 34 S. E. 1020; *Hoskins v. State*, 11 Ga. 92. Ill.—*People v. Dougherty*, 246 Ill. 458, 92 N. E. 929; *Parker v. People*, 97 Ill. 32. Ind.—*McGregor v. State*, 16 Ind. 9. Kan.—*State v. Zimmerman*, 47 Kan. 242, 37 Pac. 999. Ky.—*Huff v. Com.*, 19 Ky. L. Rep. 1064, 42 S. W. 907. Mich.—*People v. Sharp*, 53 Mich. 523, 19 N. W. 168. Mo.—*State v. Carrington*, 210 Mo. 351, 169 S. W. 553, 16 L. R. A. (N. S.) 561. Mont.—*State v. Mission*, 37 Mont. 366, 96 Pac. 326, 127 Am. St. Rep. 732. N. Y.—*People v. Adler*, 140 N. Y. 321, 35 N. E. 614; *People v. Rembar*, 12 Wend. 425. Ohio.—*Stroughton v. State*, 2 Ohio St. 523. Tenn.—*Luttrell v. State*, 85 Tenn. 232, 1 S. W. 886, 4 Am. St. Rep. 769; *Boren v. State*, 16 Lea 61; *Ponte v. State*, 16 Lea 712. Tex.—*Mitts v. State*, 40 Tex. Crim. 607, 31 S. W.

596; *Clanton v. State*, 23 Tex. App. 577, 9 S. W. 163; *Butts v. State*, 15 Tex. App. 650; *Barwell v. State*, 1 Tex. App. 746.

Contr.—*State v. Henry*, 23 Iowa 391, 13 N. W. 441; *State v. McBurnick*, 70 Iowa 283, 9 N. W. 910, disapproving *State v. Nichols*, 48 Iowa 110; *State v. Wood*, 13 Minn. 171.

See 8 STANDARD PROC. 1178.

Necessity of Showing Instruments To Be Same.—8 STANDARD PROC. 1179.

60. *Com. v. Bradley*, 132 Ky. 512, 110 S. W. 761, under Code Crim. Proc. §127. See 6 STANDARD PROC. 17.

61. *Com. v. Boyino*, 155 Mass. 224, 20 N. E. 515. See generally the title "Perjury."

62. **Mo.**—*State v. Tavis*, 244 Mo. 276, 146 S. W. 330; *State v. Gondala*, 216 Mo. 915, 109 S. W. 9. **Tex.**—*Wiggins v. State*, 47 Tex. Crim. 598, 84 S. W. 821; *Owens v. State*, 35 Tex. Crim. 345, 23 S. W. 577. **Wis.**—*Porath v. State*, 90 Wis. 327, 62 N. W. 1061, 48 Am. St. Rep. 954.

But see *State v. Thomas*, 23 Iowa 214, 13 N. W. 908, holding that the statute defining incest requires to constitute the crime that the parties have carnal knowledge of each other, and that the word knowledge indicates the exception to be one of mind as well as body. Consequently in the case of rape, the woman would not have the necessary carnal knowledge to constitute the crime of incest and a joinder would be improper. See generally the titles "Incest;" "Rape."

63. **Ala.**—*Clifford v. State*, 105 Ala. 86, 17 So. 184; *Leonson v. State*, 72 Ala. 161. **Cal.**—*Higginett v. People*, 30 Cal. 208, 70 Pac. 447. **Mo.**—*State v. Houx*, 100 Mo. 654, 19 S. W. 25, 19 Am. St. Rep. 686. **Tenn.**—*Wright v. State*, 4 Humph. 104. See, however, *State v. Cherry*, 1 Swan 180, holding it improper to join counts for rape, and a count charging a negro with carnal knowledge of a white female child under ten years of age.

female, of rape and fornication,⁶⁴ of adultery and fornication,⁶⁵ may properly be joined in one indictment.⁶⁶

3. Charging Same Offense in Different Ways.—The rule that it is not permissible to charge an accused with different offenses in the same indictment,⁶⁷ does not prevent the charging of the same offense in separate counts in different ways so as to meet the evidence to be offered at the trial,⁶⁸ such practice being not only allowable, but con-

[a] **An assault upon a girl with intent to commit rape and the taking indecent liberties with her without committing or intending to commit rape may be joined.** *People v. Dupree*, 175 Mich. 632, 141 N. W. 672.

64. *Jackson v. State*, 91 Wis. 253, 64 N. W. 838. See generally the title "Rape."

65. **Ala.**—*Smitherman v. State*, 27 Ala. 23. **Ga.**—*Sutton v. State*, 124 Ga. 815, 53 S. E. 381. **Hawaii.**—*United States v. Hirata*, 3 Hawaii Fed. 616. **Pa.** *Com. v. Burk*, 2 Pa. Co. Ct. 12, fornication and bastardy in one count and adultery in the second. **Tex.**—*Garland v. State*, 51 Tex. Crim. 643, 104 S. W. 898.

66. For other specific instances of offenses which may be properly joined in the same indictment by means of separate counts, see the particular titles, such as "Arson," 3 STANDARD PROC. 5; "Assault and Battery," 3 STANDARD PROC. 36; "Conspiracy," 5 STANDARD PROC. 310; "Disorderly House," 7 STANDARD PROC. 705.

67. See *supra*, XI, B, 1.

68. See the following: **U. S.**—*Anderson v. United States*, 170 U. S. 481, 18 Sup. Ct. 689, 42 L. ed. 1116; *United States v. Howell*, 65 Fed. 402. **Ala.**—*Untreinor v. State*, 146 Ala. 133, 41 So. 170; *Crittenden v. State*, 134 Ala. 145, 32 So. 273 (wherein larceny from two different persons was charged in separate counts); *Carleton v. State*, 100 Ala. 129, 14 So. 472; *Oliver v. State*, 37 Ala. 134; *Mac v. State*, 30 Ala. 32. **Ariz.**—*Territory v. Duffield*, 1 Ariz. 58, 25 Pac. 476. **Ark.**—*Grayson v. State*, 92 Ark. 413, 108 S. W. 388; *Henry v. State*, 71 Ark. 374, 76 S. W. 1071; *Howard v. State*, 24 Ark. 433. **Cal.**—*People v. Jallies*, 140 Cal. 301, 79 Pac. 965; *People v. Thompson*, 28 Cal. 216; *People v. Johnson*, 22 Cal. App. 306, 134 Pac. 339; *People v. Miles*, 12 Cal. App. 323, 125 Pac. 206. **Fla.**—*Caullay v. State*, 40 Fla. 347, 22 So. 537; *Kennedy v. State*,

31 Fla. 428, 12 So. 858; *Murray v. State*, 25 Fla. 528, 6 So. 498. **Ga.**—*Bashinski v. State*, 123 Ga. 508, 51 S. E. 499; *Lascelles v. State*, 90 Ga. 347, 16 S. E. 945, 35 Am. St. Rep. 216; *Tooke v. State*, 4 Ga. App. 495, 61 S. E. 917. **Idaho.**—*State v. Gruber*, 19 Idaho 692, 115 Pac. 1; *Territory v. Guthrie*, 2 Idaho 432, 17 Pac. 39. **Ill.**—*Kotter v. People*, 150 Ill. 441, 37 N. E. 932; *Herman v. People*, 131 Ill. 594, 22 N. E. 471, 9 L. R. A. 182. **Ind.**—*Merrick v. State*, 63 Ind. 327; *Bissot v. State*, 53 Ind. 408; *Joy v. State*, 14 Ind. 139; *Engleman v. State*, 2 Ind. 91, 52 Am. Dec. 494. **Ia.**—*State v. Caine*, 134 Iowa 147, 111 N. W. 443; *State v. Trusty*, 122 Iowa 82, 97 N. W. 989; *State v. Baldwin*, 79 Iowa 714, 45 N. W. 297; *State v. Brannan*, 50 Iowa 372; *State v. McPherson*, 9 Iowa 53. **Kan.**—*State v. O'Kane*, 23 Kan. 244. **Ky.**—*Saylor v. Com.*, 149 Ky. 152, 148 S. W. 6. **La.**—*State v. Clement*, 42 La. Ann. 583, 7 So. 685; *State v. Palmer*, 32 La. Ann. 565; *State v. Cook*, 20 La. Ann. 145. **Me.**—*State v. Flye*, 26 Me. 312. **Md.**—*Toomer v. State*, 112 Md. 285, 76 Atl. 118; *State v. McNally*, 55 Md. 559, 563; *State v. Bell*, 27 Md. 675. **Mass.**—*Com. v. Thompson*, 159 Mass. 56, 33 N. E. 1111; *Com. v. Jacobs*, 152 Mass. 276, 25 N. E. 163; *Com. v. Tobias*, 141 Mass. 129, 6 N. E. 217; *Com. v. Isnahl*, 134 Mass. 201; *Com. v. Adams*, 127 Mass. 15; *Pettes v. Com.*, 126 Mass. 242; *Com. v. Macdon*, 101 Mass. 1, 100 Am. Dec. 89; *Com. v. Desmarceau*, 16 Gray 1; *Com. v. Webster*, 5 Cush. 295, 52 Am. Dec. 711. **Mich.**—*People v. Peck*, 147 Mich. 84, 110 N. W. 495; *People v. Seaman*, 107 Mich. 345, 65 N. W. 203, 61 Am. St. Rep. 326; *People v. Allen*, 66 Mich. 469, 33 N. W. 821, 11 Am. St. Rep. 512. **Mo.**—*State v. Jeffries*, 210 Mo. 302, 109 S. W. 614; *State v. Williams*, 191 Mo. 205, 90 S. W. 448; *State v. Hargraves*, 188 Mo. 337, 87 S. W. 491; *State v. Jackson*, 17 Mo. 544, 39 Am. Dec. 281; *State v. Porter*, 26 Mo. 201; *State v. Leonard*, 22 Mo. 449; *State v. Price*, 3

sidered the better,⁶⁹ if not indeed, a sometimes necessary practice.⁷⁰

Mo. App. 586. Mont.—*State v. Milton*, 37 Mont. 366, 98 Pac. 920, 127 Am. St. Rep. 732; *Territory v. Poulter*, 8 Mont. 146, 19 Pac. 524. Neb.—*Bartley v. State*, 55 Neb. 319, 73 N. W. 744; *Hurlbert v. State*, 52 Neb. 478, 72 N. W. 471; *Hill v. State*, 42 Neb. 408, 68 N. W. 916. Nev.—*State v. Mallis*, 14 Nev. 288. N. H.—*State v. Runt*, 25 N. H. 438, 441. N. J.—*Hunter v. State*, 49 N. J. L. 495; *Pennelly v. State*, 26 N. J. L. 463. N. Y.—*People v. Young*, 207 N. Y. 592, 101 N. E. 471; *People v. Knapp*, 206 N. Y. 373, 99 N. E. 841, Ann. Cas. 1914B, 245; *People v. Adler*, 149 N. Y. 331, 35 N. E. 644; *People v. McCarthy*, 110 N. Y. 309, 18 N. E. 128; *People v. Ragg*, 98 N. Y. 537; *People v. Sullivan*, 173 N. Y. 122, 93 N. E. 989, 23 Am. St. Rep. 582, 63 L. R. A. 356; *Kane v. People*, 8 Wend. 263, 211; *People v. Commis*, 123 App. Div. 65, 118 N. Y. Supp. 317; *People v. Kellogg*, 105 App. Div. 505, 94 N. Y. Supp. 617; *People v. Haren*, 35 Misc. 590, 12 N. Y. Supp. 205; *People v. Moore*, 26 Misc. 168, 56 N. Y. Supp. 892. N. C.—*State v. Burnett*, 142 N. C. 577, 55 S. E. 72; *State v. Howard*, 129 N. C. 581, 40 S. E. 71; *State v. Surles*, 117 N. C. 720, 23 S. E. 224; *State v. Barber*, 118 N. C. 711, 18 S. E. 515; *State v. Harris*, 106 N. C. 682, 11 S. E. 377; *State v. Phillips*, 101 N. C. 756, 10 S. E. 493; *State v. Easton*, 70 N. C. 88. N. D.—*State v. Eakford*, 28 N. D. 36, 147 N. W. 467. Ohio.—*Griffin v. State*, 18 Ohio St. 437; *State v. Fennareh*, 11 Ohio Dec. (Reprint) 775, 29 Waly. L. Bul. 159; *Cottell v. State*, 12 Ohio C. C. 407. Okla.—*Cochran v. State*, 4 Okla. Crim. 379, 111 Pac. 271. Pa.—*Douglas v. Com.*, 2 Rawle 202; *Com. v. Ganger*, 21 Pa. Super. 217. R. I.—*State v. Brady*, 16 R. I. 51, 12 Atl. 338; *State v. Doyle*, 15 R. I. 527, 9 Atl. 909. S. C.—*State v. Priestner*, *Chaves* 193. Tenn.—*Forte v. State*, 15 Lea 715. Tex.—*Hawthorn v. State*, 62 Tex. Crim. 114, 126 S. W. 776; *Wentzer v. State*, 52 Tex. Crim. 11, 105 S. W. 189; *Kochs v. State* (Tex. Crim.), 69 S. W. 526; *Hogus v. State* (Tex. Crim.), 60 S. W. 562; *Moore v. State*, 37 Tex. Crim. 568, 40 S. W. 287; *Dill v. State*, 65 Tex. Crim. 349, 33 S. W. 126, 60 Am. St. Rep. 27; *Shamus v. State*, 34 Tex. Crim. 66, 23 S. W. 160; *Chasler v. State*, 25 Tex. App. 577, 5 S. W. 145; *Shelbert v. State*, 20 Tex. App. 520; *Lebs v.*

State, 15 Tex. App. 650; *Gonzales v. State*, 12 Tex. App. 657. Va.—*State v. Com.*, 21 Gratt 509. W. Va.—*State v. Shores*, 21 W. Va. 491, 7 S. E. 413, 13 Am. St. Rep. 575; *State v. Halida*, 78 W. Va. 469. Wis.—*Libbert v. State*, 125 Wis. 422, 104 N. W. 61; *Parath v. State*, 80 Wis. 577, 63 N. W. 1091, 48 Am. St. Rep. 954; *Newman v. State*, 14 Wis. 393. Eng.—*Reg. v. Downing*, 1 Denison C. C. 23, 9 C. & R. 382.

[6] The Texas statute expressly provides that an indictment or information may contain as many counts charging the same offense as the attorney who prepares it may think necessary to insert, and an indictment or information shall be sufficient if any one of those counts be sufficient. Code Crim. Proc., art. 469; *Johnson v. State*, 52 Tex. Crim. 207, 107 S. W. 52.

[6] Separate Counts on Different Sections of Statute.—The state may vary the charges by means of several counts, although under different sections of the statute, so as to meet the proof which may be adduced. *State v. Davis*, 29 Mo. 321; *State v. Porter*, 26 Mo. 201.

69. "It is not only allowable, but considered the better practice, to set up the same transaction by as many counts as the pleader may deem necessary to meet the various phases which the proof may possibly develop, and only in a case where it may appear that the rights of a defendant may be jeopardized or prejudiced will the state be required to elect on which count it will proceed to trial." *Shuman v. State*, 74 Tex. Crim. 69, 29 S. W. 160. As to election generally, see *infra*, XVI.

[8] "A careful solicitor should always frame the indictment with as many counts as may be necessary to meet the different phases the evidence may assume." *Oer v. State*, 107 Ala. 35, 18 So. 142.

70. "It is often necessary to insert in one indictment many counts charging the crime in as many different ways, in order to meet the various phases of the case as developed by the evidence, and after a general verdict if one count is sufficient, and others fail, the court will pronounce judgment upon the good count only; if all are good, judgment will be rendered upon the count charging the highest offense."

Statutes providing that but one offense may be charged in an indictment, also sometimes provide that such offenses may be charged in different ways in separate counts thereof.⁷¹

Accordingly, if the offense may be committed by different means or modes it is permissible to charge in separate counts the different means or modes in which the offense may have been committed,⁷² as for example, a murder or manslaughter may be charged with having been committed by different instruments or means,⁷³ or, it has been held a statutory rape may in one count be based on the fact that the female was under age, and in another count, on the fact that she was an idiot;⁷⁴ or an abortion may be charged in one count by means of drugs and in another by means of instruments.⁷⁵ Likewise, it is permissible to charge in different counts of the same indictment, that the act com-

State v. Ward, 61 Vt. 153, 194, 17 Atl. 483.

71. See the statutes of the several states, and the following: **Ariz.**—Territory *v. Duffield*, 1 Ariz. 58, 25 Pac. 476. **Ark.**—*State v. Brewer*, 33 Ark. 176. **Cal.**—*People v. Jailles*, 146 Cal. 361, 79 Pac. 965; *People v. Johnson*, 22 Cal. App. 362, 134 Pac. 339; *People v. Miles*, 19 Cal. App. 223, 125 Pac. 250. **Idaho.**—Territory *v. Guthrie*, 2 Idaho 432, 17 Pac. 39. **Ia.**—*State v. Caine*, 134 Iowa 147, 111 N. W. 443; *State v. Baldwin*, 79 Iowa 714, 45 N. W. 297; *State v. Elsham*, 70 Iowa 531, 31 N. W. 66. **Ky.**—*Allison v. Com.*, 135 Ky. 693, 123 S. W. 267. **Mont.**—*State v. Mitton*, 37 Mont. 366, 96 Pac. 926, 127 Am. St. Rep. 732. **Nev.**—*State v. Mallin*, 14 Nev. 288. **N. Y.**—*People v. Sullivan*, 173 N. Y. 122, 65 N. E. 989, 93 Am. St. Rep. 582, 63 L. R. A. 353; *People v. Knapp*, 206 N. Y. 373, 99 N. E. 841, Ann. Cas. 1914B, 243; *People v. Kellogg*, 105 App. Div. 505, 94 N. Y. Supp. 617; *People v. Rice*, 59 Hun 616, 13 N. Y. Supp. 161. **Okla.**—*Bond v. State*, 9 Okla. Crim. 696, 129 Pac. 666.

72. **Ind.**—*Joy v. State*, 14 Ind. 139; *Egleman v. State*, 2 Ind. 91, 52 Am. Dec. 494. **Ia.**—*State v. Baldwin*, 79 Iowa 714, 45 N. W. 297; *State v. Brannon*, 59 Iowa 372. **Ky.**—*Greenwell v. Com.*, 30 Ky. L. Rep. 1282, 100 S. W. 852. **Me.**—*State v. Nelson*, 29 Me. 329. **Mass.**—*Com. v. Adams*, 127 Mass. 15. **Mo.**—*State v. Price*, 3 Mo. App. 386. **Mont.**—Territory *v. Poulter*, 8 Mont. 146, 19 Pac. 594. **Neb.**—*Furst v. State*, 31 Neb. 403, 47 N. W. 1116. **N. J.**—*Donnelly v. State*, 26 N. J. L. 463. **N. Y.**—*People v. Dimick*, 107 N.

Y. 13, 14 N. E. 178; *People v. Weiss*, 158 App. Div. 235, 142 N. Y. Supp. 1092; *People v. Rice*, 59 Hun 616, 13 N. Y. Supp. 161; *People v. Emerson*, 53 Hun 437, 6 N. Y. Supp. 275. **Pa.**—*Douglass v. Com.*, 2 Rawle 262. **Va.**—*Smith v. Com.*, 21 Gratt. 809; *Lazier v. Com.*, 10 Gratt. 708.

73. **Fla.**—*Gantling v. State*, 40 Fla. 237, 23 So. 857. **Mich.**—*People v. Aiken*, 66 Mich. 460, 33 N. W. 821, 11 Am. St. Rep. 512. **Mo.**—*State v. Lanahan*, 144 Mo. 31, 45 S. W. 1090. **N. Y.**—*People v. Wright*, 136 N. Y. 625, 32 N. E. 629. **Tex.**—*Huges v. State* (Tex. Crim.), 60 S. W. 562. **Eng.**—*Reg. v. O'Brian*, 1 Denison C. C. 9, 2 C. & K. 115, where murder was charged to have been committed, by striking with a stick in one count, and with a stone in another.

[a] Wherever there is doubt or uncertainty as to the means by which death was effected all the different probable means should be alleged either in separate counts in the indictment or information or in the alternative in the same count, so as to provide against such contingencies in that respect as are likely to arise from the proof. *Elliott v. State*, 4 Okla. Crim. 224, 111 Pac. 820, 140 Am. St. Rep. 683.

74. *People v. Gray*, 251 Ill. 431, 96 N. E. 268; *State v. Trusty*, 122 Iowa 82, 97 N. W. 989. But see generally the title "Rape."

75. See the following: **Ill.**—*Beasley v. People*, 89 Ill. 571. **Ind.**—*Diehl v. State*, 157 Ind. 549, 62 N. E. 51. **Mass.**—*Com. v. Thompson*, 159 Mass. 56, 33 N. E. 1111; *Com. v. Pollansbee*, 155 Mass. 274, 29 N. E. 471; *Com. v. Adams*, 127 Mass. 15; *Com. v. Brown*, 121 Mass. 69; *Com. v. Brown*, 14 Gray

plained of was committed with different intents or designs.⁷⁶ And this is true even though such different intents may affect different people.⁷⁷

To Meet Evidence as to Time, Place and Ownership.—The fact that two distinct dates for the commission of the offense are alleged in different counts of the same indictment will not invalidate such indictment or a conviction thereon.⁷⁸ It is not ordinarily permissible, however, to charge in one count of an indictment that the crime was committed in one county and in another count that it was committed in a different county,⁷⁹ though circumstances may arise, under which such practice is permissible,⁸⁰ as where offenses committed in one of the counties are triable in the other.⁸¹

If it is clear that the same offense and transaction is meant, it does not render the indictment double to charge by means of different counts that property stolen, unlawfully appropriated, or otherwise injured or destroyed, belonged to different persons.⁸²

419. **Mich.**—*People v. Aiken*, 66 Mich. 465, 33 N. W. 821, 11 Am. St. Rep. 512.
N. Y.—*People v. Lohman*, 2 Barb. 216, *affirmed*, 1 N. Y. 379, 49 Am. Dec. 349.
Tex.—*Moore v. State*, 37 Tex. Crim. 552, 40 S. W. 287.
W. Va.—*State v. Lilly*, 47 W. Va. 406, 35 S. E. 837.

See generally the title "Abortion."

76. **Ala.**—*Carleton v. State*, 109 Ala. 130, 14 So. 472. **Fla.**—*Green v. State*, 17 Fla. 669. **La.**—*State v. Conway*, 55 La. Ann. 259; *State v. Gilhrie*, 35 La. Ann. 53. **Neb.**—*Candy v. State*, 8 Neb. 482, 1 N. W. 454. **N. Y.**—*Nelson v. People*, 23 N. Y. 293. **N. C.**—*State v. Slagle*, 82 N. C. 643. **Tenn.**—*Tucker v. State*, 8 Lea 633; *Lawless v. State*, 4 Lea 173.

[a] It may be charged in one count that the offense of murder was committed with premeditated design and in another that it was committed while committing a felony, both being murder in the first degree. *People v. Sullivan*, 173 N. Y. 122, 65 N. E. 989, 93 Am. St. Rep. 582, 63 L. R. A. 363.

77. *People v. Lenhardt*, 4 N. Y. Crim. 317.

78. **Ia.**—*State v. Eldam*, 70 Iowa 531, 31 N. W. 66. **Ohio.**—*Griffin v. State*, 18 Ohio St. 428, 445 since ordinarily time when offense was committed is immaterial. **Tex.**—*Shuman v. State*, 24 Tex. Crim. 69, 29 S. W. 169. **Va.**—*Hausenfluck v. Com.*, 85 Va. 702, 8 S. E. 683.

[a] In *Hausenfluck v. Com.*, 85 Va. 702, 8 S. E. 683, the court said: "Is this case each count set forth the same crime as committed on different days,

and there was no misjoinder of counts, and the court properly exercised its discretion in not quashing the indictment on either count, and in not excluding the evidence to any particular day."

As to averments as to time, see *supra*, IX, E, 5, d.

79. *State v. Johnson*, 50 N. C. 220.

[a] In such case the counts are repugnant, and the indictment will be quashed on motion, or the prosecutor be compelled to elect which he will proceed on. *State v. Johnson*, 50 N. C. 220.

80. *State v. Johnson*, 50 N. C. 220; *McKenna v. State*, 32 Tex. Crim. 508, 305, 25 S. W. 426, 40 Am. St. Rep. 795.

81. *State v. Johnson*, 50 N. C. 220; *McKenna v. State*, 32 Tex. Crim. 508, 305 S. W. 426, 40 Am. St. Rep. 795.

82. See the following cases: **Ala.**—*Love v. State*, 133 Ala. 154, 28 So. 473; *Oliver v. State*, 37 Ala. 134. **Cal.**—*People v. Thompson*, 28 Cal. 216; *People v. Connor*, 11 Cal. 354. **Fla.**—*Kennedy v. State*, 31 Fla. 428, 12 So. 858. **Ind.**—*Cooper v. State*, 79 Ind. 906; *Hell v. State*, 42 Ind. 335. **La.**—*State v. Palmer*, 33 La. Ann. 573. **Me.**—*State v. Nelson*, 29 Me. 329. **Md.**—*State v. McNally*, 55 Md. 559. **N. Y.**—*People v. Kellogg*, 195 App. Div. 505, 94 N. Y. Supp. 617; *People v. Fandawe*, 65 Hun 77, 12 N. Y. Supp. 863, *affirmed*, 117 N. Y. 68, 32 N. E. 1162. **Ohio.**—*Mayes v. State*, 4 Ohio C. C. 379; *State v. Frankish*, 11 Ohio Dec. (Reprint) 176, 29 Wiley L. Bul. 129. **Pa.**—*Com. v. Dabkins*, 2 Pars. Eq. Cas. 380. **Tex.**—*Mc-*

Committing Same Offense in Different Capacities. — Where under the statute the same offense may be committed in different capacities, as for example, as principal, agent, broker, or the like, it may be charged in separate counts respectively that the defendant committed the offense in each of the several capacities.⁸² So too, a defendant may be charged in one count as a principal and in another count as an accessory,⁸³ or in one count as an accessory before the fact and in another as an accessory after the fact,⁸⁵ or in one count as a principal in the first degree and in another count as a principal in the second degree.⁸⁶ Upon the trial, however, the prosecution may sometimes be required to elect upon which count it will proceed.⁸⁷

Different Degrees of Same Offense.— If an offense comprises different degrees, the indictment or information may contain counts for the

Laughlin v. State (Tex. Crim.), 34 S. W. 280; *Pisano v. State*, 34 Tex. Crim. 63, 29 S. W. 42; *Shuman v. State*, 34 Tex. Crim. 69, 29 S. W. 160. **Va.** *Dowdy v. Com.*, 9 Gratt. 727, 60 Am. Dec. 314.

See the title "Larceny," and other criminal titles involving ownership of property.

[a] "By way of illustration take a case of larceny. Suppose, from the evidence in the possession of the pleader, and upon which the indictment is to be framed, it is doubtful whether the stolen goods were the property of A or B, and it is material for the purpose of identifying the larceny (Crim. Prac. Act, §243), to allege the ownership of the goods with certainty. In such a case two counts, one alleging the ownership in A and the other in B is proper." *People v. Thompson*, 28 Cal. 214.

83. *State v. Beattie*, 103 Miss. 864, 60 So. 1016.

84. See the following: **U. S.** *Roney v. United States*, 293 Fed. 928, 122 C. C. A. 230; *United States v. Burns*, 5 McLean 23, 24 Fed. Cas. No. 14491. **Ark.**—*Lay v. State*, 42 Ark. 105; *Carley v. State*, 30 Ark. 395, 7 S. W. 225; *Qill v. State*, 39 Ark. 422, 27 S. W. 298. **Cal.**—*People v. Shepardson*, 48 Cal. 189; *People v. Valenzuela*, 43 Cal. 552; *People v. Davidson*, 5 Cal. 133. **Conn.** *State v. Hamlin*, 47 Conn. 95, 26 Am. Rep. 34. **Idaho.**—*Territory v. Guthrie*, 2 Idaho 432, 17 Pac. 39. **Ill.**—*People v. Jordan*, 244 Ill. 386, 91 N. E. 482. **Ind.** *Harty v. State*, 5 Blackf. 386. **Ky.** *Capp v. Com.*, 87 Ky. 36, 7 S. W. 405; *Callins v. Com.*, 43 Ky. L. Rep. 884, 70 S. W. 187; *Puckett v. Com.*, 13 Ky. L. Rep. 466, 17 S. W. 335; *Angel v. Com.*,

14 Ky. L. Rep. 10, 18 S. W. 849. **La.** *State v. Ardoin*, 49 La. Ann. 1145, 22 So. 620, 62 Am. St. Rep. 678, and cases cited therein; *State v. Cook*, 20 La. Ann. 145. **Mo.**—*State v. Jeffries*, 210 Mo. 302, 109 S. W. 614; *State v. Rollins*, 186 Mo. 501, 85 S. W. 516; *State v. Hendrickson*, 165 Mo. 262, 65 S. W. 550. **Pa.** *Com. v. Westervelt*, 11 Phila. 461. **S. C.** *State v. Burbage*, 51 S. C. 284, 28 S. E. 237, accessory after the fact. **Vt.** *State v. Marsh*, 70 Vt. 283, 40 Atl. 836. **Wis.**—*Tarasinski v. State*, 146 Wis. 598, 131 N. W. 899; *State v. Cameron*, 2 Pinn. 490, 2 Chand. 172.

See also 1 STANDARD PROC. 149.

[a] An indictment against several persons may charge all as principals in one count and in another one or more as principals and the others as accessories. *People v. Jordan*, 244 Ill. 386, 91 N. E. 482.

[b] An indictment may charge in one count that five defendants committed an offense, and in the second that one of them committed it, and, in the others aided, and in the third that another committed it and the others aided. *Thompson v. Com.*, 1 Met. (Ky.) 13.

[c] An indictment for murder may charge in the first count three defendants as principals, in the second, two as principals, and in the third, all as accessories before the fact. *State v. Hamlin*, 47 Conn. 95, 26 Am. Rep. 54.

85. *Rex v. Blackson*, 8 Car. & P. 43, 34 E. C. L. 598.

86. **Ga.**—*Williams v. State*, 69 Ga. 11. **Ky.**—*Puckett v. Com.*, 13 Ky. L. Rep. 466, 17 S. W. 335. **La.**—*State v. Cook*, 20 La. Ann. 145. **Eng.**—*Rex v. Folkes*, 1 Moody C. C. 351.

87. See *infra*, XVI, B, d.

several degrees of the same offense,⁸⁸ or for one or more of them.⁸⁹

Manner of Describing It in Subsequent Counts.—Though it is usual, at common law, in charging the same offense in different counts, to charge it as if the offense in each count was a distinct offense,⁹⁰ yet it is unnecessary to allege that they are different offenses,⁹¹ and under some

88. Ala.—*Henry v. State*, 33 Ala. 1. 389. Ga.—*Williams v. State*, 72 Ga. 180; *Harris v. State*, 1 Ga. App. 136, 57 S. E. 937. Me.—*State v. Hood*, 51 Me. 303. Md.—*Manly v. State*, 7 Md. 155, assault with intent to kill and assault and battery. Mass.—*Com. v. McLaughlin*, 12 Cush. 612. Mo.—*State v. Christian*, 253 Mo. 382, 392, 161 S. W. 736; *State v. Gates*, 130 Mo. 351, 32 S. W. 971; *State v. Porter*, 26 Mo. 200; *State v. McKee*, 126 Mo. App. 524, 194 S. W. 486. Neb.—*Baldwin v. State*, 12 Neb. 61, 10 N. W. 463. N. H.—*State v. Lincoln*, 49 N. H. 464. N. Y.—*Hawker v. People*, 75 N. Y. 487; *People v. Rynders*, 12 Wend. 426; *Cox v. People*, 19 Hun 430. Ohio.—*Barton v. State*, 18 Ohio 221. Pa.—*Kane v. Com.*, 109 Pa. 541; *Com. v. Bilderback*, 2 Pars. Eq. Cas. 447. Tenn.—*Fente v. State*, 15 Lea 715; *Lawless v. State*, 4 Lea 173. Tex.—*State v. Bradley*, 34 Tex. 95; *Waddell v. State*, 1 Tex. App. 720. Vt.—*State v. Stewart*, 59 Vt. 273, 9 Atl. 559, 59 Am. Rep. 710; *State v. Thornton*, 56 Vt. 35; *State v. Smalley*, 50 Vt. 736. Eng.—*Rex v. Ferguson*, 2 Stark. 489. Can.—*Theal v. Reg.*, 7 Can. Sup. Ct. 397.

[a] That it is permissible to charge different degrees or grades of the crime of homicide in separate counts, see 11 STANDARD PROC. 576.

[b] An assault with intent to murder and an assault with intent to do great bodily harm less than murder, a statutory offense, may be joined by means of separate counts. *People v. Sweeney*, 55 Mich. 586, 22 N. W. 50. And see 11 STANDARD PROC. 576.

[c] Where the same act is made both a felony and a misdemeanor both cannot be charged in the same indictment as different degrees of the same crime. *State v. McKee*, 126 Mo. App. 524, 194 S. W. 486. As to joinder of felonies and misdemeanors see *supra*, XI, B. 2, a.

89. *State v. Christian*, 253 Mo. 382, 392, 161 S. W. 736.

90. N. J.—*Hunter v. State*, 40 N. J. L. 425. N. Y.—*Kane v. People*, 8 Wend. 263, 211. R. I.—*State v. Doyle*, 12 R. I. 327, 9 Atl. 900. Wis.—*Newman v. State*, 14 Wis. 393, 402.

[a] In *Newman v. People*, 14 Wis. 393, 402 the court said: "The counts in this indictment do not necessarily appear to be for the same offense, and without necessity the court should not intend them to be so. We have been referred to the case of *Campbell et al. v. The Queen*, 11 Adolph. & Ellis, 709 (63 Eng. C. L.), where the court say that one offense, whether felonious or not, could not properly be charged twice over, whether in one indictment or two, and that an objection to an indictment on that ground was available on a motion in arrest of judgment. But the court immediately remarks that it would, if possible, hold the counts not to be for the same offense, and that the omission of the word 'other' would not of itself make them the same, though the insertion of the word 'other' would make them different. Within the rule here laid down, we think the indictment in this case is not chamalious to the objection taken to it."

[b] By inserting the word "other" before the subject of the offence in the subsequent counts. *Lazier v. Com.*, 10 Grant. (Va.) 708.

91. *State v. Rust*, 25 N. H. 428, unnecessary to allege the offense described in each of the several counts to be other and different from that described in the others. And see *Newman v. State*, 14 Wis. 393, 402.

[a] The use of the "other" for this purpose in the second or subsequent count, is in no case "indispensably necessary. It is not usual to insert it in indictments for murder; but the party murdered is described in all the counts as the same person, and the instrument of death is not always stated in the different counts to be a different instrument; nor can it be necessary that it should be so stated. For certainly different offenses may be committed with the same instrument." *Lazier v. Com.*, 10 Grant. (Va.) 708.

[b] Failure to do so, even if necessary, does not render the indictment

authority it would seem to be improper to do so.⁹²

On the other hand, in those states where the statutes provide that only one offense may be charged in an indictment or information, but provide that such offense may be charged in different forms under different counts, this must be done in such a way as to show clearly upon the face of the pleading that the matters and things set forth in the different counts are descriptive of one and the same offense.⁹³

XII. AMENDMENT. — A. OF INDICTMENT. — 1. By Grand Jury. An indictment may be withdrawn by leave of the court and amended by the same grand jury which found the indictment,¹⁵ at any time before the prisoner has pleaded and before they are discharged,¹⁶ especially as to mere clerical errors or mere matters of form,¹⁷ but it cannot be amended at a subsequent term of court by a different grand jury.¹⁸ The proper course is for the same grand jury if it is present

had under statutory provisions for the cure of defects of form. *State v. Doyle*, 15 R. I. 507, 9 Atl. 990.

92. See *State v. Rost*, 35 N. H. 438.

93. Ark.—*State v. Ithca*, 28 Ark. 555, failure to do so renders indictment defective. Cal.—*People v. Jallies*, 146 Cal. 501, 70 Pac. 1065; *People v. Garcia*, 78 Cal. 102; *People v. Thompson*, 28 Cal. 214. Mont.—See *Territory v. Poulter*, 8 Mont. 146, 19 Pac. 594. Nev.—*State v. Mallie*, 14 Nev. 288.

[a]. See also *State v. Jourdan*, 32 Ark. 901, wherein the court said: "If the prosecuting attorney, in drafting the indictment intended in fact, to charge but one offense, and inserted the second count to obviate uncertainty in the evidence as to the ownership of the animals, he should have stated that fact to the court, on the interposing of the demurrer, and made it appear of record."

[b]. "The use of the words 'said' or 'aforesaid,' in or equivalent expressions in the second count of an indictment, will generally be found indispensable in order to fix the identity of the offense therein stated with that contained in the first count." *People v. Thompson*, 28 Cal. 214; *State v. Mallie*, 14 Nev. 288. (2) "It would doubtless be better pleading to always use these." *People v. Ah Sam*, 41 Cal. 648. It would never do any harm and might often do good." *State v. Mallie*, 14 Nev. 288. (3) There may be cases, however, where their use is not absolutely necessary in order to show that the same offense is attempted to be charged, such as where the language of each count is identical as to the time, place,

persons and property, and no words are used in either count tending in the slightest degree to show that more than one offense is intended to be charged. *State v. Mallie*, 14 Nev. 288, *adjoining* with approval *State v. Chapman*, 6 Nev. 325 in which the objection that the indictment charged more than one offense was summarily disposed of, and the counts in the indictment were not in any manner connected by the words "said" or "aforesaid," or other equivalent words. See also *State v. Rapley*, 60 Ark. 13, 28 S. W. 508.

15. Ala.—*Gregory v. State*, 46 Ala. 451. Cal.—*People v. Rodley*, 131 Cal. 240, 63 Pac. 351, wherein matter with respect to which perjury was committed was erroneously stated. See *Terrill v. Superior Court*, 6 Cal. Unrep. 417, 60 Pac. 516, wherein it was held after demurrer sustained court could not re-submit case to same grand jury. Ga.—*Goldsmith v. State*, 2 Ga. App. 283, 58 S. E. 486. Miss.—*State v. Armstrong*, 4 Miss. 335. Miss.—*Garvin v. State*, 72 Miss. 297. S. C.—*State v. Creight*, 4 Brew. 169, 2 Am. Dec. 656. Tenn.—*State v. Davidson*, 2 Coldw. 181; *State v. Hughes*, 1 Swan 261.

See *supra*, VI. A; VI. B.

16. *People v. Rodley*, 131 Cal. 240, 63 Pac. 351; *State v. Jafcoat*, 20 S. C. 388.

17. *State v. Jafcoat*, 20 S. C. 388, wherein word "January" was added after the words "in the year of," and the amendment was by the curative of "January."

18. *State v. Davidson*, 2 Coldw. (Tenn.) 181, 198.

in court,¹⁹ or a subsequent grand jury to return a new indictment obviating the defects.²⁰

2. By Order of Court.—*a. Generally.*—An indictment is the act of the grand jury and should be held to be inviolable. It cannot be amended as to matters of substance²¹ even with the consent of the accused,²² though amendments as to mere informalities and mere clerical errors which do not render the language of the indictment uncertain may be made by the court.²³

19. *Com. v. Drew*, 3 Cush. (Mass.) 279; *Hatcher v. Com.*, 106 Va. 827, 55 S. E. 677. See also *State v. Withrow*, 47 Ark. 551, 2 S. W. 184.

20. *Hatcher v. Com.*, 106 Va. 827, 55 S. E. 677.

21. **U. S.**—*Ex parte Bain*, 121 U. S. 1, 7 Sup. Ct. 781, 30 L. ed. 849; *United States v. Munday*, 211 Fed. 536. **Ark.**—*Henderson v. State*, 91 Ark. 324, 120 S. W. 966 (indictment cannot be amended to correspond to proof); *State v. Springer*, 43 Ark. 91. **Cal.**—*People v. Anthony*, 29 Cal. App. 580, 129 Pan. 969. **Conn.**—*Merritt v. Langdon*, 10 Conn. 469, 470. **Fla.**—*Dickson v. State*, 26 Fla. 860. **Ga.**—*Hill v. State*, 41 Ga. 484. **Ill.**—*Patrick v. People*, 133 Ill. 529, 24 N. E. 619. **Ind.**—*Finch v. State*, 4 Blackf. 532. But see *Com. v. State*, 4 Blackf. 512. **Ky.**—*Com. v. Adams*, 92 Ky. 124, 17 S. W. 276. **La.**—*State v. Hewitt*, 131 La. 115, 59 So. 34; *State v. Terrellanne*, 45 La. Ann. 25, 12 So. 315. **Md.**—*Watts v. State*, 99 Md. 30, 57 Atl. 542 (name of a person in an indictment whether Christian or surname is a matter of substance); *Hawthorn v. State*, 56 Md. 530. **Mass.**—*Com. v. Maher*, 16 Pick. 120. See *Com. v. Drew*, 3 Cush. 279. **Mich.**—*Yanor v. People*, 34 Mich. 286. **Minn.**—*State v. Armstrong*, 4 Minn. 335. **Miss.**—*Kline v. State*, 44 Miss. 317; *Unger v. State*, 42 Miss. 642; *McGuire v. State*, 35 Miss. 366, 72 Am. Dec. 124; *Moore v. State*, 13 Smed. & M. 229. **Nev.**—*State v. Chamberlain*, 6 Nev. 257. **N. H.**—*State v. Lyon*, 47 N. H. 416; *State v. Squire*, 10 N. H. 558. **N. J.**—*State v. Startup*, 39 N. J. L. 423. **N. Y.**—*People v. Campbell*, 4 Park Crim. 286; *People v. Metello*, 157 App. Div. 510, 142 N. Y. Supp. 622; *People v. Trank*, 88 App. Div. 294, 85 N. Y. Supp. 55. **N. C.**—*State v. Gady*, 119 N. C. 908, 22 S. E. 252, 56 Am. St. Rep. 692. See *State v. Sexton*, 10 N. C. 184, 14 Am. Dev.

584, stating that indictments are not within the statutes of *jeoffails* and cannot be amended. **Pa.**—*Com. v. Kana*, 3 Brewst. 497. **R. I.**—*State v. McCarthy*, 17 R. I. 270, 92 Atl. 186. **S. C.**—*State v. Blakeney*, 30 S. C. 311, 11 S. E. 637, amendment inserting place of death not permissible. **Tenn.**—*State v. Hughes*, 1 Swan 261; *McKinley v. State*, 8 Humph. 72. **Tex.**—*Dury v. State*, 54 Tex. Crim. 613, 114 S. W. 817; *Wade v. State*, 22 Tex. Crim. 619, 108 S. W. 677; *Sanders v. State*, 26 Tex. 119; *Calvin v. State*, 25 Tex. 789; *Chesnut v. State*, 22 Tex. App. 23, 2 S. W. 379; *Drummond v. State*, 4 Tex. App. 159. **Va.**—*Com. v. Hubbard*, 5 Gratt. 604. **Wis.**—*Seacor v. State*, 115 Wis. 621, 95 N. W. 942; *State v. McCarty*, 2 Pinn. 513, 54 Am. Dec. 150. **Eng.**—*Rex v. Wilkes*, 4 Barr. 2527, 2379, 28 Eng. Reprint 327; *Rog. v. Tufahin*, 6 Mod. 165, 281, 87 Eng. Reprint 922.

[a] An abandonment of some of the recitals in an indictment is not an amendment but operates as a nullity *prosequi* and thus does not vitiate the indictment where amendments are not allowed. *United States v. Munday*, 211 Fed. 536.

22. See *infra*, XIII. A. 4.

23. **Ind.**—*State v. Moore*, 1 Ind. 548 (insertion of word "oath" omitted by clerical error from presentment, it appearing abundantly that the grand jury were properly sworn); *Cain v. State*, 4 Blackf. 512. **La.**—*State v. Gibson*, 120 La. 242, 45 So. 271, wherein word "him" before "at" was omitted. **Md.**—*Hawthorne v. State*, 56 Md. 530. **Miss.**—*McGuire v. State*, 35 Miss. 366, 72 Am. Dec. 124. **N. H.**—*State v. Lyon*, 47 N. H. 416. **N. C.**—*State v. Coffey*, 119 N. C. 908, 22 S. E. 252, 56 Am. St. Rep. 692. Compare *State v. Sexton*, 10 N. C. 184, 14 Am. Dec. 184. **Pa.**—*Com. v. Pashen*, 21 Pa. Dist. 1139. **S. C.**—*State v.*

At common law the common practice was for the grand jury to consent, at the time they were sworn that the court should amend matters of form altering no matter of substance; and mere informalities could be amended by the court before the commencement of the trial,²⁴ and accordingly in some states even in the absence of statutes an indictment may be amended in matters of form with the consent of the grand jury,²⁵ and amendment by merely striking out or ignoring words of variance is not error when it does not affect the charge against the defendant and the indictment is good without the words omitted.²⁶

b. *Statutes* frequently provide for the amendment of indictments as to matters therein specified,²⁷ where the amendment does not affect

Means, 86 S. C. 401, 61 S. E. 898. Tenn. McKinley v. State, 8 Humph. 72. Tex. Parker v. State (Tex. Crim.), 150 S. W. 1184; Sanders v. State, 26 Tex. 119; Calvin v. State, 25 Tex. 789. Wis. State v. Jenkins, 60 Wis. 599, 19 N. W. 496, failure to allege name of accused. But see State v. Squire, 10 N. H. 558.

[a] Although writing the year 1878 instead of 1877 was undoubtedly a clerical error, the date of the commission of the offense is a matter of substance and cannot be amended. Drummond v. State, 4 Tex. App. 150.

24. 1 Chitty Crim. Law 297; State v. Jafaunt, 20 S. C. 383.

25. 1 Bishop New Crim. Proc., §710; 1 Chitty Crim. Law 297; Watts v. State, 99 Md. 80, 57 Atl. 542; State v. Jefferson, 20 S. C. 383. But see State v. Squire, 10 N. H. 558.

26. Com. v. Hunt, 4 Pick. (Mass.) 275; Com. v. Arnold, 4 Pick. (Mass.) 251; Com. v. Bullock, 3 Pick. (Mass.) 281; State v. Bailey, 31 N. H. 321; State v. Capps, 15 N. H. 212; State v. Buckman, 8 N. H. 202, 29 Am. Dec. 640.

27. See statutes of the various jurisdictions and: Cal.—People v. Anthony, 20 Cal. App. 785, 129 Pac. 968. La. State v. Hamilton, 48 La. App. 1506, 21 So. 232. Mass.—Com. v. Holley, 3 Gray 376, under 21, 1887, c. 307, §28. Miss.—Hines v. State, 44 Miss. 217. N. H.—State v. Kelley, 62 N. H. 577, 22 Atl. 348; State v. Mainelli, 19 N. H. 81. Pa.—Myers v. Com., 79 Pa. 303; Hough v. Com., 78 Pa. 407, both under Act of March 31, 1869, §13.

[a] There is no federal enactment authorizing amendments to an indictment. United States v. Manday, 211 Fed. 330.

[b] An allegation of former conviction is amendable as of right without terms by virtue of special statute. Com. v. Holley, 3 Gray (Mass.) 458.

[c] As to constitutionality of statutes permitting amendment of indictments, see 3 Am. & Eng. Ann. Cas. 558, and the following cases: Cal. People v. Anthony, 20 Cal. App. 586, 129 Pac. 968. Ia.—State v. Schumacher, 162 Iowa 231, 143 N. W. 1110; State v. Mullen, 151 Iowa 392, 131 N. W. 679, Ann. Cas. 1913A, 399. La.—State v. Gibson, 120 La. 343, 45 So. 271; State v. Hanks, 39 La. Ann. 234, 1 So. 478. Miss. Mackguire v. State, 91 Miss. 151, 44 So. 802; Peebles v. State, 55 Miss. 434; Miller v. State, 53 Miss. 403. N. J.—State v. Minford, 61 N. J. L. 518, 45 Atl. 817; State v. Startup, 39 N. J. L. 193. N. Y.—People v. Johnson, 104 N. Y. 213, 10 N. E. 690. Tex. Sharp v. State, 6 Tex. App. 650. Wis. Schultz v. State, 135 Wis. 644, 114 N. W. 505, 116 N. W. 259, 271; Baker v. State, 38 Wis. 146, 59 N. W. 570.

[d] Statute authorizing amendment as to matters of substance would be unconstitutional. People v. Anthony, 20 Cal. App. 586, 129 Pac. 968; State v. Mullan, 151 Iowa 392, 131 N. W. 679, Ann. Cas. 1913A, 399.

[e] Under the Florida statute (ch. 1197, Laws, 1861) the court may on the application of the accused and either before or after trial, when the vagueness of the indictment would expose an accused to substantial danger of a new indictment for the same offense, require the prosecuting officer to modify in writing the details of the offense charged against accused with such distinctness as will obviate the objection, such specifications to form part of the record. While this amounts

the rights of the defendant or prejudice his defense,³⁰ and does not charge defendant with a different crime or a different degree of crime from that charged in the original indictment returned by the grand jury.³¹

Statutes generally permit amendments as to matters of form only,³² but some statutes allow amendments either of form or substance.³³

in effect to amendment of indictment at the instance of the defendant, it does not authorize amendment by the prosecuting officer at the instance of the court, as to any matter of substance, *e. g.* of the date when the crime is alleged to have been committed. *Dickson v. State*, 20 Fla. 899; *Barrington v. State*, 17 Fla. 643.

28. **Ia.**—*Laws*, 33 Gen. Ass., ch. 227; *State v. Foxton (Iowa)*, 147 N. W. 347; *State v. Muller*, 151 Iowa 392, 131 N. W. 679, Ann. Cas. 1913A, 339. **Mich.**—*Howell's St.*, 1913, §15,693. **Miss.**—*Code*, 1906, §1508; *Miller v. State*, 53 Miss. 403. **N. J.**—*Comp. St.*, 1910, p. 1831; *State v. Ham*, 72 N. J. L. 4, 60 Atl. 41. **N. Y.**—*Code Crim. Proc.*, §223; *People v. Johnson*, 104 N. Y. 214, 10 N. E. 699; *People v. Scullion*, 132 App. Div. 528, 117 N. Y. Supp. 57; *People v. Herman*, 45 Hun 175. **Pa.**—*Rough v. Com.*, 78 Pa. 465. **Vt.**—*State v. Casavant*, 64 Vt. 405, 23 Atl. 626; *State v. Arnold*, 50 Vt. 731. **Wis.**—*Schultz v. State*, 135 Wis. 644, 114 N. W. 505, 116 N. W. 239. **Eng.**—14 & 15 Vict., ch. 109, §1.

[a] An amendment which adds nothing to the gravity of the offenses with which the defendant is otherwise charged, and which involves no other penalty than that to which he is otherwise liable, is immaterial in the sense the defendant has sustained no substantial prejudice thereby. *State v. Gregg*, 132 La. 979, 48 So. 426; *State v. Snow*, 30 La. Ann. 401.

29. **Ia.**—*Laws*, 1909, ch. 227; *State v. Foxton (Iowa)*, 147 N. W. 347; *State v. Muller*, 151 Iowa 392, 131 N. W. 679, Ann. Cas. 1913A, 339. **Ky.**—*Com. v. Adams*, 92 Ky. 133, 17 S. W. 270. **Miss.**—*Blossenberg v. State*, 25 Miss. 378. See *Foran v. State*, 95 Miss. 77, 48 So. 611, holding that the court should have granted a continuance, where the amendment made a new case and the defendant sought a continuance on the ground of surprise. The court said: "Since the case must be reversed,

we here express grave doubts as to the propriety of the amendment, and suggest that a new indictment be secured."

30. See the following: **Cal.**—*People v. Anthony*, 30 Cal. App. 285, 180 Pac. 908. **Ia.**—*Laws*, 33 Gen. Ass., ch. 227; *State v. Foxton (Iowa)*, 147 N. W. 347. **La.**—*Rev. St.*, §1004; *State v. Hardaway*, 30 La. Ann. 1345, 24 So. 220; *State v. Hamilton*, 48 La. Ann. 1569, 21 So. 232; *State v. Wilson*, 11 La. Ann. 164, N. H.—*State v. Kelley*, 66 N. H. 577, 29 Atl. 843; *State v. Lyon*, 47 N. H. 416. **S. C.**—*Crim. Code*, 1902, §48; *State v. Davis*, 86 S. C. 208, 68 S. E. 232. **Tex.**—*Code Crim. Proc.*, §589; *Rutherford v. State (Tex. Crim.)*, 102 S. W. 1157; *Hightower v. State (Tex. Crim.)*, 105 S. W. 185; *Hamilton v. State (Tex. Crim.)*, 145 S. W. 348; *Davis v. State*, 54 Tex. Crim. 619, 114 S. W. 817; *White v. State*, 59 Tex. Crim. 619, 108 S. W. 675; *Bosshard v. State*, 25 Tex. 297 (inserting word "court" after word "district"); *Collins v. State*, 6 Tex. App. 647. **Vt.** *State v. Arnold*, 50 Vt. 731, under §1, No. 5, Acts, 1870.

[a] Amendments as to matters of substance are not permitted under such statutes. **La.**—*State v. Durbin*, 20 La. Ann. 408. **N. H.**—*State v. Kelley*, 66 N. H. 577, 29 Atl. 843; *State v. Lyon*, 47 N. H. 416. **Tex.**—*Code Crim. Proc.*, §587; *Hamilton v. State (Tex. Crim.)*, 145 S. W. 348; *Collins v. State*, 6 Tex. App. 647.

[b] An indictment fatally defective cannot be amended so as to make it sufficient. **La.**—*State v. Durbin*, 20 La. Ann. 408. **Miss.**—*Wilburn v. State*, 101 Miss. 392, 78 So. 7; *Hall v. State*, 44 So. 810. **N. J.**—*State v. Startup*, 29 N. J. L. 473. **Tex.**—*Bates v. State*, 12 Tex. App. 26.

31. *Comp. St.*, 1910, p. 1824, §44 (defects of form or substance apparent on the face of the indictment); *State v. Lamb*, 81 N. J. L. 234, 80 Atl. 111; *State v. Twining*, 71 N. J. L. 388, 38

Statutes authorizing the amendment of indictments are construed strictly,³² and if not specifically providing otherwise will be construed to apply only to amendments as to matters of form.³³

The quashing of one count of an indictment is equivalent to a *nolle prosequi* as to that count and is permissible,³⁴ but an indictment containing but one count cannot be amended by striking out a material portion.³⁵

Atl. 1698. See *State v. Minford*, 64 N. J. L. 513, 45 Atl. 817.

[a] **Where Indictment Fails To Charge Offense.**—But such amendment, although of substance, must not be of such character as to make the indictment charge a crime when, as presented by the grand jury, it fails to do so. *State v. Lamb*, 81 N. J. L. 234, 80 Atl. 111; *State v. Twining*, 71 N. J. L. 388, 58 Atl. 1698; *State v. Startup*, 39 N. J. L. 423.

32. *State v. Armstrong*, 4 Minn. 335.

33. Minn. Rev. St., 1905, §5345; *State v. Armstrong*, 4 Minn. 335; *State v. Lyon*, 47 N. H. 416, 417; *State v. Goodrich*, 46 N. H. 186.

[a] The Minnesota statute reads: "If the demurrer shall be allowed judgment shall be final . . . unless the court shall allow an amendment when the defendant will not be unjustly prejudiced thereby." Held that statute only authorizes amendments as to matters of form. *State v. Armstrong*, 4 Minn. 335.

[b] A statute providing that an indictment cannot be amended so as to change the offense charged, only authorizes amendments as to matters affecting the formal parts of the indictment. *Pamph v. Anthony*, 20 Cal. App. 586, 129 Pac. 568.

[c] **Distinction Between Matters of Form and Matters of Substance.**—The attempt to classify the defects in an indictment as matters of form and as matters of substance has not been a fortunate one. Some authorities treat as matters of substance all defects other than clerical errors and technical defects in the form of the indictment; others include as matters of substance only matters necessary to be proved in order to convict the defendant; others regard as matters of form all matters which may be presented without prejudicing defendant's defense or charging him with a different crime from that

contemplated by the original indictment. Thus the name of defendant and of the owners of stolen property have been held to be matters of substance. Yet in other cases statutes permitting amendment as to such matters have been held to apply solely to matters of form. See the following: Fla.—*Dickson v. State*, 20 Fla. 800. Ia.—*State v. Mullen*, 151 Iowa 392, 131 N. W. 679, Ann. Cas. 1913A, 399. Md.—*Watts v. State*, 99 Md. 30, 57 Atl. 542. Mich.—*Yauer v. People*, 34 Mich. 286. Miss.—*Gamblin v. State*, 45 Miss. 658. N. H. *State v. Blaisdell*, 49 N. H. 81, 82; *State v. Lyon*, 47 N. H. 416, 417. Eng. *Rex v. Harne*, 1 Cowp. 672, 98 Eng. Reprint 1300.

[d] "The statement of every fact necessary to be proven to make the act complained of a crime is matter of substance in an indictment, and that all beyond, the order of arrangement, the precise words, unless particular words alone convey the meaning, is formal." *State v. Amidon*, 58 Vt. 524, 2 Atl. 154.

[e] "It is obvious . . . that a defect that does not affect the merits of the case or the evidence necessary to be given to maintain the indictment can be regarded as only formal." *State v. Arnold*, 59 Vt. 731.

34. Ala.—*Salm v. State*, 89 Ala. 56, 9 So. 66. Ind.—*Moody v. State*, 7 Blackf. 424. Nev.—*State v. McKiernan*, 17 Nev. 224, 30 Pac. 831. N. J. *State v. Lamb*, 81 N. J. L. 234, 80 Atl. 111. Tex.—*Duty v. State*, 54 Tex. Crim. 613, 114 S. W. 817.

See *infra*, XIV.

35. *Duty v. State*, 54 Tex. Crim. 619, 114 S. W. 817; *Calvin v. State*, 25 Tex. 789.

[a] But where an indictment is duplicitous, the striking out of several charges leaving but one is proper, at least in New Jersey whose statute authorizes the amendment of every de-

Discretion of Court.— Sometimes by virtue of statute the amendment of the indictment is within the discretion of the court.³⁸

3. Amendment by Prosecuting Attorney.— The district attorney, though he may amend an information,³⁹ has no power to amend an indictment.⁴⁰ Any such amendment would violate the indictment.⁴¹

4. By Consent.— In the absence of statute the consent of defendant to a correction of the indictment in open court before pleading thereto is binding on him,⁴² even after trial and motion in arrest of judgment,⁴³ except perhaps in a capital case.⁴⁴ But the court cannot, even with the consent of defendant, amend an indictment as to matters of substance,⁴⁵ or so as to charge a different offense from that contemplated by the grand jury.⁴⁶

Statutes sometimes authorize amendment of indictment by consent of defendant in particular matters,⁴⁷ such as incorrect description of property⁴⁸ or persons.⁴⁹ In such case the consent of the defendant must

feet apparent on the face of the indictment whether of form or substance. *State v. Clement*, 89 N. J. L. 669, 77 Atl. 1067.

36. *State v. Donovan*, 75 Vt. 308, 55 Atl. 611.

37. See *infra*, XIII, B, 4.

38. U. S.—*Ex parte Bain*, 121 U. S. 1, 7 Sup. Ct. 781, 30 L. ed. 849. Fla. *Dickson v. State*, 20 Fla. 899. La. *State v. Hewitt*, 131 La. 115, 59 So. 34. Miss.—*Shurley v. State*, 90 Miss. 415, 43 So. 239. Tenn.—*McKinley v. State*, 8 Humph. 72. Tex.—*Calvin v. State*, 25 Tex. 789.

[a] **Reason.**—To permit the district attorney to amend the indictment in matters of substance would in effect render the indictment no longer the finding of the grand jury. *People v. Anthony*, 20 Cal. App. 586, 129 Pac. 968.

39. *McKinley v. State*, 8 Humph. (Tenn.) 72.

40. Ala.—*Shiff v. State*, 84 Ala. 454, 4 So. 419. Ind.—*McCorkle v. State*, 14 Ind. 39. N. C.—*State v. Cady*, 149 N. C. 608, 26 S. E. 252, 56 Am. St. Rep. 692. S. C.—*State v. Fulle*, 43 S. C. 52, 20 S. E. 798.

41. *Com. v. Smith*, 1 Mass. 245.

42. *Com. v. Mahar*, 16 Pick. (Mass.) 120.

43. Ky.—*Com. v. Adams*, 92 Ky. 134, 17 S. W. 376. Mass.—*Com. v. Mahar*, 16 Pick. 120. N. Y.—*People v. Campbell*, 4 Park. Crim. 386.

44. *Com. v. Adams*, 92 Ky. 134, 17 S. W. 376.

45. Ala. Rev. Code, §4143; *Reynolds v. State*, 90 Ala. 44, 9 So. 398; *Shiff v. State*, 84 Ala. 454, 4 So. 419; *Johnson v. State*, 16 Ala. 212; *Gregory v. State*, 46 Ala. 151; *Dix v. State*, 8 Ala. App. 228, 62 So. 1007.

[a] **Consent Necessary to Immaterial Amendment.**—An indictment is the act of the grand jury and cannot be amended, even as to immaterial matter, without the defendant's consent. *Johnson v. State*, 46 Ala. 212; *Gregory v. State*, 46 Ala. 151; *Dix v. State*, 8 Ala. App. 228, 62 So. 1007.

[b] In Rhode Island, an amendment of substance is not allowable unless with the consent of the accused if not made with the concurrence of the grand jury. *State v. McCarthy*, 17 R. I. 370, 22 Atl. 282.

[c] The fact that defendant consents to an amendment only to avoid being bound over to answer to a new indictment does not destroy the validity of the amendment. *Ross v. State*, 59 Ala. 477.

46. Ala. Rev. St., §4143; *Reynolds v. State*, 90 Ala. 44, 9 So. 398, *amendment of money*.

47. Ala. Rev. St., §4143; *Crawford v. State*, 112 Ala. 1, 21 So. 214 (*amendment as to name of deceased*); *Pate v. State*, 61 Ala. 16; *Ross v. State*, 59 Ala. 477, *amendment of Christian name of owner of goods stolen*.

appear of record,⁴⁸ and the amendment must follow the terms of the consent.⁴⁹ If he does not consent to such amendment the prosecution may be dismissed at any time before the jury retires.⁵⁰

Effect of Statute.—Where the statute allows the amendment of an indictment with the consent of the defendant, that is equivalent to a declaration on the part of the legislature that an indictment cannot be amended in any case without the defendant's consent.⁵¹ Nor can defendant be held to answer to a new indictment unless he has refused to allow the original indictment to be amended.⁵²

5. Time of Amendment.—Statutes may require or permit amendment of an indictment before or at the time of arraignment,⁵³ or on demurrer,⁵⁴ or on plea in abatement,⁵⁵ at,⁵⁶ or before trial,⁵⁷ but not after trial,⁵⁸ nor on appeal.⁵⁹

6. How Made.—An amendment made under the statute must be in strict conformity with its provisions.⁶⁰ Statutes frequently require that amendments be made by order of court⁶¹ specifically specifying

48. *Stone v. State*, 105 Ala. 60, 17 So. 114; *Shiff v. State*, 84 Ala. 454, 4 So. 419; *Johnston v. State*, 46 Ala. 212; *Gregory v. State*, 46 Ala. 151.

49. *Stone v. State*, 105 Ala. 60, 17 So. 114; *Shiff v. State*, 84 Ala. 454, 4 So. 419.

50. *Reynolds v. State*, 92 Ala. 44, 9 So. 398.

51. *Shiff v. State*, 84 Ala. 454, 4 So. 419; *Johnson v. State*, 46 Ala. 212; *Gregory v. State*, 46 Ala. 151; *Dix v. State*, 8 Ala. App. 338, 62 So. 1007.

52. *Washington v. State*, 143 Ala. 62, 39 So. 388.

53. *People v. Kelly*, 6 Cal. 210 (defendant indicted under wrong name); *People v. Anthony*, 20 Cal. App. 586, 129 Pac. 968.

[a] Amendment as to matters of form may be made by the court at any time before commencement of trial. *Hawthorn v. State*, 56 Md. 539.

[b] Whether before service of process on the defendant, *quære*. *Shiff v. Com.*, 99 Va. 386, 18 S. E. 838.

54. Mont. Rev. Code, §9204.

[a] Amendment permitted on demurrer being sustained. Minn. Rev. St., 1905, 40349.

55. Md. Pub. Gen. Laws, art. 27, §423.

56. Ind.—*Wells v. Ward*, 161 Ind. 457, 78 N. E. 889, amendment by changing venue. Ky.—*International*

Harvester Co. v. Com., 124 Ky. 543, 99 S. W. 637; *Russellville Home Tel. Co. v. Com.*, 33 Ky. L. Rep. 132, 109 S. W. 340. La.—Rev. St., §1047; *State v. Gregg*, 122 La. 979, 48 So. 426 (amendment as to variance in the matters specified in the statute); *State v. Dominique*, 39 La. Ann. 323, 1 So. 665. Md. Pub. Gen. Laws, art. 27, §436. Miss. *Miller v. State*, 53 Miss. 403. And see note immediately following. N. Y. *People v. Lewis*, 132 App. Div. 256, 116 N. Y. Supp. 893. Pa.—*Rough v. Com.*, 78 Pa. 495. Tex.—*But see Osborne v. State*, 23 Tex. App. 431, 5 S. W. 251.

[a] After the evidence is closed, the indictment may be amended as to any defect apparent on the face thereof. *State v. Fontenette*, 38 La. Ann. 61.

[b] After Verdict.—*State v. Johnson*, 93 Mo. 317, 6 S. W. 77.

57. *State v. Gregg*, 122 La. 979, 981, 48 So. 426; *People v. Lewis*, 132 App. Div. 256, 116 N. Y. Supp. 893.

58. *State v. Joseph*, 40 La. Ann. 5, 3 So. 405 (no authority for remanding the case that contain essential averments be supplied); *Moore v. State*, 13 Smed. & M. (Miss.) 259.

59. *State v. Kennedy*, 36 Vt. 563.

60. *Shurley v. State*, 90 Miss. 415, 43 So. 729, wherein statute required minutes to show amendment.

61. *Shurley v. State*, 90 Miss. 415, 43 So. 299. See *supra*, XII, A, 2.

the amendment.⁶² This order must be spread upon the minutes.⁶³ It is within the court's discretion to allow the prosecutor time to amend, or to order the amendment *instanter*.⁶⁴

The presence of the defendant at the time that the indictment is amended, has been held unnecessary.⁶⁵

7. Necessity of Making on Face of Pleading.—Simply ordering the indictment amended is ordinarily insufficient,⁶⁶ the amendment must be actually made on the face of the pleading. If there is a failure to comply with the order to amend resulting in a variance on the face of the indictment conviction cannot be sustained.⁶⁷ Mistakes merely clerical, variances and discrepancies not going to the merits of the cause which are amendable without question are frequently disregarded and treated by the supreme court as having been corrected by amendment,⁶⁸ but this rule does not extend to material defects.⁶⁹

Of the same force and effect as statutes providing for amendment of indictments are the statutes (known as statutes of jeofails) to be found in several states, which instead of providing for amendment of matter of variance merely provide that such variance "shall not be ground for an acquittal," or that the indictment "shall not be invalid," or the trial or judgment "in any way affected" by reason of the variance or insufficiency set forth in the statute.⁷⁰

8. Particular Matters Amendable.—a. *In General.*—Where descriptive averments, though unnecessarily particular or minute, are of such a nature that they must be proved as laid,⁷¹ they cannot be stricken from the indictment by amendment⁷² and the same is true of other words materially qualifying or describing the offense.⁷³ Essen-

62. *Shurley v. State*, 90 Miss. 415, 43 So. 299.

63. *Shurley v. State*, 90 Miss. 415, 43 So. 299.

[a] That order was not entered on the minutes to be availed of must be made ground of special exception in the trial court. *Richbarger v. State*, 90 Miss. 806, 44 So. 772.

64. *State v. Thompson*, 4 Ind. 623.

65. *State v. Dominique*, 39 La. Ann. 223, 1 So. 605.

[a] An amendment correcting a misnomer made in the absence of the defendants is not objectionable on that ground in view of the statute providing that no indictment shall be abated for any misnomer of the accused. *Shifflett v. Com.*, 90 Va. 386, 18 S. E. 878.

66. *Robins v. State*, 2 Tex. App. 606.

[a] It cannot be presumed that an information was amended from a showing that leave to amend was granted. *People v. Lee*, 185 Ill. App. 452; *State v. Halida*, 28 W. Va. 409.

67. *Miller v. State*, 53 Miss. 403. But see *State v. Patterson*, 66 Kan. 447, 71 Pac. 869; *Robins v. State*, 2 Tex. App. 606.

[a] Actual obliteration of irrelevant matter ordered disregarded is not absolutely essential where the emasculation does not confuse the remaining charge. *State v. Patterson*, 66 Kan. 447, 71 Pac. 869.

68. *Soyine v. State*, 85 Ind. 576. See *infra*, XV.

69. *Soyine v. State*, 85 Ind. 576; *Kelser v. State*, 78 Ind. 400.

70. La.—*Rev. St.*, §1063. Md.—See *Hammond v. State*, 14 Md. 185. Mich.—*Hawell's St.*, 1013, §15,000; *Cyde v. People*, 37 Mich. 544. N. J.—See *State v. Unsworth*, 85 N. J. L. 207, 88 Atl. 1007. And see *infra*, XVI.

71. See *supra*, IX, J.

72. *Wain v. State*, 52 Tex. Crim. 619, 108 S. W. 677.

73. An amendment by striking out the words "malice aforethought" from

tial words cannot be supplied when omitted from an indictment.⁷⁴

b. *Names of Persons*.—The name of the accused is considered a matter of substance which cannot be changed without the consent of the grand jury.⁷⁵ Some statutes authorize a correction of the name of the accused in the case of a misnomer.⁷⁶ Some statutes instead of providing for the amendment of the indictment proper, provide that on suggestion by the defendant that the name by which he is alleged is not his true name and where he gives his correct name, an entry thereof is made in the minutes and the subsequent proceedings are had by that name, referring also to the name alleged in the indictment.⁷⁷

a charge of the commission of the crime "wilfully, feloniously and of malice aforethought" would be an amendment as to a matter of substance and therefore unauthorized. This amendment is not within the purport of Code Crim. Proc., §293, which is expressly limited to variance between pleading and proof. *People v. Motello*, 157 App. Div. 519, 142 N. Y. Supp. 622.

74. *State v. Durbin*, 20 La. Ann. 408, feloniously.

75. Md.—*Watts v. State*, 99 Md. 30, 57 Atl. 542, such amendment according to proof is permissible only after swearing of jury. Miss.—*McGuire v. State*, 35 Miss. 366, 72 Am. Dec. 124. Mo.—*State v. Sovern*, 225 Mo. 580, 125 S. W. 769 (where information alleged infliction of wounds on defendant himself); *State v. Hahn*, 93 Mo. 190, 6 S. W. 96. Va.—*Com. v. Buzzard*, 5 Gratt. 694.

[a] Where, in the charge the name of the defendant immediately followed that of the person killed separated only by a comma, an amendment striking out defendant's name was proper. *State v. Means*, 80 S. C. 401, 61 S. E. 598.

[b] Both Christian and surname are matters of substance. *Watts v. State*, 99 Md. 30, 57 Atl. 542.

76. Ala.—Code, 1907, §7155. Colo.—*Harris v. People*, 21 Colo. 95, 39 Pac. 1083. Fla.—*Harris v. State*, 17 Fla. 642. La.—*State v. Matthews*, 111 La. 992, 36 So. 48; *State v. Buchanan*, 35 La. Ann. 89. Md.—Pub. Gen. Laws, art. 27, §485. Miss.—*Orr v. State*, 81 Miss. 139, 32 So. 108. N. J.—2 Comp. St., 1831, 122; *Hubbard v. State*, 62 N. J. L. 628, 43 Atl. 699. Tex.—*Thomp-*

son v. State (Tex. Crim.), 160 S. W. 685; *Peters v. State* (Tex. Crim.), 154 S. W. 563; *Woods v. State* (Tex. Crim.), 150 S. W. 633; *Colter v. State*, 41 Tex. Crim. 78, 51 S. W. 945; *Sinclair v. State*, 34 Tex. Crim. 453, 30 S. W. 1070; *State v. Manning*, 14 Tex. 402; *Morris v. State*, 4 Tex. App. 589. Va.—Code, §3999; *Hatcher v. Com.*, 106 Va. 827, 55 S. E. 677; *Shiflett v. Com.*, 90 Va. 386, 18 S. E. 838. W. Va.—*State v. Strayer*, 58 W. Va. 676, 52 S. E. 862.

[a] **Statute Applies to Misdemeanor Cases**.—*Bassett v. State*, 4 Tex. App. 41.

[b] **Where Name Appears in Charge**. Statute authorizing the correction of the name of the accused upon suggestion that he bears another name, applies whether the name appears in the caption or in the body of the indictment. *Colter v. State*, 41 Tex. Crim. 78, 51 S. W. 945.

[c] **Statute Mandatory**.—Statute requiring court to correct name of defendant as alleged, upon his suggestion that such is not his correct name is mandatory. *Popinaw v. State*, 52 Tex. Crim. 409, 107 S. W. 350.

[d] **The given name of the accused when omitted may be supplied, especially after he has pleaded under that name**. *State v. Matthews*, 111 La. 992, 36 So. 48.

[e] **The striking out words "and divers other persons to the jurors unknown" is a proper amendment**. *Rocco v. State*, 37 Miss. 357.

77. Cal.—*People v. Maroney*, 109 Cal. 277, 41 Pac. 1097; *People v. Le Roy*, 65 Cal. 612, 4 Pac. 649; *People v. Kelly*, 6 Cal. 210. Ky.—Crim. Code, §125; *International Harvester Co. v. Com.*, 124 Ky. 543, 99 S. W. 637; *Com.*

Names of Third Persons.—A mistake in the name of the owner of the property stolen or otherwise involved in the crime,⁸⁰ or the name of the complainant,⁸¹ or the person injured,⁸² may be corrected by amendment.

Substitution of Another Person.—But it is not permissible under the color of amendment to substitute another person instead of accused,⁸³ or the person injured,⁸⁴ or in intoxicating liquor cases, of the person to whom the liquor was sold.⁸⁵

c. *Time.*—The time of the commission of the offense is a matter of substance and cannot be cured by amendment,⁸⁶ but such amendments are sometimes provided for by statute.⁸⁷

v. Jenkins, 115 Ky. 22, 72 S. W. 303; *Russellville Home Tel. Co. v. Com.*, 38 Ky. L. Rep. 122, 109 S. W. 340. **Mo.** *State v. Schriber*, 29 Mo. 265. **Ohio.** *Lasure v. State*, 19 Ohio St. 43.

78. Ala.—*Ross v. State*, 55 Ala. 177. **Kan.**—*State v. Moberly*, 90 Kan. 837, 126 Pac. 324. **La.**—*State v. Satterwhite*, 52 La. Ann. 499, 26 So. 1906; *State v. Dominique*, 39 La. Ann. 323, 1 So. 665. **Miss.**—*Garvin v. State*, 72 Miss. 207; *Murray v. State*, 51 Miss. 652, 675 (inserting middle name); *Haywood v. State*, 47 Miss. 1. **N. Y.**—*People v. Richards*, 44 Hun 278, name of owner of building burglarized. **Pa.** *Com. v. Haslett*, 14 Pa. Super. 352. **Vt.**—*State v. Casavant*, 64 Vt. 405, 23 Atl. 636.

[a] Amendment Allowed as of Course.—*Garvin v. State*, 72 Miss. 207.

[b] The name of the owner of property stolen is a matter of substance which cannot be supplied by amendment. **Mass.**—*Com. v. Mahar*, 16 Pick. 470. **N. H.**—*State v. Loan*, 47 N. H. 416. **Ore.**—*State v. Moser*, 149 Pac. 84. **R. I.**—*State v. McCarthy*, 17 R. I. 370, 22 Atl. 282.

[a] Inserting instead of the person named as owner, the words, "by some person unknown," is allowable. **Conn.** *v. O'Brien*, 2 Brewst. (Pa.) 566.

[b] But where by mistake a wrong name was inserted in the indictment, although the indorsement on the indictment and the record of the court shows the correct name, an amendment striking out the incorrect name and inserting the name of the person intended is not authorized. **Conn. v. Barvard, 5 Gratt. (Vt.) 694.**

79. State v. Holmes, 23 La. Ann. 664; *Rough v. Com.*, 78 Pa. 425, name

of person to whom intoxicating liquor is sold.

80. La.—*State v. Lee*, 127 La. 1077, 24 So. 356; *State v. Johnson*, 116 La. 20, 40 So. 321. **Md.**—*Hawthorn v. State*, 56 Md. 330. **Miss.**—*Miller v. State*, 68 Miss. 221, 8 So. 373. **N. Y.**—*People v. Johnson*, 104 N. Y. 213, 40 N. E. 696. **Vt.**—*State v. Arnold*, 59 Vt. 731, name of particeps in an adultery case.

But see *State v. Moran*, 23 Mo. 190, 6 S. W. 90.

81. State v. Taylor, 49 La. Ann. 319, 21 So. 516; *State v. Morgan*, 35 La. Ann. 1139.

82. State v. Taylor, 49 La. Ann. 319, 21 So. 516; *State v. Morgan*, 35 La. Ann. 1139.

In case of variance, see *infra*, XII, S. f.

83. State v. O'Donnell, 81 Me. 271, 17 Atl. 66; *Blumenberg v. State*, 55 Miss. 528.

84. Fla.—*Dickson v. State*, 20 Fla. 800. **Pa.**—*Com. v. Seymour*, 2 Brewst. 567. **Tex.**—*Mealer v. State* (Tex. Crim. L. 145 S. W. 333; *State v. David*) 89, 36 Tex. 325; *Sanders v. State*, 26 Tex. 119; *Drummond v. State*, 4 Tex. App. 150, overruling *State v. Elliott*, 34 Tex. 148.

[a] Where Offense as Charged Was Outlawed.—An indictment charging an offense to have been committed in the year 1890 cannot be amended by inserting the words 1868. **Conn. v. Seymour, 2 Brewst. (Pa.) 567.**

[b] On Appeal.—*State v. Kennedy*, 20 Vt. 563.

[c] Mere clerical error in the date may be corrected. *Bush v. State*, 57 Tex. Crim. 645, 124 S. W. 608.

85. Cal.—*People v. Anthony*, 30 Cal. App. 586, 129 Pac. 968. **Ia.**—*State v.*

d. *Place*.—An averment of place cannot be corrected, changed, or supplied by amendment.⁸⁶

e. *Of Property*.—The statute sometimes authorizes correction of an imperfect description of property⁸⁷ or matter⁸⁸ described in the indictment.

f. *In Case of Variance*.⁸⁹—In many statutes, it is variously provided that in the event of a variance in the indictment and the proof in the name of any place mentioned,⁹⁰ or in the name or description

Brooks, 85 Iowa 366, 52 N. W. 240. **La.**—State v. Lee, 125 La. 1077, 54 So. 356; State v. Cornelius, 118 La. 146, 42 So. 754; State v. Hardaway, 59 La. Ann. 1345, 24 So. 329 (where time is not of the essence); State v. Hamilton, 48 La. Ann. 1506, 21 So. 232; State v. Pierre, 39 La. Ann. 915, 3 So. 60; State v. Fontenette, 38 La. Ann. 61. **N. J.** State v. Unsworth, 84 N. J. L. 22, 86 Atl. 64; Ketline v. State, 58 N. J. L. 462, 37 Atl. 133. **N. Y.**—People v. Jackson, 111 N. Y. 362, 6 N. Y. Crim. 393, 19 N. E. 54. **Pa.**—Myers v. Com., 79 Pa. 308. **S. C.**—State v. Richey, 88 S. C. 239, 70 S. E. 729; State v. Davis, 86 S. C. 268, 68 S. E. 532 (supplying day of the designated month); State v. May, 45 S. C. 509, 23 S. E. 513.

[a] **Where New Offense Charged.** A charge of a nuisance, viz., of keeping a disorderly house on the 13th day of Feb., 1910, and divers other times between that day and the 1st day of April, 1910, cannot be amended to reach back for a period of one year beyond the date therein mentioned, for every continuance of a nuisance is a new offense. State v. De Lorenzo, 80 N. J. L. 300, 78 Atl. 660.

[b] **Where the date of the offense is shown to be subsequent to the return of the indictment,** it is beyond the power of the court to correct it. Clement v. State, 22 Tex. App. 23, 2 S. W. 272. But see State v. Anderson, 125 La. 779, 51 So. 840 (by statute); State v. Blahodil, 39 N. H. 81.

86. **Minn.**—State v. Armstrong, 4 Minn. 333, inserting name of county. **Nev.**—State v. Chamberlain, 6 Nev. 257. **N. H.**—State v. Keller, 66 N. H. 577, 20 Atl. 843. **S. C.**—People v. Rodman, 86 S. C. 124, 68 S. E. 943. **Tex.**—Robline v. State, 9 Tex. App. 666; Collins v. State, 6 Tex. App. 647, venue is a matter of substance.

But see Com. v. Lambrecht, 18 Phila. 505, 3 Pa. Co. Ct. 323.

[a] **Locality of the crime being an essential allegation,** an indictment omitting this averment cannot be corrected by amendment. Collins v. State, 6 Tex. App. 647.

87. **Ala.**—Code, 1907, §7155; Simpson v. State, 111 Ala. 6, 20 So. 572. **La.** State v. Satterwhite, 52 La. Ann. 499, 26 So. 1006; State v. Perkins, 49 La. Ann. 310, 21 So. 839; State v. Carter, 9 So. 128; State v. Thomas, 30 La. Ann. 600; State v. Johnson, 29 La. Ann. 717. **Mich.**—People v. Cook, 10 Mich. 164, description of promissory note. **N. Y.** People v. Hagan, 60 Hun 577, 14 N. Y. Supp. 233; People v. Dunn, 53 Hun 381, 6 N. Y. Supp. 805, 7 N. Y. Crim. 173. **Pa.**—Com. v. Hazlett, 14 Pa. Super. 352. **Wis.**—Secor v. State, 118 Wis. 621, 95 N. W. 942.

[a] **Amendment more particularly describing the property stolen is properly made.** People v. Price, 74 Mich. 37, 41 N. W. 853.

88. **Ala.** Code, 1907, §7155.

89. In Arkansas, an amendment of the indictment to conform to the proof is not permissible. Henderson v. State, 91 Ark. 224, 120 S. W. 966.

90. **La.**—Rev. Laws (Volff, 1904), §1047; State v. Gregg, 122 La. 979, 48 So. 426. **Mich.**—Howell's St., §15,093. **Miss.**—Code, 1906, §1598; Winston v. State, 101 Miss. 101, 57 So. 545. **Mont.** Rev. Code, 1907, §2174. **N. J.**—2 Comp. St., 1831, §34. **N. Y.**—Code Crim. Proc., §123; People v. Seannlon, 132 App. Div. 228, 117 N. Y. Supp. 57; People v. Langley, 114 App. Div. 477, 100 N. Y. Supp. 123. **Wis.**—St., 1898, §4703, any place or premises.

[a] **The venue of an indictment where incorrectly laid may be corrected and all papers may be directed certified**

of any person, or body politic or corporation alleged to be the owner of any property forming the subject of the offense,²¹ or alleged to have been injured or intended to have been injured,²² or in the name or description of any other person named,²³ or in the ownership of any property,²⁴ or in the description of any property²⁵ or thing²⁶

to the proper county, by virtue of special statute in Indiana. *Wells v. Ward*, 164 Ind. 457, 73 N. E. 889.

[b] Place being a material element in the illegal sale of liquor, an amendment substituting another place for that alleged is improper, under a statute which authorizes an amendment to correct a variance where it is not material or does not prejudice the defendant. *State v. Ham*, 72 N. J. L. 4, 69 A. 431.

91. Ia.—See Laws, 22 Gen. Ass., ch. 227. La.—*State v. Dominique*, 30 La. Ann. 323, 1 So. 665; *State v. Christian*, 30 La. Ann. 367. Md.—Pub. Gen. Laws, art. 27, §436. Mich.—Howell's St., §15,003. Miss.—Code, 1906, §1508; *Knight v. State*, 64 Miss. 802, 2 So. 853; *Garvin v. State*, 62 Miss. 297; *Murray v. State*, 51 Miss. 652; *Haywood v. State*, 47 Miss. 1. Mont.—See Rev. Code, 1907, §9174. N. J.—2 Comp. St., 1831, §24. N. Y.—Code Crim. Proc., §292; *People v. Dunn*, 53 Hun 381, 6 N. Y. Supp. 805, 7 N. Y. Crim. 173; *People v. Herman*, 45 Hun 175; *People v. Richards*, 44 Hun 278, 5 N. Y. Crim. 375. Pa.—*Rosenberger v. Com.*, 118 Pa. 77, 11 Atl. 782. Vt.—*State v. Casavant*, 64 Vt. 405, 23 Atl. 636. Wis.—St., 1898, §4703, any person or the ownership of any property described.

[a] Substitution of another person as owner allowable, the identity of the thing stolen not being affected, since the identity of the offense is not thereby changed. *State v. Ware*, 44 La. Ann. 254, 11 So. 579; *State v. Hanks*, 39 La. Ann. 234, 1 So. 458.

[b] The corporate title of the bank may be amended. *People v. Dunn*, 53 Hun 381, 6 N. Y. Supp. 805, 7 N. Y. Crim. 173.

92. Ia.—See Laws, 22 Gen. Ass., ch. 227. La.—*State v. Peterson*, 41 La. Ann. 81, 6 So. 527. Md.—Pub. Gen. Laws, art. 27, §436. Mich.—Howell's St., §15,003. Miss.—Code, 1906, §1508; *Milks v. State*, 68 Miss. 221, 4 So. 274; *Wood v. State*, 64 Miss. 701, 2 So. 347; *Miller v. State*, 60 Miss. 403. Mont.—Rev. Codes, 1907, §9174. N. J.—2

Comp. St., 1891, §24; *State v. Tallia*, 14 N. J. L. 316, 97 Atl. 970. N. Y.—Code Crim. Proc., §292; *People v. Johnson*, 104 N. Y. 310, 16 N. E. 990. Wis.—See St., 1898, §4703.

[a] Amendment inserting the official number of a convict in place of his true name where witnesses identified him only by number. *Thurmond v. State*, 94 Miss. 1, 47 So. 423.

93. Ia.—Laws, 22 Gen. Ass., ch. 227. Md.—Pub. Gen. Laws, art. 27, §436 (allowing witnesses of person other than defendant to be corrected); *Watts v. State*, 66 Md. 39, 37 Atl. 342; *Hammond v. State*, 34 Md. 125. Mich.—Howell's St., §15,003. Miss.—Code, 1906, §1508; *Smith v. State*, 103 Miss. 356, 60 So. 330 (defendant); *De v. State*, 81 Miss. 100, 31 So. 998, defendant. Mont.—Rev. Code, 1907, §9174, not person. N. J.—2 Comp. St., 1891, §24. N. Y.—Code Crim. Proc., §292. Pa.—*Rough v. Com.*, 78 Pa. 495, killing in name of person to whom liquor was sold. Wis.—St., 1898, §4703; *State v. Lincoln*, 37 Wis. 527.

94. Ia.—Laws, 22 Gen. Ass., ch. 227; *State v. Kiefer*, 151 N. W. 440. La.—*State v. Christian*, 30 La. Ann. 367. Mich.—Howell's St., §15,003. Miss.—Code, 1906, §1508. N. J.—2 Comp. St., 1831, §24. Wis.—St., 1898, §4703.

[a] A variance in the ownership of the property and not merely in the name of the person named as owner is contemplated by the statute in Louisiana. *State v. Ware*, 44 La. Ann. 254, 11 So. 579; *State v. Hanks*, 39 La. Ann. 234, 1 So. 458; *State v. Dominique*, 30 La. Ann. 323, 1 So. 665. See also *State v. Sweeney*, 145 La. 500, 65 So. 145.

95. Ia.—*State v. Mullen*, 151 Iowa 397, 131 N. W. 679. Ann. Cas. 1913A, 299. La.—Rev. Laws §1014; *State v. Jacobs*, 50 La. Ann. 447, 23 So. 908; *State v. Carter*, 9 So. 128; *State v. Sullivan*, 34 La. Ann. 843. Miss.—Code, 1906, §1508.

96. Ia.—Laws, 22 Gen. Ass., ch. 227. La.—*State v. Jacobs*, 50 La. Ann. 447, 23 So. 908; *State v. Carter* (La. Ann.),

writing or record,⁹⁷ or in respect to time⁹⁸ or to any case where the variance between the facts alleged and those proved are not material to the merits of the case,⁹⁹ it shall be lawful to amend according to the proof, in the manner and subject to the limitations therein specified. Generally, however, it is not the purpose of such statutes to authorize amendments changing the substantial elements and the nature of the crime and thus in effect to substitute a new indictment in place of that presented by the grand jury.¹

An amendment changing the identity of the offense as by substituting another thing for that alleged to have been stolen,² or in amending as to time so that a different offense would thereby be charged³ is not permissible.

9. Effect of Amendment.—An amendment has operation as from the inception of the prosecution.⁴ An unauthorized amendment vitiates the indictment,⁵ but the insertion of an immaterial matter without

9 So. 128; *State v. Sullivan*, 35 La. Ann. 844. Mich.—Howell's St., §15,093.

Miss.—Code, 1906, §1508; *Freeman v. State*, 67 So. 469, description of deposit. Mont.—Rev. Code, 1907, §9174. N. Y.—Code Crim. Proc., §293; *People v. Geyer*, 196 N. Y. 364, 90 N. E. 48. Wis.—St., 1898, §4703; *Meehan v. State*, 119 Wis. 621, 97 N. W. 173.

[a] **Substitution of another thing** for that averred is not allowable; thus is it improper in a charge of larceny of coin, to amend so as to charge larceny of currency. *People v. Geyer*, 196 N. Y. 364, 90 N. E. 48; *People v. Poucher*, 30 Hun (N. Y.) 576.

[b] Where under a charge of larceny of several articles the testimony of the witness tended to show that the correct name was other than that alleged, the court cannot strike out that item on that account. *Schenk v. State* (Tex. Crim.), 174 S. W. 357.

97. Mich.—Howell's St., §15,093. Miss.—Mackguire v. State, 91 Miss. 151, 44 So. 802. Wis.—St., 1898, §4703.

98. Miss.—Sancier v. State, 95 Miss. 226, 48 So. 840. Mont.—Rev. Code, 1907, §9174. N. Y.—Code Crim. Proc., §293; *People v. Arnstein*, 157 App. Div. 766, 143 N. Y. Supp. 842; *People v. Lewis*, 132 App. Div. 236, 116 N. Y. Supp. 823; *People v. Jones*, 129 App. Div. 775, 113 N. Y. Supp. 1697; *People v. Willis*, 23 Misc. 609, 62 N. Y. Supp. 808, 5 N. Y. App. Cas. 181, 13 N. Y. Crim. 256. Pa.—*Con. v. Tamm*, 246 Pa. 543, 92 Atl. 716. Tex.—*Bark v. State*, 57 Tex. Crim. 625, 124 S. W. 658. Wis.—*Schultz v. State*, 135 Wis. 611,

114 N. W. 505, 116 N. W. 259, 271.

[a] **A charge of burglary during the daytime** cannot be amended to burglary at night, for these are different offenses. *State v. Sowell*, 85 S. C. 278, 67 S. E. 316.

[b] **Although the offense was outlawed**, where the defendants by failing to object had waived their right to raise this objection, an amendment of the date alleged to conform to the proofs was authorized. *State v. Unsworth*, 84 N. J. L. 22, 86 Atl. 64.

99. Mich.—Howell's St., §15,093. Miss.—Mackguire v. State, 91 Miss. 151, 44 So. 802. N. Y.—*People v. Clegg*, 57 Hun 591, 10 N. Y. Supp. 675, correction of the allegation of the published libel which omitted some words. Vt.—*State v. Donovan*, 75 Vt. 308, 55 Atl. 611. Wis.—St., 1898, §4703.

1. *People v. Geyer*, 196 N. Y. 364, 90 N. E. 48.

2. *People v. Geyer*, 196 N. Y. 364, 90 N. E. 48; *People v. Poucher*, 30 Hun (N. Y.) 576.

3. **Amending a Charge of Burglary During the Day to Burglary at Night.** *State v. Sowell*, 85 S. C. 278, 67 S. E. 316.

4. *United States v. Munday*, 211 Fed. 556.

5. *United States v. Munday*, 211 Fed. 556; *Calvin v. State*, 25 Tex. 789.

[a] **The unauthorized erasure of the name of one defendant as to whom the prosecution had been dismissed after plea, does not prejudice the rights of the others or render the indictment de-**

proper authority will not necessarily have this effect for the matter so inserted will be considered as surplusage and ignored.⁹

The defendant may be held to waive all objections as to the form of the indictment and therefore as to amendments improperly made therein, unless such objections are raised before trial.¹

B. OF INFORMATION.—1. In the Absence of Statute.—Informations are amendable at common law" in the discretion of the court," without the restrictions imposed upon amendment of indictments.¹⁰ The mere fact that the use of informations was extended to include offenses not informable at common law does not abridge the power of amendment.¹¹ Informations may, with leave, be amended by the prosecuting attorney in the same manner as declarations in civil cases.¹² Thus is it proper to amend both formal or substantial defects

fective as to them. *People v. Carroll*, 92 Cal. 565, 28 Pac. 600.

6. Murphy v. State (Tex. Crim.), 164 S. W. 1.

7. Hill v. State, 41 Ga. 484; *Howell's Mich. St.*, 1913, \$15,091; *People v. Hoffman*, 142 Mich. 531, 105 N. W. 838. And see *infra*, XV.

8. Conn.—*State v. Rowley*, 12 Conn. 101; *Merriam v. Langdon*, 10 Conn. 469, 470. **Ill.**—*Bergstrasser v. People*, 134 Ill. App. 609; *Giroux v. People*, 132 Ill. App. 562. **Ia.**—*State v. Abrams*, 131 Iowa 479, 108 N. W. 1041; *State v. Reilly*, 108 Iowa 735, 78 N. W. 680; *State v. Butcher*, 79 Iowa 110, 44 N. W. 239; *State v. Merchant*, 38 Iowa 375. **Mo.**—*State v. Psycher*, 179 Mo. 140, 77 S. W. 836; *State v. Vinso*, 171 Mo. 576, 71 S. W. 1634; *State v. Jump*, 176 Mo. App. 294, 162 S. W. 633. **N. H.**—*State v. Weare*, 38 N. H. 314. **Wis.**—*Secor v. State*, 118 Wis. 621, 95 N. W. 949. **Eng.**—*Rex v. Wilkes*, 4 Burr. 2527, 98 Eng. Reprint 327.

[a] Amendment not changing the meaning of the information is immaterial. *State v. McKee*, 17 Utah 370, 53 Pac. 733.

[b] An unverified information can be amended on motion to quash. *State v. Moore*, 79 Kan. 688, 100 Pac. 629.

[c] Where the charge does not amount to a misdemeanor an amendment is not allowed. *Com. v. Williamson*, 4 Gratt. (Va.) 554.

[d] A charge may not amount to a misdemeanor when the information is so indefinite as not to indicate the offense intended; but when this appears *State v. Doe*, 50 Iowa 541, is authority

to the contrary, for the right to make a charge more definite cannot be doubted. *State v. Abrams*, 131 Iowa 479, 108 N. W. 1041.

9. Conn.—*Merriam v. Langdon*, 10 Conn. 469, 470. **Ill.**—*People v. Manns*, 146 Ill. App. 571; *People v. Whittington*, 143 Ill. App. 437; *Bergstrasser v. People*, 134 Ill. App. 609; *Giroux v. People*, 132 Ill. App. 562. **Ind.**—*Miles v. State*, 5 Ind. 216; *State v. Thompson*, 4 Ind. 623.

10. Secor v. State, 118 Wis. 621, 95 N. W. 942.

[a] Reason for Difference in Rules as to Indictments and Informations.

(1) "Indictments are found upon the oaths of a jury, and ought to be amended only by themselves; but informations are as declarations in the King's suit. An officer of the Crown has the right of framing them originally, and may, with leave, amend in like manner as any plaintiff may do." *Rex v. Wilkes*, 4 Burr. 2527, 98 Eng. Reprint 327, quoted in *State v. White*, 64 Vt. 372, 24 Atl. 250. See *State v. Vinso*, 171 Mo. 576, 71 S. W. 1634; *State v. Weare*, 38 N. H. 314. (2) In addition to this, the prosecuting officer unlike the grand jury is always present in court. *Secor v. State*, 118 Wis. 621, 95 N. W. 949.

11. Secor v. State, 118 Wis. 621, 95 N. W. 942.

12. Lang v. People, 105 Ill. 445, 25 N. E. 831; *Rex v. Wilkes*, 4 Burr. 2507, 98 Eng. Reprint 327.

[b] An information may be amended to any extent which the judge deems consistent with orderly conduct of ju-

in an information.¹² As a general rule, amendments should not be made after the trial has commenced¹³ or after verdict.¹⁵ An amendment after commencement of trial has been permitted where it did not tend to prejudice the defendant on the merits.¹⁶ But amendments of substance cannot be made at the trial,¹⁷ or after rendition of the verdict.¹⁸ Nor can an information be amended in the supreme court.¹⁹

In conformity with the foregoing general rule, an information which

dicial business, with public interest, and with private rights. *Long v. People*, 135 Ill. 435, 25 N. E. 851; *State v. Butcher*, 79 Iowa 110, 44 N. W. 239; *State v. Doe*, 50 Iowa 541.

13. *Ala.*—*Tatum v. State*, 66 Ala. 465 (if a new case is not introduced); *Thomas v. State*, 58 Ala. 365. *Ill.* *Gilbert v. People*, 121 Ill. App. 423, as to form. *Vt.*—*State v. Barrell*, 75 Vt. 202, 54 Atl. 183, 98 Am. St. Rep. 813; *State v. Hubbard*, 71 Vt. 495, 45 Atl. 751; *State v. White*, 64 Vt. 372, 24 Atl. 250. *Wis.*—*Secor v. State*, 118 Wis. 621, 95 N. W. 942.

[a] After plea and before trial at common law substantial amendments could be made on court's order only. *State v. Chance*, 82 Kan. 388, 108 Pac. 789.

[b] There must be a substantially sufficient affidavit on file to authorize an amendment of an information in a matter of substance. *Ind.*—*Sovine v. State*, 85 Ind. 576; *State v. Wise*, 7 Ind. 645. *Neb.*—*State v. Dennison*, 60 Neb. 157, 82 N. W. 383. *Tex.*—*Patillo v. State*, 3 Tex. App. 442.

14. *Conn.*—*State v. Stebbins*, 29 Conn. 463, 79 Am. Dec. 223. *D. C.* *District of Columbia v. Herlihy*, 1 MacArthur 466. *Okla.*—*Lowe v. State*, 7 Okla. Crim. 32, 121 Pac. 793, an information should not be amended after impaneling of the jury. *Tex.*—*Williams v. State*, 34 Tex. Crim. 100, 29 S. W. 472, after state's evidence is in.

15. *Ia.*—*State v. Butcher*, 79 Iowa 110, 44 N. W. 239. *Mo.*—*State v. Guthe*, 188 Mo. 424, 87 S. W. 503, after verdict has been rendered and the record made up with the exception of the final sentence. *Utah.*—*State v. Topham*, 41 Utah 39, 123 Pac. 888, after conviction.

16. *Conn.*—*State v. Stebbins*, 29 Conn. 463, 470, 79 Am. Dec. 223; *State v. Frybaird*, 35 Conn. 319. See *State v. Rowley*, 12 Conn. 101. *Ill.*—*People v. Pecon*, 181 Ill. App. 666. *Mich.*

People v. Hickman, 164 Mich. 672, 130 N. W. 331, amendment not formal merely which included a new offense during argument, error. *Mo.*—*State v. Walton*, 255 Mo. 232, 164 S. W. 211. *Mont.*—*State v. Oliver*, 20 Mont. 318, 50 Pac. 1018. *Okla.*—*Bohannon v. State* (Okla. Crim.), 142 Pac. 1092; *Hogue v. State*, 9 Okla. Crim. 521, 132 Pac. 511; *Pozzini v. State*, 7 Okla. Crim. 692, 126 Pac. 1040; *Rollen v. State*, 7 Okla. Crim. 673, 125 Pac. 1087; *Lowe v. State*, 7 Okla. Crim. 32, 121 Pac. 793; *Davis v. State*, 4 Okla. Crim. 508, 113 Pac. 220; *Lancaster v. State*, 2 Okla. Crim. 681, 103 Pac. 1065. *Wis.*—*Secor v. State*, 118 Wis. 621, 95 N. W. 942, after close of state's case.

[a] Where, however, a verdict of acquittal due to the information failing through variance would not benefit defendant since he might be informed against again. *State v. Stebbins*, 29 Conn. 463, 470, 79 Am. Dec. 223.

[b] An amendment of substance is not permissible after commencement of trial, and an amendment of form is allowable only where not prejudicial to defendant. *Pozzini v. State*, 7 Okla. Crim. 692, 126 Pac. 1040.

[c] Amendment Presumed Not Prejudicial.—Where it is not shown what the amendment was, it may be assumed that if the amendment had been such as to prejudice defendant, counsel would have pointed it out. *Rose v. State*, 3 Okla. Crim. 12, 103 Pac. 1066.

17. *District of Columbia v. Herlihy*, 1 MacArthur (D. C.) 466; *Byrnes v. People*, 37 Mich. 515, after proofs are in.

18. *State v. Butcher*, 79 Iowa 110, 44 N. W. 239.

19. *Dyer v. State*, 85 Ind. 525; *State v. Coleman*, 186 Mo. 154, 84 S. W. 978, 69 L. R. A. 381. But see *State v. Reilly*, 108 Iowa 735, 78 N. W. 680, information may be amended on appeal in the district court.

is fatally defective may be amended so as to render it sufficient.²⁷ New counts may be added²⁸ where such counts relate to the same transaction and were framed to meet different phases of proof but do not charge any different offense,²⁹ but new charges cannot be made by amendment.³⁰

An information may not be amended so as to charge an offense not shown by the evidence taken at the preliminary examination.³¹ Nor can an information be amended after verdict to change the offense to that found by the jury if such amendment changes the nature of the offense charged.³² After new trial ordered, however, the information may be amended, apparently either as to matter of form or substance to conform to proof made at first trial.³³ But where an information charges two offenses and defendant has entered a single plea it cannot be amended so as to charge one offense only without a fresh arraignment and plea of defendant.³⁴

Where the statute of limitations has run so as to preclude the lodging of a new information against defendant the information may still be amended,³⁵ unless there has been unreasonable delay in the prosecution,³⁶ or the effect of the amendment would be to introduce a new cause of action itself barred by the statute.³⁷

2. Under Statute.—Statutes, said to be declaratory of the common law,³⁸ authorize an amendment of the information as to matters

20. Ala.—*Thomas v. State*, 38 Ala. 365. Conn.—*State v. Pritchard*, 32 Conn. 319, 326. Ill.—*People v. Jackson*, 178 Ill. App. 355; *People v. Zlotnicka*, 112 Ill. App. 363. Mo.—*State v. Broeder*, 90 Mo. App. 156. Okla.—*Sandlin v. State*, 3 Okla. Crim. 578, 197 Pac. 946. Wis.—*State v. Jenkins*, 90 Wis. 599, 19 N. W. 456.

But see *People v. Vogt*, 156 Mich. 594, 121 N. W. 293; *People v. Bennett*, 122 Mich. 281, 81 N. W. 117.

[a] Not After Evidence Is in.—*Hickford v. People*, 32 Mich. 209; *Byrnes v. People*, 37 Mich. 515.

21. Conn.—*State v. Rowley*, 12 Conn. 101. Mo.—*State v. Simpson*, 126 Mo. App. 169, 108 S. W. 592. Vt.—*State v. Hubbard*, 71 Vt. 465, 45 Atl. 701.

22. *State v. Simpson*, 126 Mo. App. 169, 108 S. W. 592.

23. *Com. v. Rhodes*, 1 Dana (Ky.) 595. See also *Tatum v. State*, 66 Ala. 465.

24. Cal.—*People v. Anthony*, 20 Cal. App. 586, 129 Pac. 968. Mich.—*Hickford v. People*, 39 Mich. 779; *Byrnes v. People*, 37 Mich. 515. Mo.—*State v. Walton*, 235 Mo. 332, 164 S. W. 211. Neb.—*Rabee v. State*, 73 Neb. 709, 108 N. W. 428.

25. Ia.—*State v. Abrams*, 131 Iowa 479, 108 N. W. 1041. Ky.—*Com. v. Rhodes*, 1 Dana 595. Mich.—*Turner v. Muskegon Cir. Judge*, 88 Mich. 359, 50 N. W. 310. Mo.—*State v. Jenkins*, 90 Mo. App. 439.

26. *People v. Dillard*, 1 Mich. N. P. 112.

27. *People v. Clement*, 4 Cal. Unrep. 403, 32 Pac. 1022.

28. *Merriam v. Langdon*, 10 Conn. 469 (citing early English authorities); *Drake v. Watson*, 4 Day (Conn.) 87; *Davis v. Saunders*, 7 Mass. 62.

29. *Merriam v. Langdon*, 10 Conn. 469, 479, citing early English authorities.

[a] Statute requiring persons indicted or imprisoned to be tried within a certain period do not operate to bar the filing of an amended information.—*State v. Pender*, 179 Mo. 140, 77 S. W. 836.

30. *State v. Rowley*, 12 Conn. 101; *Merriam v. Langdon*, 10 Conn. 469, 479, citing early English authorities.

31. *State v. Silbaugh*, 280 Mo. 308, 157 S. W. 332. See also *State v. Chumbe*, 82 Kan. 288, 108 Pac. 789, which holds the statute is not less liberal than the common rule and that amendments of

of form or substance at any time before plea³² or trial³³ without leave of court,³⁴ but thereafter only as to matters of form, in the court's discretion.³⁵ Where leave of court is required, the court may impose

substance could after plea be made if made on order of court.

32. Cal.—See *People v. Anthony*, 20 Cal. App. 586, 129 Pac. 978. Mont. *State v. Duncan*, 40 Mont. 531, 107 Pac. 519. Utah.—*State v. Toopham*, 41 Utah 29, 123 Pac. 888; *State v. Canland*, 104 Pac. 285.

[a] Where the statute provides for the amendment of the affidavit the information based thereon may be likewise amended. *Kennegar v. State*, 120 Ind. 176, 21 N. E. 917.

[b] Presumption as to Time.—In the absence of any showing to the contrary it will be presumed that the amendment was made before plea as it could then be properly made. *Malone v. State*, 179 Ind. 181, 100 N. E. 567.

33. D. C.—*District of Columbia v. Herlihy*, 1 MacArthur 466. Kan.—Comp. St. (1901, §2343), §5647; *State v. Moore*, 79 Kan. 688, 100 Pac. 629; *State v. Eaddy*, 71 Kan. 779, 81 Pac. 459; *State v. Johnson*, 70 Kan. 861, 79 Pac. 732; *State v. McDonald*, 57 Kan. 537, 46 Pac. 906; *State v. Svedendoye*, 47 Kan. 160, 28 Pac. 994; *State v. McLain*, 43 Kan. 409, 13 Pac. 651. See *State v. Coggin*, 10 Kan. App. 453, 62 Pac. 247. Mo.—*State v. Walton*, 255 Mo. 232, 164 S. W. 211; *State v. Coleman*, 186 Mo. 101, 84 S. W. 978, 69 L. R. A. 384; *State v. Vinso*, 171 Mo. 576, 71 S. W. 1034; *State v. Jenkins*, 92 Mo. App. 439; *State v. Emberton*, 45 Mo. App. 59. N. H.—*State v. Weene*, 38 N. H. 314. Okla.—*Chapplear v. State*, 10 Okla. Crim. 395, 126 Pac. 978; *Cox v. State*, 2 Okla. Crim. 278, 131 Pac. 1109; *Prasini v. State*, 7 Okla. Crim. 692, 126 Pac. 1049; *McLaughlin v. State*, 2 Okla. Crim. 343, 102 Pac. 713. S. C.—*State v. Nash*, 91 S. C. 619, 28 S. E. 946. Eng.—*King v. Garcia*, 1 Bull. 47, 91 Eng. Rep. 47.

[a] Statutes which provide for amendments at any time before submission of the case to the jury and providing that an amendment shall cause a delay of the trial, authorizes amendments which do not change the nature of the charge or the defense which

might be interposed. *State v. Walton*, 255 Mo. 232, 164 S. W. 211.

[b] Restriction of Right to Defects Cured by Statute of Jeofails.—Where the right is given to amend as to both form and substance, the right cannot be restricted to such defects as would be cured by the statute of jeofails, after verdict, but exists even if the information failed to state any offense, if it can be clearly gathered from what is stated that the prosecuting attorney intended to charge a particular offense. *State v. Broeder*, 90 Mo. App. 156.

[c] If the amendment in no manner prejudices the defendant, an amendment after plea is allowable. *Rose v. State*, 3 Okla. Crim. 12, 103 Pac. 1066.

[d] Either before or after the information has been quashed an amendment is allowable. *Daxanbeklar v. People*, 93 Ill. App. 553.

[e] After Overruling Motion To Quash.—*Giroux v. People*, 132 Ill. App. 562.

[f] A new information curing defects of substance cannot be filed after plea because the filing of a new information is in effect an amendment of the first information. *State v. Canland* (Utah), 104 Pac. 285.

34. La.—*State v. Terrebonne*, 45 La. App. 25, 12 So. 315. Mo.—Rev. St., 1899, §2481; *State v. Vinso*, 171 Mo. 576, 71 S. W. 1034. Utah.—Comp. Laws, §4694.

[a] If amendment is made after plea and before trial leave of court must be obtained. Kan.—Crim. Code, §72; *State v. Chance*, 82 Kan. 388, 108 Pac. 759; *State v. Svedendoye*, 47 Kan. 160, 28 Pac. 994. Mont.—Rev. Codes, §9108. Okla.—*Storder's Comp. Laws*, §6645; *Leave v. State*, 7 Okla. Crim. 32, 121 Pac. 790; *McLaughlin v. State*, 2 Okla. Crim. 343, 102 Pac. 713.

[b] An amendment, made without leave of court, was held nonprejudicial to the substantial rights of the defendant in *McLaughlin v. State*, 17 Wyo. 106, 90 Pac. 325.

35. See cases and statutes in preceding notes, and the following cases:

such terms as may seem just.³⁸ Some statutes make applicable to informations the statutes providing for the amendment of indictments.³⁹ Under others amendments may only be made as to formal matters.⁴⁰

A statute providing that certain defects shall not invalidate an information is in effect a statute of amendment though not providing directly therefor,⁴¹ and in such cases an amendment may be permitted by the court even though it is not necessary.⁴²

Notice to defendant of the application for amendment is sometimes required.⁴³

III.—*People v. Pergen*, 181 Ill. App. 666.
Ind.—*State v. Wisc.*, 7 Ind. 645. Kan.—*State v. Spencer*, 43 Kan. 111, 22 Pac. 109. La.—*State v. Cayanauph*, 22 La. Ann. 1251, 27 So. 704. Mich.—*People v. Root*, 117 Mich. 578, 76 N. W. 91; *Turner v. Mushogon Circuit Judge*, 88 Mich. 329, 50 N. W. 319. Mo.—*State v. Sullivan*, 250 Mo. 308, 157 S. W. 332; *State v. Strandberg*, 209 Mo. 304, 108 S. W. 17. Mont.—*Rev. Code*, 1907, §9174. Okla.—*Bahamian v. State* (Okla. Crim.), 142 Pac. 1092; *Flowers v. State*, 10 Okla. Crim. 494, 128 Pac. 1041; *Chappelow v. State*, 16 Okla. Crim. 392, 130 Pac. 978 (after commencement of trial); *Hogge v. State*, 2 Okla. Crim. 521, 139 Pac. 511; *Gay v. State*, 9 Okla. Crim. 378, 131 Pac. 1100; *Pardini v. State*, 7 Okla. Crim. 692, 133 Pac. 1040; *McLaughlin v. State*, 2 Okla. Crim. 343, 137 Pac. 712. Utah.—*State v. Potello*, 42 Utah 290, 132 Pac. 14.

[a] What Is Leave of Court.—The court having allowed the motion to amend the information and overruled the motion to quash the amended information was thereby held to have of court. *State v. Spendlove*, 47 Kan. 160, 28 Pac. 294.

[b] As to what is matter of form, see *People v. Dickman*, 104 Mich. 672, 130 N. W. 331; *People v. Fox*, 142 Mich. 528, 105 N. W. 1111.

[c] Curing Illegal Amendment by New Arraignment.—The illegality of an amendment as to matter of substance made after defendant has pleaded is not cured by defendant being required to plead afresh to the amended information. *State v. Bandy*, 71 Kan. 772, 81 Pac. 432.

36. *State v. Knull*, 5 Mo. App. 282 (terms as to delay); *Mont. Rev. Code*, 1907, §9174.

37. Mich.—*Howell's St.*, 1915, §15-167. Mont.—*Rev. Codes*, 1907, §9174.

N. H.—*Pub. St.*, ch. 253, §12. VI. *State v. White*, 64 Vt. 372, 24 Atl. 250. Wis.—*Rev. St.*, §4708; *Bauer v. State*, 88 Wis. 140, 59 N. W. 370, assuming name of owner of property.

[a] Statute Does Not Curtail Court's Authority as to Amendment.—Although the statute providing the same rules for indictments and informations, provides for amendments "except as to matters of substance," the statutes are to be considered as remedial and as having been passed with a view to obviate defects in the existing law to give courts power to amend where none was supposed to exist before, but not to curtail their powers. Such statute therefore does not deprive the court of power to amend an information in a matter of substance. *State v. White*, 64 Vt. 372, 24 Atl. 250.

38. *Hamilton v. State* (Tex. Crim.), 145 S. W. 348; *Portenberry v. State* (Tex. Crim.), 72 S. W. 595; *Brown v. State*, 11 Tex. App. 451; *State v. Van Cleve*, 5 Wash. 642, 32 Pac. 401. See *People v. Anthony*, 20 Cal. App. 585, 129 Pac. 968.

[a] Even if the defect be of a matter of substance it can be cured by the filing of a new information. *Portenberry v. State* (Tex. Crim.), 72 S. W. 595.

39. See *Howell's Mich. St.*, 1913, §15-169; *Mo. Ann. St.*, 1906, §32578, 2335.

40. *People v. Hoffman*, 142 Mich. 591, 105 N. W. 828.

41. *Curroll v. State*, 55 Tex. Crim. 78, 118 S. W. 1631.

[a] Where the information was fatally defective, due notice of the application for amendment should be given the defendant with opportunity on his part to resist the application. *State v. Bragg*, 63 Mo. App. 7.

3. **Amendment of Information by Consent.**—The court may permit the withdrawal of part of the charge contained in an information with the consent of the defendant.⁴²

4. **By Whom Made.**—Under the conditions and circumstances heretofore discussed,⁴³ an information may be amended by the prosecuting or district attorney,⁴⁴ or his successor,⁴⁵ or in his absence, by the assistant prosecuting attorney.⁴⁶ Or it may be amended by the court, or judge,⁴⁷ on his own motion.⁴⁸

5. **Number of Amendments Allowable.**—The number of amendments that may be made is left to the discretion of the court.⁴⁹

6. **How Made.**—An information may be amended by substituting a new instrument,⁵⁰ or the prosecuting attorney may ask leave of court to amend the information already filed by interlineation or erasure.⁵¹

42. *People v. Ah Lee Doon*, 97 Cal. 171, 31 Pac. 933.

43. See discussion immediately preceding.

44. **Cal.**—*Ex parte Nicholas*, 91 Cal. 649, 28 Pac. 47. **Conn.**—*State v. Rowley*, 12 Conn. 191. **Ill.**—*Long v. People*, 135 Ill. 435, 25 N. E. 851; *Truitt v. People*, 83 Ill. 518; *People v. Jackson*, 178 Ill. App. 355; *People v. Zlotinke*, 152 Ill. App. 363; *People v. Nelson*, 159 Ill. App. 595; *People v. Manns*, 146 Ill. App. 571; *People v. Nylin*, 139 Ill. App. 500; *Bergstesser v. People*, 134 Ill. App. 699; *Giroux v. People*, 132 Ill. App. 562; *Carter v. People*, 122 Ill. App. 77, 79; *Gilbert v. People*, 121 Ill. App. 423; *Daxanbell v. People*, 93 Ill. App. 553. **Ind.**—*Miles v. State*, 5 Ind. 215. **Ia.**—*State v. Abrams*, 131 Iowa 479, 108 N. W. 1041; *State v. Brown*, 128 Iowa 24, 102 N. W. 799; *State v. Potts*, 117 Iowa 463, 91 N. W. 795; *State v. Reilly*, 108 Iowa 735, 78 N. W. 689; *State v. Doe*, 59 Iowa 541; *State v. Merchant*, 38 Iowa 375. **Kan.**—*State v. Moore*, 79 Kan. 688, 100 Pac. 629; *State v. Conover*, 69 Kan. 352, 70 Pac. 845; *State v. McDonald*, 57 Kan. 747, 46 Pac. 969; *State v. Oliver*, 55 Kan. 711, 41 Pac. 954; *State v. Pryor*, 53 Kan. 957, 37 Pac. 169; *State v. Spencer*, 43 Kan. 114, 33 Pac. 159; *State v. Gould*, 40 Kan. 258, 19 Pac. 739 (amendment of verification); *State v. Cooper*, 31 Kan. 305, 3 Pac. 429 (amendment of date when offense alleged to have been committed); *State v. Sterns*, 28 Kan. 154, Mich. *People v. Brown*, 116 Mich. 109, 67 N. W. 1112; *People v. Sullivan*, 83 Mich. 355, 47 N. W. 229;

People v. Perriman, 72 Mich. 184, 40 N. W. 425; *People v. Hildebrand*, 71 Mich. 313, 38 N. W. 919 (amending name of party); *People v. Waller*, 70 Mich. 237, 38 N. W. 261 (amending place where offense alleged to have been committed); *People v. Mott*, 34 Mich. 80, amending description of promissory note. **Mo.**—*State v. Kelly*, 188 Mo. 450, 87 S. W. 451.

45. *State v. Barrell*, 75 Vt. 202, 54 Atl. 183, 98 Am. St. Rep. 813; *State v. Meacham*, 67 Vt. 707, 32 Atl. 494.

46. *People v. Henssler*, 48 Mich. 49, 11 N. W. 804.

47. *State v. Weare*, 38 N. H. 314.

48. *State v. Jenkins*, 60 Wis. 599, 19 N. W. 406.

49. *State v. Psycher*, 179 Mo. 140, 77 S. W. 836.

[a] There is no limit to the number of amendments that may be made. *State v. Powell*, 66 Mo. App. 598.

50. **Ia.**—*State v. Reilly*, 108 Iowa 735, 78 N. W. 680. **Mo.**—*State v. Sillbaugh*, 250 Mo. 308, 157 S. W. 352; *State v. Vinso*, 171 Mo. 576, 71 S. W. 1034. **Tex.**—*Portenberry v. State* (Tex. Crim.), 72 S. W. 503, even if a matter of substance. *Wis.*—*Secor v. State*, 118 Wis. 621, 95 N. W. 942.

[a] If the information is defective in failing to give the correct name as stated in the affidavit, it should be quashed and a new one prepared. *Patillo v. State*, 3 Tex. App. 442.

51. *State v. Sillbaugh*, 250 Mo. 308, 157 S. W. 352.

7. Particular Matters Amendable.— Amendments of an information which render the offense charged more specific, are proper.⁵² It has been held proper to strike from an information matter constituting surplusage.⁵³ Essential words such as feloniously,⁵⁴ or unlawfully,⁵⁵ may be supplied by amendment. Applying the rules heretofore stated an information may be amended in respect to the name of the defendant,⁵⁶ of the person injured or otherwise involved in the offense,⁵⁷ of the owner of property mentioned,⁵⁸ or the name of complainant,⁵⁹ and in respect of the date⁶⁰ or the place of the commission of the

52. *People v. McCullough*, 81 Mich. 25, 45 N. W. 515.

[a] An information may be amended by stating that the penalty accrued to the town instead of the commonwealth. *Com. v. Smith*, 1 Cranch C. C. (U. S.) 22.

[b] An information for uttering obscene language may be amended by the interlineation of the words to the effect that the words were uttered in the presence of a female. *Sandlin v. State*, 3 Okla. Crim. 578, 107 Pac. 946.

53. *State v. Duncan*, 40 Mont. 531, 107 Pac. 510; *State v. Kendall*, 38 Neb. 817, 57 N. W. 525.

54. *State v. Sillbaugh*, 250 Mo. 308, 157 S. W. 352.

55. *State v. Engborg*, 63 Kan. 853, 66 Pac. 1007.

56. Ill.—*Gilbert v. People*, 121 Ill. App. 423. Ind.—*Keiser v. State*, 78 Ind. 430. Kan.—*State v. Coover*, 69 Kan. 382, 76 Pac. 845; *State v. Pipes*, 65 Kan. 543, 70 Pac. 363; *State v. McDonald*, 57 Kan. 537, 46 Pac. 906; *State v. McLain*, 43 Kan. 439, 23 Pac. 651. Mo.—*State v. Krull*, 5 Mo. App. 589, where name of accused appeared in information but a blank for his name in one sentence was not filled out, the omission could be supplied. S. C.—*State v. Washington*, 15 Mich. L. 39. Tex.—*Hatcher v. State* (Tex. Crim.), 170 S. W. 726; *Kilgoyne v. State* (Tex. Crim.), 92 S. W. 26; *Wilson v. State*, 6 Tex. App. 154; *Patillo v. State*, 3 Tex. App. 442. Vt.—*State v. Murphy*, 65 Vt. 547.

[a] Where the names of the defendant and the person injured were transposed in the allegation as to the infliction of wounds so that it was alleged that L., the injured, wounded S., the defendant, the information being for assault with intent to murder the allegation regarding the wounding may be treated as surplusage and the amend-

ment is immaterial. *State v. Severn*, 225 Mo. 580, 125 S. W. 769.

[b] Inserting name of defendant where omitted from the body of the information but is stated in the caption. *State v. Coover*, 69 Kan. 382, 76 Pac. 845.

[c] Such amendment permissible only on defendant's suggestion that the name charged is not his true name. *Patillo v. State*, 3 Tex. App. 442.

[d] To What Crimes Statute Applies. Statute authorizing amendments as to the name of defendant applies to both felonies and misdemeanors. *Wilson v. State*, 6 Tex. App. 154.

57. *State v. Moore*, 2 Penne. (Del.) 299, 46 Atl. 669 (persons influenced to register); *State v. Moore*, 79 Kan. 688, 100 Pac. 629.

58. Conn.—*State v. Stebbins*, 29 Conn. 463, 79 Am. Dec. 223. Kan.—*State v. McDonald*, 57 Kan. 537, 46 Pac. 906. Mich.—*People v. Courtney*, 178 Mich. 137, 144 N. W. 568.

[a] Name of owner of property stolen held a matter of substance and non-amendable. *State v. Van Cleve*, 5 Wash. 642, 32 Pac. 461.

59. *Murphy v. State* (Tex. Crim.), 164 S. W. 1.

60. U. S.—*United States v. Shook*, 1 Cranch C. C. 56, 27 Fed. Cas. No. 16, 285; *United States v. Evans*, 1 Cranch C. C. 55, 25 Fed. Cas. No. 16,063. Ala.—*Tatum v. State*, 66 Ala. 465. Ill.—*People v. Whittington*, 143 Ill. App. 418. Kan.—*State v. Oliver*, 55 Kan. 711, 41 Pac. 954; *State v. Coover*, 69 Kan. 382, 76 Pac. 845. La.—*State v. Behler*, 124 La. 499, 50 So. 483. Mich.—*People v. Hoffman*, 142 Mich. 531, 105 N. W. 828; *People v. Hamilton*, 76 Mich. 212, 42 N. W. 1181. Neb.—*McKay v. State*, 90 Neb. 63, 132 N. W. 741, Ann. Cas. 1913B, 1034, 91

offense,⁶¹ or in respect to the property involved in the charge.⁶²

In Case of Variance.—In some jurisdictions the operation of the statutes permitting the amendment of the indictment to conform to the proof in the particulars therein specified have been extended to include informations. Thus it is proper to amend the information when a variance between the allegation therein and the proof, in respect to time,⁶³ or in name or description of any place,⁶⁴ person,⁶⁵ thing,⁶⁶

Neb. 281, 125 N. W. 1024. Okla. *Flowers v. State*, 10 Okla. Crim. 434, 138 Pac. 1041. Vt.—*State v. Hubbard*, 71 Vt. 405, 45 Atl. 751.

[a] **A charge of the commission of the offense (1) subsequent to the information may be amended** (*People v. Huff*, 122 Cal. 589, 55 Pac. 407; *People v. Moody*, 69 Cal. 184, 10 Pac. 392), (2) where the charge is in the past tense. *State v. Cooper*, 31 Kan. 505, 3 Pac. 429. (3) Where the information was reverified and refiled, an amendment of an information which charged the offense subsequent to its filing so as to charge it prior thereto is immaterial. *State v. Oliver*, 55 Kan. 711, 41 Pac. 954.

[b] **The date prohibition was put in force in an information charging unlawful sale of intoxicating liquors is a matter of form which may be amended.** *Parker v. State* (Tex. Crim.), 150 S. W. 1184. See also *Jackson v. State*, 71 Tex. Crim. 297, 137 S. W. 1196, indictment.

[c] **Contra, in Texas.**—(1) *Mealer v. State* (Tex. Crim.), 145 S. W. 353 (date is a matter of substance, and in Texas therefore non-amendable); *Huff v. State*, 23 Tex. App. 291, 4 S. W. 890. (2) The proper procedure to correct the date in such case is to quash the information and discharge the jury. He may then file another information upon the original complaint. *Broughton v. State*, 71 Tex. Crim. 617, 100 S. W. 792.

[d] **Accused should not be required to proceed to trial without a continuance, after an amendment as to the date of the commission of the offense.** *McKay v. State*, 98 Neb. 63, 102 S. W. 741, Ann. Cas. 19100, 1034, 31 Neb. 281, 135 S. W. 1024.

61. U. S.—*United States v. Rhoads*, 1 Granch. C. C. 50, 47 Fed. Cas. No. 16735. Cal.—*People v. Perry*, 25 Cal.

App. 337, 143 Pac. 798, changing the number of the supervisorial district in which the township was alleged to be situated. Mich.—*People v. Waller*, 70 Mich. 237, 38 N. W. 261, to another township in the same county.

[a] **An information, charging an offense in a particular locality as in a city, town, or township, may be amended to charge the offense anywhere within the jurisdiction of the court.** *State v. Abrams*, 131 Iowa 479, 108 N. W. 1041.

[b] **A portion of the description of the place may be stricken out where the description is left complete.** Thus in *State v. Sterns*, 28 Kan. 154, a charge of selling intoxicating liquors in a certain building "known as the Belmont House (situated on fractional lots 14, 15, and 16, in block 24) in the city of Parsons," was amended by striking out the phrase in parenthesis.

62. Kan.—*State v. Johnson*, 70 Kan. 861, 79 Pac. 732, adding another weapon used in assault. La.—*State v. Snow*, 36 La. Ann. 401; *State v. Johnson*, 29 La. Ann. 717. Mich.—*People v. Bennett*, 122 Mich. 281, 81 N. W. 117, an information for uttering a forged note which sets out the signature in English, when in fact the note was signed in German, of which the translation given is incorrect, may be amended to cure the defect.

63. *People v. Hamilton*, 76 Mich. 212, 42 N. W. 1131; Mont. Rev. Codes, 1907, §9174.

64. Mont. Rev. Codes, 1907, §9174; Wis. St., 1898, §4793.

65. Mont. Rev. Codes, 1907, §9174; *State v. Oliver*, 90 Mont. 318, 50 Pac. 1018; Wis. St., 1898, §4793.

66. Mich.—*People v. Brown*, 110 Mich. 108, 67 N. W. 1112. Mont.—Rev. Codes, 1907, §9174. Wis.—St., 1898, §4793; *Steen v. State*, 118 Wis. 621, 95 N. W. 912.

writing,⁶⁷ or record,⁶⁸ or the ownership of any property therein described.⁶⁹

8. Effect.—The amended information supersedes the original.⁷⁰

C. Caption.—The caption to an indictment or information may be amended, under the authority and sanction of the court,⁷¹ as it is

67. *People v. Brown*, 110 Mich. 168, 67 N. W. 1112; *People v. Mott*, 34 Mich. 80; Wis. St., 1898, §4793.

68. Wis. St., 1898, §4793.

69. *State v. Bright*, 105 La. 341, 29 So. 903; Wis. St., 1898, §4793; *Galen-bashi v. State*, 101 Wis. 333, 77 N. W. 189; *Baker v. State*, 88 Wis. 140, 59 N. W. 379.

70. *Ill.*—*People v. Nelson*, 150 Ill. App. 395. *Mo.*—*State v. Hoffman*, 70 Mo. App. 271. *Okla.*—*Harris v. State*, 9 Okla. Crim. 658, 132 Pac. 1121. *Wis.*—*Sacco v. State*, 118 Wis. 621, 95 N. W. 912.

71. **U. S.**—*Gardes v. United States*, 87 Fed. 172, 183, 30 C. C. A. 390; *United States v. Clark*, 125 Fed. 92 (term at which found); *United States v. Thompson*, 6 McLean 36, 28 Fed. Cas. No. 16,499, referring to the language of Lord Mansfield, 1 Saund. 250, which is the basis of most of the authorities permitting amendments to the caption. See *United States v. Howard*, 132 Fed. 325, 343. **Colo.**—*Par-num v. United States*, 1 Colo. 309, amendment allowed to correctly describe the court. **Dak.**—*United States v. Beebe*, 2 Dak. 292, 301, 11 N. W. 505. **Ind.—*State v. Moore*, 1 Ind. 548; *Moody v. State*, 7 Blackf. 424. **La.—*State v. Humphries*, 35 La. Ann. 966. **Mass.**—*Com. v. Smith*, 108 Mass. 480; *Com. v. James*, 1 Pick. 375. **N. H.**—*State v. Jenkins*, 64 N. H. 375, 10 A. L. 629; *State v. Blaisdell*, 49 N. H. 81, in matter of time. **N. J.**—*State v. See*, for Establishing Useful Mfgs., 42 N. J. L. 594; *State v. Norton*, 23 N. J. L. 33, 47; *State v. Jones*, 9 N. J. L. 367, 17 Am. Dec. 481; *State v. Jones*, 9 N. J. L. 2. **N. D.**—*State v. Ralier*, 26 N. D. 231, 144 N. W. 238. **Ohio.**—*Smith v. State*, 4 Ohio Dec. (Reprint) 48.****

Cleve. L. Rep. 62, date of term at which found. **Pa.**—*Brown v. Com.*, 78 Pa. 122. **R. I.**—*State v. Mowry*, 21 R. I. 376, 43 A. L. 871. **S. C.**—*State v. Davis*, 80 S. C. 208, 68 S. E. 529 (date of finding); *State v. Moore*, 23 S. C. 150, 58 Am. Rep. 241; *State v. Williams*,

2 McCord 301; *State v. Wright*, 1 Hise, 169, 2 Am. Dec. 618. **S. D.**—*State v. Hyennan*, 2 S. D. 384, 301, 30 S. W. 675. **Tex.**—*Hightower v. State* (Tex. Crim.), 165 S. W. 185 (term at which found); *Young v. State*, 23 Tex. Crim. 383, 116 S. W. 1165; *Ross v. State*, 45 Tex. Crim. 469, 76 S. W. 427, 77 S. W. 213; *Witherson v. State* (Tex. Crim.), 45 S. W. 805, (date of presentation); *Murphy v. State*, 36 Tex. Crim. 24, 35 S. W. 174; *Grayson v. State*, 35 Tex. Crim. 639, 34 S. W. 961 (date of organization of grand jury); *James v. State*, 44 Tex. 314; *Boschard v. State*, 35 Tex. Supp. 207, 209; *Jackson v. State*, 11 Tex. 291; *Murphy v. State*, 29 Tex. 507, 16 S. W. 417; *Osborne v. State*, 25 Tex. App. 431, 443, 5 S. W. 201; *Banks v. State*, 7 Tex. App. 591 (style of court and term at which found); *Sharp v. State*, 6 Tex. App. 650; *Long v. State*, 1 Tex. App. 490. **Vt.**—*State v. Gilbert*, 13 Vt. 647. **Wis.**—*State v. Emmert*, 23 Wis. 632; *Allen v. State*, 5 Wis. 329, 347; *State v. Gaffney*, 3 Penn. 369. **Eng.**—*King v. Daxley*, 4 East 174, 102 Eng. Reprint 790; *Rex v. Lord Bramble*, Comb. 70, 30 Eng. Reprint 349; *Phillips's Case*, 1 Wm. Saund. 249, 85 Eng. Rep. 232, citing *The King v. Atkinson*, E. T. 24, Geo. 2, K. B., in which all the authorities were cited and considered.

See also *Van Dyke v. Dare*, 1 Bailey (S. C.) 65; *State v. Mochety*, 2 Penn. (Wis.) 513, 2 Chand. 199, 64 Am. Dec. 100 (holding that the allowance of an amendment to the caption of an indictment, in all respects good before the amendments were allowed, was no reason for arresting the judgment); 1 Chitty Crim. Law 335, for discussion of doctrine of amendments of the caption in England.

[a.] "The caption is no part of the indictment proper, but is merely the ministerial act of the clerk or prosecuting officer. It is therefore amendable by reference to the records of the court in which it was found. . . . Indeed, it is not even necessary to amend the

really no essential part of the indictment.⁷² Such amendment may be made at any time.⁷³

D. CONCLUSION. — The conclusion of an indictment, although prescribed by the constitution, is nevertheless merely formal,⁷⁴ and therefore the indictment in that regard is subject to amendment.⁷⁵

caption, as was held in a similar case in Massachusetts, where the court said it was sufficient if reference to the other records of the court showed the time of finding the indictment. *Com. v. Stone*, 3 Gray 453. *State v. Mowry*, 21 R. L. 376, 382, 43 Atl. 871.

[b] The caption might, at common law, be amended according to the truth. *State v. Soc. for Establishing Useful Mfrs.*, 42 N. J. L. 504; *State v. Jones*, 9 N. J. L. 357, 17 Am. Dec. 483.

[c] Where information begins with words proper for an indictment, that "the grand jurors aforesaid under their oath aforesaid," etc., it may be amended, it being a clerical error. *State v. Curtis*, 44 La. Ann. 320, 10 So. 784.

[d] To deny the application to insert the word "county" in the description of the court is an abuse of discretion. *State v. Butler*, 26 N. D. 231, 144 N. W. 238.

72. See *supra*, VIII, A, 3, a; VIII, B, 2.

73. *Brown v. Com.*, 78 Pa. 122 (wherein the caption was amended after trial, conviction and sentence, so as to be entitled, as in the court of quarter sessions); *State v. Williams*, 2 McCord (S. C.) 501 (wherein the court gave leave, after conviction, to state that it was at a special court); *State v. Creight*, 1 Bray. (S. C.) 169, 2 Am. Dec. 650, even after conviction, and after motion in arrest for the defect. See also *Van Dyke v. Dare*, 1 Bailey (S. C.) 65.

[e] Supreme Court.—Some of the cases go so far as to say that the caption to an indictment may be amended in the supreme court, after its removal thereto by certiorari, upon proof of the necessary facts, or the case may be sent back to the lower court, there to be amended from the record. *State v. Jones*, 9 N. J. L. 357, 17 Am. Dec. 483, wherein the court said: "For a time indeed, it was held that no amendment could only be made in the form of the return of the writ, and not at any subsequent term, as will

be seen from 2 Hale P. C. 168, and by the cases of *Rex v. Brandon*, Comb. 70. *Faulkner's Case*, 1 Saund. 249. *Regina v. Hoskins*, 2 Ld. Raym. 968. *Regina v. Franklyn*, *ibid* 1038. *Rex v. Glover*, 1 Sid. 259. But in the time of Lord Mansfield the subject underwent a thorough investigation, and it was found that the caption was not only liable to amendment in the term of its return, but afterwards, and even after verdict."

[b] Application for leave to amend should be made before the opening of the argument upon the exceptions. *State v. Zule*, 10 N. J. L. 348.

74. See *supra*, VIII, A, 6; VIII, B, 6.

75. Ind.—*Cain v. State*, 4 Blackf. 512. Mass.—*Com. v. Hoxey*, 16 Mass. 385. N. J.—*State v. Minford*, 64 N. J. L. 518, 45 Atl. 817, under statutory authority. Vt.—*State v. Amidon*, 58 Vt. 524, 2 Atl. 154.

[a] In *State v. Minford*, 64 N. J. L. 518, 45 Atl. 817, the court, discussing *Cain v. State*, 4 Blackf. (Ind.) 512, said this case "is a close precedent for our present decision. It goes farther indeed than we need to, for the right to amend was rested solely on the consent of the grand jury presumed to have been given on the presentation of the indictment. The constitution of Indiana prescribes that all indictments shall conclude 'against the peace and dignity of the state.' The challenged indictment concluded 'against the peace of the state.' The trial court, against objection, amended, by inserting the omitted words. This action was approved by the Supreme Court in these words: 'The words with which the constitution requires all indictments to conclude are mere words of form. The facts are found by the jury on their oath, but the conclusion is affixed by law. The grand jury have nothing to do with finding that conclusion, nor does the constitution require that it should be found by the grand jury. The amendment made in this case did

Signature. — Where an information was in fact sworn to and the signature omitted through mere inadvertence, the defect is correctible by amendment.⁷⁸ But it has been held that where the indictment is returned without the signature of the foreman, it cannot afterwards be affixed by the foreman, except on recommitment to the jury.⁷⁹

E. VERIFICATION. — If an information is not properly verified, it may be amended in this respect,⁸⁰ at any time before trial.⁸¹ Where an unverified information is not void it may be amended by adding the affidavit.⁸²

F. INDORSEMENT. — An indorsement may be amended.⁸³ The subsequent indorsing of names of witnesses examined by the grand jury is permissible as being a matter of form.⁸⁴

G. COMPLAINT AND AFFIDAVIT. — 1. **Generally.** — A complaint upon which a trial is based is in the nature of an information at common law and amendable as such.⁸⁵ Amendments are sometimes reg-

not hinder, delay or embarrass the defendant nor did it deprive him of any just means of defence. We think the court did right in permitting the amendment, and that the judgment of the Circuit Court should be affirmed."

76. *State v. Merchant*, 38 Iowa 375; *Holcomb v. State*, 60 Tex. Crim. 498, 132 S. W. 362.

[a] Where the signature of the prosecuting attorney is omitted, whether he will be allowed to amend in this respect, *quære*. *Mentor v. People*, 30 Mich. 91.

77. *State v. Squire*, 10 N. H. 558. Compare *Bassham v. State*, 38 Tex. 622, wherein the court permitted the foreman of the grand jury at the term at which an indictment was filed without his signature, to sign the indictment on the trial several terms later.

78. Ill.—*People v. Nylin*, 129 Ill. App. 500, no verification being necessary, the amendment was not error. Kan.—*State v. Gould*, 49 Kan. 258, 49 Pac. 739 (not error for the court to permit a slight amendment to verification); *State v. Scott*, 1 Kan. App. 748, 42 Pac. 264. Mich.—*People v. Eunt*, 117 Mich. 578, 76 N. W. 91. Mo.—*State v. Rollins*, 186 Mo. 561, 87 S. W. 516; *State v. Schnettler*, 181 Mo. 173, 79 S. W. 1123; *State v. McCray*, 74 Mo. 303; *State v. Patton*, 94 Mo. App. 32, 67 S. W. 979.

[a] A positive verification may be added by amendment. *State v. Scott*, 1 Kan. App. 748, 42 Pac. 264.

79. *State v. Schnettler*, 181 Mo. 173,

79 S. W. 1123; *State v. Patton*, 94 Mo. App. 32, 67 S. W. 979.

[a] Not Amendable on Appeal in Circuit Court.—*State v. Kempe*, 27 Mo. App. 392.

80. Mo.—*State v. Speyer*, 194 Mo. 459, 91 S. W. 1075; *State v. Schnettler*, 181 Mo. 173, 79 S. W. 1123. Neb.—*Barre v. State*, 73 Neb. 732, 103 N. W. 438. Vt.—*State v. Freeman*, 59 Vt. 601, 10 Atl. 752.

Compare *State v. Bragg*, 63 Mo. App. 22.

81. Ill.—*People v. Nylin*, 129 Ill. App. 500, changing date of endorsement of filing. La.—*State v. Williams*, 47 La. Ann. 1409, 18 So. 647 (where indictment was indorsed "thru" bill); *State v. Anderson*, 45 La. Ann. 651, 12 So. 737, where there was a variance between defendant's name as it appeared in the indorsement and in the charge. Mo.—*State v. Coleman*, 186 Mo. 151, 84 S. W. 978, 69 L. R. A. 381, supplying omission of indorsement of filing.

82. *State v. Hawks*, 56 Minn. 129, 57 N. W. 455; *State v. Doyle*, 107 Mo. 26, 47 S. W. 761; *State v. Beckley*, 69 Mo. 665, 19 S. W. 192.

83. Ala.—*Marrison v. State*, 151 Ala. 115, 44 So. 150; *Campbell v. State*, 169 Ala. 70, 43 So. 743; *Holland v. State*, 199 Ala. 120, 23 So. 1000; *Wright v. State*, 126 Ala. 170, 24 So. 622 (amendable to perfect if as near any suppressed defects); *Simpson v. State*, 111 Ala. 6, 20 So. 572. Ill.—*Troitt v. People*, 88 Ill. 518; *People v. Marcus*, 146 Ill. App. 571, with leave of court. Ia.

ulated by statute.⁸⁴ The complaint of a private person should be re-verified on amendment.⁸⁵ But it is not required that the same person who signed the original complaint sign the amended complaint.⁸⁶

Amendable Defects.—A jurat can be supplied before trial,⁸⁷ but not after conviction.⁸⁸ Abbreviations, where objectionable, of the names

State v. Merchant, 28 Iowa 375. **Vt.** *State v. Batchelder*, 6 Vt. 470.

See also 2 Bishop New Crim. Proc., §721.

[a] The addition of a count which merely made the offense charged more specific in no way impinges the rights of the defendant. *Bush v. State* (Ala. App.), 67 So. 847.

[b] A complaint of a town grand juror may be amended by leave of court. *State v. Batchelder*, 6 Vt. 470.

[c] The jurisdictional fact that the accused was a resident of the township may be inserted by amendment. *Conrley v. State*, 8 Okla. Crim. 598, 129 Pac. 684.

81. **Ind.**—Burns' St., 1914, §2043 (in matters of substance or form at any time before defendant pleads); *Malone v. State*, 179 Ind. 184, 100 N. E. 507. **N. C.**—*State v. Yellowday*, 152 N. C. 784, 67 S. E. 480; *State v. Pool*, 106 N. C. 608, 10 S. E. 1033. **Vt.** *State v. Freeman*, 39 Vt. 601, 10 Atl. 754; *State v. Perkins*, 58 Vt. 722, 5 Atl. 894. **Wis.**—*Pfeffenhauser v. State*, 112 Wis. 401, 88 N. W. 294; *Rasmussen v. State*, 65 Wis. 1, 22 N. W. 835. See *Boehs v. Stein*, 72 Wis. 196, 39 N. W. 372.

[a] Amendments are authorized as a matter of right at any time before defendant pleads, and upon being made the affidavit must be sworn to. *State v. Anderson*, 177 Ind. 437, 98 N. E. 280.

[b] Solicitor of the city court may amend the accusation, 111 provided the affidavit of the prosecutor will legally support the accusation as amended. *Crawford v. State*, 4 Ga. App. 789, 62 S. E. 30; *Jackman v. State*, 4 Ga. App. 401, 61 S. E. 803; *Goldsmith v. State*, 2 Ga. App. 242, 28 S. E. 486. (2) But not after the trial has begun. *Conrley v. State*, 80 Ga. 466, 10 S. E. 123.

[c] Amendments as to matters of substance (1) are not proper (*State v. Hancock*, 49 N. H. 498; *State v. Dolby*, 49 N. H. 484; 6 Am. Rep. 588), (2) for the same reason that an indictment

cannot be thus amended. *State v. Wheeler*, 64 Vt. 569, 25 Atl. 434.

[d] Where the complaint charged an offense with certain aggravations making it a felony and therefore beyond the jurisdiction of the court, an amendment striking out these aggravations, thereby reducing it to a misdemeanor would be an amendment as to matters of substance which is not permissible. *State v. Runnals*, 49 N. H. 498.

[e] The failure of the magistrate to make a minute on the complaint of the day, month, and year at the time the same was exhibited to him, as required by statute, is a fatal defect which cannot be cured by amendment. *State v. Perkins*, 58 Vt. 722, 5 Atl. 894.

[f] Complaint of state's attorney may be amended in substance. *State v. Sutton*, 65 Vt. 439, 26 Atl. 66.

[g] On appeal amendment is improper. *State v. Kennedy*, 36 Vt. 563. See also *State v. Wheeler*, 64 Vt. 569, 25 Atl. 434.

85. *Rogers v. State* (Ala. App.), 67 So. 781; *State v. Anderson*, 177 Ind. 437, 98 N. E. 289 (by statute); *State v. Simpson*, 166 Ind. 211, 76 N. E. 544, 1005. But see *State v. Davis*, 111 N. C. 729, 16 S. E. 540.

[a] But where no objection to the complaint on this ground is made, under the curative statutes (Code, §6723) the defect will be treated as cured by amendment. *Rogers v. State* (Ala. App.), 67 So. 781.

86. *Malone v. State*, 179 Ind. 184, 100 N. E. 507.

87. *Carroll v. State*, 56 Tex. Crim. 78, 118 S. W. 1031.

[a] Permission of Court Necessary. *Carroll v. State*, 56 Tex. Crim. 78, 118 S. W. 1031; *State v. Freeman*, 39 Vt. 601, 10 Atl. 732.

[b] Clerical omissions in the jurat may be corrected; thus it is proper to amend the year where given as 189—. *Bush v. State*, 9 Ind. App. 36, 36 N. E. 167.

88. *Carroll v. State*, 56 Tex. Crim. 78, 118 S. W. 1031.

of the month,⁸⁹ and of the state,⁹⁰ may be expanded by amendment.

The signature of a prosecuting witness inadvertently omitted may be added in the appellate court.⁹¹

2. On Trial De Novo. — Where the case is tried *de novo* upon appeal, the complaint or affidavit, in most jurisdictions, may be amended in the appellate court.⁹²

3. Preliminary Complaint. — The right to amend the preliminary information is denied,⁹³ at least as to matters of substance,⁹⁴ unless it be reverified by the affiant.⁹⁵ But the better practice in any case is to make an entirely new affidavit.⁹⁶ Immaterial defects may be corrected by amendment.⁹⁷ The matter of amendment is sometimes covered by statute.⁹⁸

II. BILL OF PARTICULARS. — A bill of particulars may be amended.⁹⁹

89. *State v. Quintini*, 76 Miss. 408, 25 So. 365.

90. *State v. Quintini*, 76 Miss. 408, 25 So. 365.

91. *State v. Merchant*, 38 Iowa 375.

92. Ala.—*Blankenshire v. State*, 70 Ala. 161; *Martin v. State*, 1 Ala. App. 215, 56 So. 3. Ind.—*Malone v. State*, 179 Ind. 184, 100 N. E. 567. See *Strong v. State*, 125 Ind. 1, 4 N. E. 293, 1a.—*State v. Merchant*, 38 Iowa 375. Kan.—*State v. Hinkle*, 27 Kan. 288. But compare *City of Burlington v. James*, 17 Kan. 521. Mass.—*Com. v. Forbes*, 126 Mass. 307 (at any time before submission of the cause to the jury; citing local cases); *Com. v. Magoon*, 14 Gray 398, after commencement of the trial. Ore.—*State v. Jones*, 18 Ore. 255, 22 Pao. 840. Vt.—*State v. Sutton*, 65 Vt. 439, 26 A1j. 66.

Contra, *State v. Kanaman*, 94 Mo. 71, 6 S. W. 704; *State v. Russell*, 88 Mo. 648.

[a] Complaint of state's attorney may be amended as to matters of substance in the appellate court. *State v. Sutton*, 65 Vt. 439, 26 A1j. 66.

[b] Pending appeal, an amended complaint charging the offense with greater particularity may be filed by the state. *Burton v. State*, 80 Neb. 525, 114 N. W. 484.

[c] Where Appellate Court Has No Original Jurisdiction.—Where a defendant is convicted before a police judge for the violation of a city ordinance, and on appeal to the district court the original complaint is quashed, it is error for the district court to permit a new

and amended complaint to be filed, for the reason that the court, having no original jurisdiction of the cause, must take the case as it existed before the police judge. The district court has no power to change or modify it in the slightest respect. *City of Burlington v. James*, 17 Kan. 521.

[d] Where the affidavit charged a violation of a void ordinance, on appeal the judge had power to amend the affidavit so as to charge an offense growing out of those facts. *State v. Davis*, 111 N. C. 739, 16 S. E. 540.

[e] If a new and different case is not thereby introduced. *Perry v. State*, 78 Ala. 22. *Tatum v. State*, 66 Ala. 465. See *Gandy v. State*, 81 Ala. 68, 1 So. 25.

93. *United States v. Townsend*, 20 Fed. 231; *Wilson v. State*, 6 Tex. App. 151; *Patillo v. State*, 3 Tex. App. 443. But see *People v. Mallory*, 2 Colo. 706, 707.

94. *Lewis v. State*, 15 Neb. 82, 17 N. W. 366.

95. *Lewis v. State*, 15 Neb. 82, 17 N. W. 366.

96. *Lewis v. State*, 15 Neb. 82, 17 N. W. 366.

97. *Taylor v. State*, 22 Ind. 123.

[a] A mistake in the date of the file mark may be corrected. *Quinn v. State*, 123 Ind. 636, 15 N. E. 908.

98. *State v. McGee*, 74 Mo. 301.

99. *Julia v. State*, 85 Md. 302, 30 A1j. 167. See also *People v. Rudorf*, 142 Ill. App. 317.

XIII. CONVICTION OF OTHER OFFENSES.—A. CONVICTION OF INCLUDED OFFENSE.—1. Generally.—The defendant may be convicted of any offense necessarily included in that charged¹ without

1. U. S.—Rev. St., 1878, §1035; *Stevenson v. United States*, 182 U. S. 313-315, 16 Sup. Ct. 839, 40 L. ed. 980; *United States v. McHugh*, 37 Fed. 875-878; *United States v. Carr*, 1 Woods 480, 25 Fed. Cas. No. 11,732; *United States v. Leonard*, 2 Fed. 639. Ala.—*Letcher v. State*, 145 Ala. 639, 39 So. 922; *Smith v. State*, 142 Ala. 14-29, 39 So. 329; *Sankey v. State*, 128 Ala. 51, 29 So. 578; *Thomas v. State*, 125 Ala. 45-46, 27 So. 920; *Daughdrill v. State*, 113 Ala. 735, 21 So. 378; *White v. State*, 107 Ala. 132, 18 So. 226; *Morris v. State*, 97 Ala. 82, 12 So. 276; *Bryant v. State*, 76 Ala. 33; *McWilliams v. State* (Ala. App.), 67 So. 735; *Beason v. State*, 5 Ala. App. 103, 59 So. 712. Ariz.—*Mapula v. Territory*, 9 Ariz. 199-202, 80 Pac. 389. Ark.—*Monk v. State*, 105 Ark. 12, 150 S. W. 123; *Jones v. State*, 100 Ark. 195-197, 139 S. W. 1126; *Allison v. State*, 74 Ark. 444, 451, 86 S. W. 409; *Davis v. State*, 45 Ark. 464-470; *McPherson v. State*, 29 Ark. 225-238; *Guest v. State*, 19 Ark. 405; *Cameron v. State*, 13 Ark. 712. Cal.—*People v. Howard*, 135 Cal. 266-270, 67 Pac. 148; *People v. Arnett*, 126 Cal. 680-681, 59 Pac. 204; *People v. Holland*, 59 Cal. 364; *People v. English*, 29 Cal. 315-318; *Ex parte Cook*, 13 Cal. App. 329, 116 Pac. 352; *People v. Wetzel*, 9 Cal. App. 223, 98 Pac. 549; *People v. Ah Tong*, 2 Cal. App. 278, 83 Pac. 806. Conn.—*State v. Parmelee*, 9 Conn. 719. Dak.—*People v. Odell*, 1 Dak. 197, 46 N. W. 601. Del.—*State v. Fleetswood*, 6 Penn. 153-159, 65 Atl. 772. Fla.—*Lindsey v. State*, 53 Fla. 56-62, 43 So. 87; *Winborn v. State*, 28 Fla. 299, 9 So. 634; *Patschauer v. State*, 17 Fla. 806-804. Ga.—*Smith v. State*, 190 Ga. 544, 55 S. E. 475; *Watson v. State*, 116 Ga. 697-608, 42 S. E. 32, 21 L. R. A. (N. S.) 1; *Galdin v. State*, 104 Ga. 540-550, 30 S. E. 749; *Saxe v. State*, 73 Ga. 307; *Wood v. State*, 48 Ga. 109-201; *Whitney v. State*, 12 Ga. App. 23, 78 S. E. 23 (unpublished). Mitchell v. State, 6 Ga. App. 354, 65 S. E. 277. Idaho.—*Rev. St.*, 17920; *Matter of McLean v. Idaho*, 957, 199 Pac. 1100, 42 L. R. A. (N. S.) 813; *State v. Phinney*, 13 Idaho 307, 89 Pac. 634, 12 L. R. A. (N. S.) 935. Ill.—*Paglia v. People*, 229 Ill. 286-293, 82 N. E. 262; *Howard v. People*, 185 Ill. 552-562, 57 N. E. 441; *Herman v. People*, 131 Ill. 594-599, 22 N. E. 471, 9 L. R. A. 182; *Reynolds v. People*, 83 Ill. 479, 25 Am. Rep. 410; *Earl v. People*, 73 Ill. 329; *Prinderville v. People*, 42 Ill. 217-220; *Beckwith v. People*, 26 Ill. 500-504. Ind.—*Rev. St.*, 1908, §2148; *Pigg v. State*, 145 Ind. 560-567, 43 N. E. 309; *State v. Fisher*, 103 Ind. 530-532, 3 N. E. 379; *Mills v. State*, 52 Ind. 187-194; *Wall v. State*, 23 Ind. 150-153; *Gillespie v. State*, 9 Ind. 380-385. Ia.—*State v. Smith*, 132 Iowa 645, 109 N. W. 115; *State v. Trusty*, 118 Iowa 498, 92 N. W. 677; *State v. Nordman*, 101 Iowa 446, 70 N. W. 621; *State v. Akin*, 94 Iowa 50, 62 N. W. 667; *State v. McAvoy*, 73 Iowa 557, 35 N. W. 630; *State v. Kegan*, 62 Iowa 106, 17 N. W. 179; *Benham v. State*, 1 Iowa 542. Kan.—*Gen. St.*, 1909, §6698; *State v. Murray*, 83 Kan. 148, 110 Pac. 103; *State v. Way*, 76 Kan. 928-930, 93 Pac. 159, 14 L. R. A. (N. S.) 603; *State v. Brock*, 61 Kan. 857, 58 Pac. 972; *State v. Hodges*, 45 Kan. 389-394, 26 Pac. 676; *State v. O'Kane*, 23 Kan. 244-248; *Roy v. State*, 2 Kan. 405-409. Ky.—*Price v. Com.*, 129 Ky. 716, 112 S. W. 855; *Housman v. Com.*, 128 Ky. 818, 110 S. W. 236; *Fenston v. Com.*, 82 Ky. 549-553; *Com. v. Wells*, 33 Ky. L. Rep. 964, 112 S. W. 568; *Begley v. Com.*, 32 Ky. L. Rep. 890, 107 S. W. 243; *Esher v. Com.*, 2 Duv. 394. La.—*State v. Lewis*, 129 La. 800-808, 56 So. 893; *State v. Perry*, 116 La. 231-235, 40 So. 686; *State v. Miller*, 45 La. Ann. 1170-1171, 14 So. 136; *State v. Ford*, 30 La. Ann. 311; *State v. De Laney*, 28 La. Ann. 434; *State v. Standerman*, 6 La. Ann. 286-289. Me.—*State v. Hood*, 13 Me. 363; *State v. Phinney*, 42 Me. 384-387; *State v. Waters*, 39 Me. 54-65; *State v. Sennell*, 39 Me. 68. Mass.—*See Gen. St.*, ch. 172, §16; *Com. v. Squires*, 97 Mass. 59-61; *Com. v. Lang*, 10 Gray 11-14; *Com. v. McLaughlin*, 12 Cosh. 612; *Com. v. Ruby*, 12 Pick. 466-507. Mich.—*People v. Abbott*, 97 Mich. 484, 488, 56 N. W. 862; *Turner v. MacLeron Circ. Judge*, 88 Mich. 359,

- 59 N. W. 210; *People v. Jacks*, 76 Mich. 218, 222, 42 N. W. 1131; *People v. Adams*, 59 Mich. 24, 17 N. W. 200; *Campbell v. People*, 34 Mich. 361; *Hanna v. People*, 19 Mich. 316-318.
- Minn.**—*State v. Snyder*, 113 Minn. 244, 247, 129 N. W. 375; *State v. Ragan*, 41 Minn. 285, 42 N. W. 5; *State v. West*, 39 Minn. 371, 49 N. W. 269; *State v. Wilos*, 26 Minn. 381, 4 N. W. 615; *State v. Lessing*, 16 Minn. 64, 60; *State v. Dampney*, 4 Minn. 249, 245; *Miss. Brown v. State*, 103 Miss. 604, 60 So. 527; *Lucas v. State*, 11 Miss. 471, 14 So. 537; *Scott v. State*, 60 Miss. 268; *Moore v. State*, 59 Miss. 25-27; *Redell v. State*, 50 Miss. 492-497; *Gipson v. State*, 38 Miss. 295-312; *Morgan v. State*, 24 Miss. 54-56. **Mo.**—*Rev. St.*, 1909, §4904; *State v. Frank*, 103 Mo. 120, 15 S. W. 330; *State v. Kooland*, 90 Mo. 337, 2 S. W. 442; *State v. Burk*, 89 Mo. 635, 2 S. W. 10; *State v. Webster*, 77 Mo. 569-568; *State v. Johnson*, 81 Mo. 60; *State v. Hamill*, 127 Mo. App. 661, 166 S. W. 1103; *State v. Wilson*, 126 Mo. App. 302, 162 S. W. 110. **Mont.**—*State v. Copenhagen*, 25 Mont. 342-344, 89 Pac. 61. **Neb.**—*Mulloy v. State*, 58 Neb. 204, 207, 78 N. W. 525; *Williams v. State*, 6 Neb. 324-342. **Nev.**—*Ex parte Finnegan*, 27 Nev. 57, 71 Pac. 632; *Ex parte Carnow*, 21 Nev. 23-24, 24 Pac. 430; *State v. Collyer*, 17 Nev. 275-285, 30 Pac. 891; *State v. Robey*, 8 Nev. 312-320; *State v. Millain*, 3 Nev. 371, 469-472. **N. H.**—*State v. Gorham*, 55 N. H. 152-163; *State v. Lincoln*, 49 N. H. 464-470; *State v. Butman*, 49 N. H. 490-494; *State v. Webster*, 29 N. H. 96-98; *State v. Nelson*, 8 N. H. 163-165. **N. J.**—*State v. Janikowski*, 82 N. J. L. 230, 82 Atl. 309-311; *State v. Thomas*, 65 N. J. L. 528, 48 Atl. 1007; *State v. Jackson*, 65 N. J. L. 105, 46 Atl. 764; *State v. Thomas*, 64 N. J. L. 532, 45 Atl. 913; *Parrell v. State*, 54 N. J. L. 416-419, 24 Atl. 723; *State v. Johnson*, 30 N. J. L. 183. **N. M.**—*Territory v. Alarid*, 15 N. M. 165, 166 Pac. 371; *United States v. Densmore*, 12 N. M. 99, 75 Pac. 31-32. **N. Y.**—*Hughessey v. People*, 21 Haw. Pr. 229-244; *People v. Miller*, 143 App. Div. 221-222, 128 N. Y. Supp. 249 (effect of putting two rules in separate code sections discussed); *People v. De Garmo*, 72 App. Div. 46-51, 76 N. Y. Supp. 477; *People v. Hayes*, 150 N. Y. Supp. 854-858; *People v. Kennedy*, 57 Hun 332, 11 N. Y. Supp. 244; *People v. Connors*, 15 Min. 133, 35 N. Y. Supp. 472. **N. D.**—*Rev. Codes*, 1909, §10,052; *State v. Tough*, 12 N. D. 425, 99 N. W. 1072; *State v. Glinski*, 12 N. D. 32, 94 N. W. 674; *State v. Johnson*, 9 N. D. 275, 83 N. W. 41; *State v. Marcha*, 3 N. D. 232-237, 18 N. W. 151; *State v. Johnson*, 3 N. D. 160-169, 44 N. W. 547. **Ohio**—*Haltz v. State*, 26 Ohio St. 486; *Howard v. State*, 25 Ohio St. 299-301; *Stewart v. State*, 2 Ohio St. 241; *Brown v. State*, 2 Ohio C. C. (N. S.) 409. **Okla.**—*Snyder's Camp Laws*, 1909, 10875; *Smith v. Territory*, 14 Okla. 162-167, 77 Pac. 187; *Gallie v. Territory*, 2 Okla. 524-532, 37 Pac. 830; *Pittman v. State*, 8 Okla. Crim. 58, 126 Pac. 696; *Cochran v. State*, 4 Okla. Crim. 379-382, 111 Pac. 954. **Ore.**—*Lord's Laws*, §1552; *State v. Hecaton*, 49 Ore. 86, 87 Pac. 535; *State v. McLennan*, 16 Ore. 529-61, 16 Pac. 879; *State v. Taylor*, 3 Ore. 10. **Pa.**—*Com. v. Paylor*, 146 Pa. 349, 23 Atl. 123; *Hunter v. Com.*, 79 Pa. 505; *Dunkly v. Com.*, 17 Pa. 126, 129, 69 Am. Dec. 542; *Com. v. Silver*, 1 Pa. Co. Ct. 526. **R. I.**—*Gen. Laws*, 285, 424, amended C. P. A., §1185; *State v. Cassanta*, 29 R. I. 587-598, 73 Atl. 312; *State v. Shapiro*, 29 R. I. 123-127, 50 Atl. 240; *State v. Fitzgibbon*, 18 R. I. 230-238, 27 Atl. 446; *State v. Collier*, 6 R. I. 195. **S. C.**—*State v. Knox*, 28 S. C. 114, 82 S. E. 278; *State v. Beckroge*, 49 S. C. 484-488, 27 S. E. 658; *State v. Gaffney*, *Rise* 431. See *State v. Tidwell*, 5 Ströckh. 1-16. **S. D.**—*Crim. Code Proc.*, §409; *State v. Stenbaugh*, 28 S. D. 50, 132 N. W. 666; *State v. Vlerch*, 23 S. D. 166, 170, 120 N. W. 1008; *State v. Horn*, 21 S. D. 237, 111 N. W. 500; *State v. Cuddy*, 15 S. D. 167, 178, 87 N. W. 227; *State v. Pinder*, 16 S. D. 163, 166, 72 N. W. 97. **Tenn.**—*Stannum's Code*, §7195; *Brinchley v. State*, 125 Tenn. 445, 145 S. W. 161; *Cochart v. State*, 125 Tenn. 131, 146 S. W. 1958; *Long v. State*, 16 Lea 413, 1 S. W. 318; *De Lacy v. State*, 8 Bast. 401; *Carlen v. State*, 3 Head 267. **Tex.**—*Foran v. State* (Pox, Crim.), 57 S. W. 843-844; *Green v. State*, 8 Tex. App. 71-73; *Stapp v. State*, 3 Tex. App. 138. **Utah**—*Comm. Laws*, 1907, 14503; *State v. Vance*, 39 Utah 602, 110 Pac. 369-370; *State v. Winshaw*, 30 Utah 403-409, 85 Pac. 433; *State v. Mutha*, 20 Utah 378-381, 58 Pac. 4108; *People v. Chambers*, 5 Utah 201-203, 14 Pac. 131; *People v. Gough*, 2 Utah 70-73. **Vt.**

noticing the other or higher offense,² thus by implication acquitting of the offense directly charged.³ But a conviction may not be had for

State *v.* Smith, 43 Vt. 324-326. Va.—Virginia Code, §4040; *Cates v. Com.*, 111 Va. 837-841, 69 S. E. 529; *Hardy v. Com.*, 17 Gratt. 502-615. Wash. Ball. Code, §6956 (2 Ball. Code 1329); State *v.* Beatty, 59 Wash. 235, 109 Pac. 1011; State *v.* Preston, 49 Wash. 298-300, 95 Pac. 82; State *v.* Michel, 20 Wash. 162, 51 Pac. 995; State *v.* Dolan, 17 Wash. 499-511, 50 Pac. 472; State *v.* Achilles, 8 Wash. 462-464, 36 Pac. 597. W. Va.—Code, ch. 159, §18; State *v.* Howes, 26 W. Va. 116-118. Wis.—Rev. St., 1898, §4695; *Bicker v. State*, 118 Wis. 108, 94 N. W. 643; *Parath v. State*, 90 Wis. 527, 534, 63 N. W. 1061; State *v.* Mueller, 85 Wis. 203-207, 55 N. W. 165; State *v.* Hooks, 69 Wis. 182, 33 N. W. 57; State *v.* Shear, 51 Wis. 400, 6 N. W. 287; State *v.* Erickson, 45 Wis. 86. Wyo.—*Brantley v. State*, 9 Wyo. 102-108, 61 Pac. 139. Eng.—See Hale P. C. 202.

[a] "To be 'necessarily included' in the offense charged, the lesser offense must not only be part of the greater in fact, but it must be embraced within the legal definition of the greater as a part thereof." *People v. Kerrier*, 144 Cal. 46-47, 77 Pac. 711.

[b] The words "necessarily included" mean simply that the offense for which a conviction may be had must be included in the acts set forth in the indictment as constituting the crime with which the defendant is charged. *People v. Miller*, 143 App. Div. 251-255, 128 N. Y. Supp. 549.

[c] The test to be applied is: Does an information in describing the greater offense necessarily contain all the essential elements of an information for the lesser? *State v. Cream*, 43 Mont. 47-50, 112 Pac. 603.

[d] The rule applies in all cases where the minor offense is necessarily an elemental part of the greater, and whose proof of the greater necessarily establishes the minor. *Miller v. State*, 52 Ind. 187-194.

[e] Whether the offense be a statutory or common-law offense is immaterial. *Cham v. Territory*, 7 N. M. 241, 34 Pac. 448.

[f] Construction of Statute Relative to Conviction of Lower Degree.—A statute which enacts that "upon an in-

dictment for any offense, consisting of different degrees as prescribed in this title, the jury may find the accused not guilty of the offense in the degree charged in the indictment, and may find such accused person guilty of any degree of such offense, inferior to that charged in the indictment, or of an attempt to commit such offense"—is not restricted in its application to offenses divided by the statutes into classes expressly designated by the name of "degrees," but it applies to all offenses of different grades or degrees of enormity, wherever the charge for the higher grade includes a charge for the less. *Hanna v. People*, 19 Mich. 316-321. See also *People v. Miller*, 143 App. Div. 251, 128 N. Y. Supp. 549.

[g] In Missouri not until the Rev. St., 1879, §1655, was enacted could a person be acquitted of the offense charged in the indictment or information and convicted of an offense the commission of which is necessarily included in that charged against him. *State v. Webster*, 77 Mo. 566-568.

[h] "Lesser crimes are not to be included . . . unless demanded by the plain provision of a statute or the facts developed at the trial bring the case within the definition of the lesser crime." *State v. Wilson* (Wash.), 145 Pac. 455, and cases cited.

2. Ind.—*Bryant v. State*, 72 Ind. 400. La.—*State v. De Laney*, 28 La. Ann. 434. Miss.—*Swainey v. State*, 8 Smed. & M. 576.

[a] But in *Kilkelly v. State*, 43 Wis. 604-609, it was held that if the jury do not find the "intent" necessary to the higher crime of murder which alone is charged, but do find the included "intent" necessary to a lower grade of crime, as intent to maim or disfigure, they must in their verdict of guilty reserve the "intent" to murder. But see *Bicker v. State*, 118 Wis. 108-112, 94 N. W. 643, modifying this ruling, when applied to intent to do great bodily harm.

[b] Unless the statute expressly provides for an acquittal of the offense charged. *Bell v. State*, 70 Tex. Crim. 106, 156 S. W. 1194-1196.

3. Ark.—*Haley v. State*, 19 Ark. 147, 4 S. W. 746; *State v. Nichols*, 38

a minor offense not included in the one which is directly charged.²

Offense Defined by Another Statute.—The fact that the included offense is defined by a statute other than that defining the offense charged is immaterial.³

Abandonment of Aggravations.—Where an indictment charges many acts with certain aggravations constituting a crime, a conviction of a lesser crime, consisting of only a portion of those acts, or with less or no circumstances of aggravation, is proper.⁴

Ark. 350; Allen v. State, 37 Ark. 433; 436. Conn.—State v. Shepard, 7 Conn. 54. Ill.—Braun v. People, 15 Ill. 511. Ind.—Bryant v. State, 72 Ind. 409; State v. Hattabough, 66 Ind. 255; Clem v. State, 42 Ind. 480, 13 Am. Rep. 329. La.—State v. Poland, 23 La. Ann. 1101. Mich.—People v. Knapp, 26 Mich. 112. Mo.—State v. O'Leary, 29 Mo. App. 470. N. Y.—People v. McGowan, 17 Wend. 386. N. D.—State v. Tongh, 12 N. D. 425, 96 N. W. 1035; State v. Maloney, 7 N. D. 119, 72 N. W. 927; State v. Johnson, 3 N. D. 159, 54 N. W. 547. Okla.—Ex parte Harris, 8 Okla. Crim. 397, 128 Pac. 156. Ore.—State v. Steeves, 29 Ore. 85, 109, 43 Pac. 947. Pa.—Diskey v. Com., 17 Pa. 126, 55 Am. Dec. 542. Tenn.—Davis v. State, 3 Coddw. 77, 82. Tex.—Jones v. State, 13 Tex. 168, 62 Am. Dec. 559; Presley v. State, 30 Tex. 160. Va.—Cates v. Com., 111 Va. 837, 69 S. E. 520; Stuart v. Com., 28 Gratt. 950. Wis.—State v. Belden, 33 Wis. 129, 125.

See the title "Jeopardy."

4. Ala.—Ray v. State, 126 Ala. 9, 28 So. 634. Fla.—Adams v. State, 60 Fla. 1, 53 So. 451; Lindsay v. State, 53 Fla. 56, 43 So. 87. Ill.—Moore v. People, 26 Ill. App. 187. Mo.—State v. Willard, 228 Mo. 328, 128 S. W. 749. Ohio.—State v. Whitten, 82 Ohio St. 174, 92 N. E. 79. Okla.—Cochran v. State, 4 Okla. Crim. 379, 111 Pac. 974. Va.—Cates v. Com., 111 Va. 837, 69 S. E. 520. Wash.—State v. Beatty, 59 Wash. 235, 109 Pac. 1011.

[a] If the lesser offense is not a constituent element in the higher crime charged no conviction may be had of the former. Reynolds v. People, 83 Ill. 479; Cates v. Com., 111 Va. 837-841, 69 S. E. 520.

[b] One crime may be inferior to another, as are the degrees in burglary, while yet the higher degree does not include the inferior and under an in-

dictment for burglary in the night time there cannot be a conviction of burglary in the daytime. State v. Coppenhaver, 35 Meut. 343-345, 39 Pac. 61.

5. State v. Way, 70 Kan. 908, 93 Pac. 109; State v. Terrence, 73 Kan. 335, 32 Pac. 334; State v. Burwell, 74 Kan. 317, 8 Pac. 470; State v. Deldridge, 105 Mo. 319, 16 S. W. 390. See State v. Korta, 64 Mo. App. 163; Ex parte Jung Sing (Gara), 145 Pac. 647. See also State v. Miller, 45 La. Ann. 1170, 1171, 14 So. 136; State v. Stouderman, 6 La. Ann. 280-282.

6. Ill.—Buckwith v. People, 28 Ill. 500-504. Ind.—See Behrman v. State, 95 Ind. 140-143. Ky.—Duncan v. Com., 94 Ky. 285, 22 S. W. 210; Pearson v. Com., 82 Ky. 549-553; Com. v. Wells, 53 Ky. L. Rep. 264, 112 S. W. 268. Mass.—Com. v. Burke, 14 Gray 166; Com. v. Kirby, 2 Cush. 577-582. Mich.—People v. McArron, 121 Mich. 1, 6, 79 N. W. 944. Miss.—Swinner v. State, 8 Smed. & M. 576-584. Mo.—State v. Kachand, 99 Mo. 337, 2 S. W. 349. N. Y.—Dutton v. People, 22 N. Y. 178-184; People v. Miller, 132 App. Div. 231-233, 128 N. Y. Supp. 549. N. D.—State v. Johnson, 3 N. D. 159, 122, 54 N. W. 547. Pa.—Hunter v. Com., 79 Pa. 303-307, 21 Am. Rep. 89; Shouse v. Com., 5 Pa. 83-86. Va.—Casada v. Com., 77 Gratt. 509-510; Hardy v. Com., 11 (1893) 502-505. W. Va.—See State v. Doyle, 64 W. Va. 366-369, 62 S. E. 450; State v. Hawes, 26 W. Va. 110-112; State v. Reese, 27 W. Va. 375.

[a] Even where a specific intent constitutes the gist of the offense charged, a conviction will be sustained for any other offense necessarily included, but in which the intent is lacking. State v. Johnson, 3 N. D. 159, 122, 54 N. W. 547. See also Dutton v. People, 22 N. Y. 178-183; People v. Miller,

If the crime is single and indivisible and there is involved in it no lower grade of the offense than the one charged there can be no conviction of a less offense.⁷

A second or third offense necessarily includes the first offense.⁸

2. **Conviction of a Lower Degree.**—When an indictment charges an offense of which there are different degrees, the defendant may be convicted of any degree inferior to and included within the degree charged, thereby impliedly acquitting him of the higher degree.⁹

143 App. Div. 251-253, 128 N. Y. Supp. 549.

[b] **The state may waive the force or the fear** of the robbery and prosecute the accused for the lesser offense of larceny. *State v. Keeland*, 90 Mo. 337, 2 S. W. 442.

7. **Ala.**—*Stone v. State*, 115 Ala. 121, 22 So. 275. See also *Vasser v. State*, 55 Ala. 264.

[a] Under the statute making it grand larceny to steal personal property from the person of another, the offense as described is single and indivisible and does not include the less grave offense of larceny. Under such an indictment there can be a conviction of grand larceny only. *Stone v. State*, 115 Ala. 121, 22 So. 275, *overruling Bolling v. State*, 98 Ala. 80, 12 So. 782.

8. *State v. Gaffeny*, 66 Iowa 262, 23 N. W. 659.

9. **Ala.**—Crim. Code, 1907, §7315; *Smith v. State*, 142 Ala. 14-29, 39 So. 329; *Littleton v. State*, 128 Ala. 31-38, 29 So. 390; *Carl v. State*, 125 Ala. 89-105, 28 So. 505; *Stoball v. State*, 116 Ala. 454-460, 23 So. 162; *Horn v. State*, 98 Ala. 23-29, 13 So. 329. **Ark.**—*Jones v. State*, 160 Ark. 195, 139 S. W. 1126; *Allison v. State*, 74 Ark. 444, 451, 86 S. W. 409; *Allen v. State*, 37 Ark. 433-436; *McPherson v. State*, 29 Ark. 225-238. **Dak.**—*People v. Odell*, 1 Dak. 197, 46 N. W. 601. **Ga.**—*Watson v. State*, 116 Ga. 607, 43 S. E. 32, 21 L. R. A. (N. S.) 1. **Idaho.**—Rev. St., §7925; *State v. Flinnery*, 13 Idaho 307, 89 Pac. 634, 12 L. R. A. (N. S.) 935; *Matter of McLeod*, 23 Idaho 257, 128 Pac. 1106, 43 L. R. A. (N. S.) 813. **Ind.**—Rev. St., 1908, §2147; *State v. Fisher*, 103 Ind. 530-532, 3 N. E. 379; *State v. Hattabough*, 66 Ind. 223-230; *State v. Threshmorton*, 53 Ind. 354-357. **Ia.**—Code, §§4465, 4466; *State v. Akin*, 94 Iowa 50-53, 62 N. W. 667;

State v. Kyno, 86 Iowa 616-619, 53 N. W. 420; *State v. White*, 45 Iowa 325-326; *State v. McLaughlin*, 44 Iowa 82-87; *State v. Jarvis*, 21 Iowa 44-46. **Kan.**—Gen. St., 1909, §6697; *State v. Franklin*, 69 Kan. 798-800, 77 Pac. 588; *State v. Frazier*, 53 Kan. 87-90, 36 Pac. 58; *State v. Decker*, 36 Kan. 717-721, 14 Pac. 283; *State v. O'Kane*, 23 Kan. 244-248; *Guy v. State*, 1 Kan. 448-453. **Ky.**—Crim. Code, §262; *Fenston v. Com.*, 82 Ky. 549-553; *Com. v. Prewitt*, 82 Ky. 240; *Begley v. Com.*, 32 Ky. L. Rep. 890, 107 S. W. 243; *Messer v. Com.*, 26 Ky. L. Rep. 40, 80 S. W. 489; *Com. v. Garland*, 3 Mete. 478. **La.**—*State v. Fruge*, 106 La. 694, 31 So. 323; *State v. Miller*, 45 La. Ann. 1170, 14 So. 136; *State v. Stouderman*, 6 La. Ann. 286-289. **Me.**—*State v. Hood*, 51 Me. 363; *State v. Waters*, 39 Me. 54-65. **Md.**—*Davis v. State*, 39 Md. 355-374. **Mich.**—How. St., §9428; *Mich. Comp. Laws*, 1897, §11,789; *People v. Abbott*, 97 Mich. 484, 488, 56 N. W. 862; *People v. Prague*, 72 Mich. 178, 40 N. W. 243; *Hanna v. People*, 19 Mich. 316-320. **Minn.**—Rev. Laws, 1905, §5371; *State v. Wiles*, 26 Minn. 381, 4 N. W. 615; *State v. Lessing*, 16 Minn. 75; *State v. Eno*, 8 Minn. 220. **Miss.**—*Brown v. State*, 103 Miss. 664, 60 So. 727; *Moore v. State*, 59 Miss. 25-27; *Morman v. State*, 24 Miss. 54-56; *Swinney v. State*, 8 Smed. & M. 576; *King v. State*, 5 How. 730-735. **Mo.**—Rev. St., 1909, §4903; *State v. Lewis*, 175 S. W. 60; *State v. Colvin*, 226 Mo. 446, 475, 126 S. W. 448; *State v. Burke*, 89 Mo. 635-640, 2 S. W. 10; *State v. Shoemaker*, 7 Mo. 177-180; *Watson v. State*, 5 Mo. 497-499. **Neb.**—Rev. St. Neb. (1913), §9128; *Russell v. State*, 66 Neb. 497, 500, 92 N. W. 751; *Mulloy v. State*, 58 Neb. 204, 210, 78 N. W. 525. **N. H.**—*State v. Webster*, 39 N. H. 96-98. **N. Y.**—*People v. Thompson*, 198 N. Y. 396-398, 91 N. E. 838; *People v. Schleiman*, 197 N. Y. 383-385, 90 N. E. 950; *People*

Aiding and Abetting.—It has been held that an indictment charging the aiding and abetting of a crime will sustain a conviction of aiding and abetting a lower degree of the crime.¹⁰

3. Conviction of Attempt.—An attempt being necessarily included in every crime,¹¹ if punishable by indictment,¹² a conviction thereof

v. Scheuren, 148 App. Div. 324-325, 132 N. Y. Supp. 1025; *People v. Schiavi*, 96 App. Div. 479-482, 89 N. Y. Supp. 564; *People v. De Garmo*, 73 App. Div. 46-53, 76 N. Y. Supp. 477. **N. C.**—Rev., 1905, §3269; *State v. Savage*, 161 N. C. 245, 76 S. E. 238; *State v. Matthews*, 142 N. C. 621, 55 S. E. 342; *State v. Green*, 119 N. C. 899, 26 S. E. 112; *State v. Brown*, 113 N. C. 615, 18 S. E. 51. **N. D.**—Rev. Codes, 1905, §19,951; *State v. Belyea*, 9 N. D. 353, 363, 83 N. W. 1; *State v. Campbell*, 7 N. D. 58, 68, 72 N. W. 935. **Ohio.**—Rev. St., 1890, §7316; *State v. Johnson*, 58 Ohio St. 417-425, 51 N. E. 40, 65 Am. St. Rep. 769; *Barber v. State*, 39 Ohio St. 660; *Heller v. State*, 23 Ohio St. 582. **Okla.**—Wilson's St., §§5535, 5536; *Smith v. Territory*, 14 Okla. 162-167, 77 Pac. 187; *Turner v. State*, 8 Okla. Crim. 11-33, 126 Pac. 452; *Rhea v. Territory*, 3 Okla. Crim. 230-235, 105 Pac. 314. **Ore.**—Lord's Laws, §1551; *State v. Goddard*, 69 Ore. 73, 133 Pac. 90, 138 Pac. 243-246; *State v. Branton*, 49 Ore. 86, 87 Pac. 335; *State v. Hanlon*, 32 Ore. 95, 48 Pac. 353-355; *State v. Lavery*, 35 Ore. 402-405, 58 Pac. 107. **S. D.** Rev. Code Crim. Proc., §408; *State v. Kapelino*, 20 S. D. 591, 108 N. W. 335; *State v. Hubbard*, 20 S. D. 148, 104 N. W. 1120. **Tenn.**—Shannon's Code, §7195; *Brinkley v. State*, 125 Tenn. 445, 145 S. W. 161; *Crockett v. State*, 125 Tenn. 131, 140 S. W. 1658; *Fuerst v. State*, 115 Tenn. 357, 360, 89 S. W. 955; *Lang v. State*, 16 Lea 433, 1 S. W. 318; *Lawless v. State*, 4 Lea 173-177. **Tex.**—Art. 772, Code Crim. Proc. (Rev. St., 1905, art. 752); *Wilson v. State*, 29 Tex. 240; *Bell v. State*, 70 Tex. Crim. 466, 156 S. W. 1194-1196; *Ward v. State* (Tex. Crim.), 151 S. W. 1073-1077; *Davis v. State*, 20 Tex. App. 302. **Utah.**—Comp. Laws, 1907, §4892. **Vt.**—*State v. Smith*, 43 Vt. 324-326; *State v. Scott*, 24 Vt. 127-129; *State v. Coy*, 2 Ark. 181-184. **Wash.**—Ball. Code, §6955 (2 H. C. 1319); *State v. Klein*, 19 Wash. 368, 53 Pac. 364; *State v. Greer*, 11 Wash. 244, 247, 39 Pac. 874; *State v. Ackles*, 8 Wash. 462-464, 36

Pac. 597; *Timmerman v. Territory*, 3 Wash. Ter. 445-449, 17 Pac. 624. **Wyo.** Rev. St., 1899, §5389; *Brantley v. State*, 9 Wyo. 102-107, 61 Pac. 139.

[a] **The reason that upon a charge of the highest degree of an offense there may be a conviction of a lesser degree is that the offense springs from the same transaction, and is supported by the same class of testimony.** *People v. Prague*, 72 Mich. 178, 40 N. W. 243; *Ex parte Curnow*, 21 Nev. 33-37, 24 Pac. 430.

[b] **Rule Existed at Common Law.** The statutes are only declaratory of the common-law rule. *Watson v. State*, 116 Ga. 607, 43 S. E. 32, 21 L. R. A. (N. S.) 1.

[c] **The term "degrees" is not used in a strictly technical sense, but as indicating the principal crime as the genus and the lesser as the species and necessarily included within the larger offense.** *State v. McKee*, 123 Mo. App. 524, 530, 104 S. W. 486; *State v. Keeland*, 94 Mo. 337, 2 S. W. 442.

[d] **The rule is that where, by rejecting the unproved allegations, there would yet remain enough in the indictment to describe an inferior degree of the offense, a conviction for such lower degree may properly be had.** *Dedien v. People*, 22 N. Y. 178-186.

10. *Goff v. Prime*, 26 Ind. 196. But see *State v. Robinson*, 12 Wash. 349-351, 41 Pac. 51, 902.

11. **Cal.**—*People v. Horn*, 144 Pac. 641; *People v. Akin* (Cal. App.), 143 Pac. 795. **Mich.**—*People v. Webb*, 127 Mich. 29, 86 N. W. 406. **Mo.**—*State v. Frank*, 103 Mo. 120, 15 S. W. 330.

12. **U. S.**—*Stevenson v. United States*, 162 U. S. 313-315, 16 Sup. Ct. 839, 40 L. ed. 980; *Sparf v. United States*, 156 U. S. 51-63, 15 Sup. Ct. 273, 39 L. ed. 343; *United States v. Leonard*, 2 Fed. 669. **Ia.**—*State v. Jordan*, 87 Iowa 86, 54 N. W. 63; *State v. McLaughlin*, 44 Iowa 82-87; *State v. Jarvis*, 21 Iowa 41-46. **Ky.**—*Hosomig v. Com.*, 128 Ky. 818, 119 S. W. 250. **Neb.**—*Evers v. State*, 84 Neb. 708, 711, 121 N. W. 1095; *Russell v. State*, 60

is proper under an indictment charging the offense.¹³ Likewise it is proper to convict of an attempt to commit a lesser degree of the offense

Neb. 497, 500, 92 N. W. 751. **N. M.**—United States *v.* Densmore, 12 N. M. 99, 75 Pac. 31-32. **Ohio**.—State *v.* Baltimore, 107 N. E. 334; Fox *v.* State, 34 Ohio St. 377-379; Barber *v.* State, 39 Ohio St. 660; State *v.* Springer, 3 Ohio N. P. 120; Donaldson *v.* State, 10 Ohio C. C. 613. **Tex.**—Bell *v.* State, 70 Tex. Crim. 466, 156 S. W. 1194-1196; Stapp *v.* State, 3 Tex. App. 138-145.

[a] The concluding words "if punishable by indictment," of §4835, Ia. Rev. St., relate alone to the first preceding clause "of an attempt to commit the offense," and not to both the degree and the attempt. State *v.* Jarvis, 21 Iowa 44-46.

13. **U. S.**—Stevenson *v.* United States, 162 U. S. 313-315, 16 Sup. Ct. 839, 40 L. ed. 980; Sparf *v.* United States, 156 U. S. 51-63, 15 Sup. Ct. 273, 39 L. ed. 343; United States *v.* Leonard, 2 Fed. 669. **Ala.**—Benbow *v.* State, 128 Ala. 1-4, 29 So. 553; Carl *v.* State, 125 Ala. 89-105, 28 So. 505; Burke *v.* State, 74 Ala. 399; Edmonds *v.* State, 70 Ala. 8-10; Wolf *v.* State, 41 Ala. 412; Lewis *v.* State, 30 Ala. 54; Tarrant *v.* State (Ala. App.), 67 So. 626. **Cal.**—Penal Code, §1159; People *v.* Horn, 144 Pac. 641; People *v.* Demasters, 105 Cal. 669-673, 39 Pac. 35; People *v.* Defoor, 100 Cal. 150-153, 34 Pac. 642; People *v.* Holland, 59 Cal. 364; People *v.* Vaughn (Cal. App.), 147 Pac. 116; People *v.* Ah Lung, 2 Cal. App. 278, 83 Pac. 296. **Dak.**—Territory *v.* Conrad, 1 Dak. 363, 46 N. W. 605; People *v.* Odell, 1 Dak. 197, 46 N. W. 601. **Ga.**—Penal Code, §1035; Smith *v.* State, 126 Ga. 544-546, 55 S. E. 475; Brownlow *v.* State, 112 Ga. 405, 37 S. E. 733; Hill *v.* State, 53 Ga. 125; Clifford *v.* State, 10 Ga. 422. **Idaho**.—State *v.* Phinney, 13 Idaho 307, 89 Pac. 634, 12 L. R. A. (N. S.) 935; Matter of McLeod, 23 Idaho 257, 128 Pac. 1106, 43 L. R. A. (N. S.) 813. **Ind.**—Hasenfuss *v.* State, 156 Ind. 246-250, 59 N. E. 463; Murphy *v.* State, 120 Ind. 115-118, 22 N. E. 106; State *v.* Fisher, 103 Ind. 530-532, 3 N. E. 379; State *v.* Hattabough, 66 Ind. 223-230. **Ia.**—State *v.* Akin, 94 Iowa 50-53, 62 N. W. 67; State *v.* Kyne, 86 Iowa 616-619, 53 N. W. 420; State *v.* White, 45 Iowa 325-326; State *v.* McLaughlin, 44 Iowa 82-87; State *v.* Jarvis, 21 Iowa

44-46. **Kan.**—State *v.* Guthridge, 88 Kan. 846, 129 Pac. 1143; State *v.* Franklin, 69 Kan. 798-800, 77 Pac. 588; State *v.* Frazier, 53 Kan. 87, 36 Pac. 58; State *v.* Decker, 36 Kan. 717-721, 14 Pac. 283; State *v.* O'Kane, 23 Kan. 244-248. **Ky.**—Nider *v.* Com., 140 Ky. 684, 688, 131 S. W. 1024; Housman *v.* Com., 128 Ky. 818, 110 S. W. 236. **Mich.** People *v.* Webb, 127 Mich. 29, 86 N. W. 406; People *v.* Abbott, 97 Mich. 484-488, 56 N. W. 862; Hanna *v.* People, 19 Mich. 316, 321. **Minn.**—State *v.* Masteller, 45 Minn. 128, 47 N. W. 541; State *v.* Wiles, 26 Minn. 381, 4 N. W. 615; State *v.* Lessing, 16 Minn. 75; State *v.* Eno, 8 Minn. 220; O'Connell *v.* State, 6 Minn. 279. **Miss.**—Code, 1892, §1426; Horton *v.* State, 84 Miss. 473, 36 So. 1033; Moore *v.* State, 59 Miss. 25-27; Morman *v.* State, 24 Miss. 54-56; King *v.* State, 5 How. 730-735. **Mo.**—State *v.* Colvin, 226 Mo. 446, 475, 126 S. W. 448; State *v.* Frank, 103 Mo. 120, 15 S. W. 330; State *v.* Shoemaker, 7 Mo. 177-180; Watson *v.* State, 5 Mo. 497-499. **Mont.**—See Rev. Codes, §9326; State *v.* Crean, 43 Mont. 47-53, 114 Pac. 603. **Neb.**—Evers *v.* State, 84 Neb. 708, 711, 121 N. W. 1005; Russell *v.* State, 66 Neb. 497, 500, 92 N. W. 751. **Nev.**—*Ex parte* Finnegan, 27 Nev. 57, 71 Pac. 642; *Ex parte* Curnow, 21 Nev. 33-34, 24 Pac. 430; State *v.* Robey, 8 Nev. 312-320; State *v.* Millain, 3 Nev. 409-442. **N. J.**—State *v.* Schwarzbach, 84 N. J. L. 268, 86 Atl. 423; State *v.* Jankowski, 82 N. J. L. 229, 82 Atl. 309; Marley *v.* State, 58 N. J. L. 207-209, 33 Atl. 208. **N. M.**—United States *v.* Densmore, 12 N. M. 99, 75 Pac. 31-32. **N. Y.**—People *v.* Schleiman, 197 N. Y. 383-385, 90 N. E. 950; Dedieu *v.* People, 22 N. Y. 178-181; Burns *v.* People, 1 Park. Crim. 182-186; People *v.* Miller, 143 App. Div. 251-253, 128 N. Y. Supp. 549. **N. C.** State *v.* Savage, 161 N. C. 245, 76 S. E. 238; State *v.* Matthews, 142 N. C. 621, 55 S. E. 342; State *v.* Green, 119 N. C. 899, 26 S. E. 112; State *v.* Brown, 113 N. C. 645, 18 S. E. 51. **N. D.** State *v.* Belyea, 9 N. D. 353, 363, 83 N. W. 1. **Ohio**.—State *v.* Baltimore, 107 N. E. 334; Barber *v.* State, 39 Ohio St. 660; Fox *v.* State, 34 Ohio St. 377-379; State *v.* Springer, 3 Ohio N. P.

charged,¹⁴ or of any degree of an attempt to commit such an offense." In some jurisdictions, however, it is provided that there cannot be a conviction of an attempt, if it appears that the crime was perpetrated. By statute an acquittal of the offense itself is not necessary in returning a verdict of guilty of an attempt.¹⁷

4. Rule Applied.—a. *Abortion.*—An indictment charging the administering drugs to a pregnant woman with intent to destroy the child will sustain a conviction of the administration of drugs with intent to procure miscarriage;¹⁸ but the reverse is not true,¹⁹ although such an averment will support a conviction of a misdemeanor under the statute.²⁰

An indictment for abortion charging the death of the female in-

- 120; *Donaldson v. State*, 10 Ohio C. C. 613. **Okla.**—*Smith v. Territory*, 14 Okla. 162-167, 77 Pac. 187; *Gatliff v. Territory*, 2 Okla. 523-532, 37 Pac. 809; *Pittman v. State*, 8 Okla. Crim. 58, 126 Pac. 696; *Cochran v. State*, 4 Okla. Crim. 379-382, 111 Pac. 974. **Ore.**—*State v. Goddard*, 69 Ore. 73, 133 Pac. 90, 138 Pac. 243-246; *State v. Ellsworth*, 30 Ore. 145-159, 47 Pac. 199; *State v. Steeves*, 29 Ore. 85-109, 43 Pac. 947. **R. I.**—*Gen. Laws*, 1909, ch. 354, §24; *State v. Casasanta*, 29 R. I. 587-598, 73 Atl. 312; *State v. Shapiro*, 29 R. I. 133-137, 69 Atl. 340. **S. D.**—*State v. Stumbaugh*, 28 S. D. 50, 132 N. W. 666, 668; *State v. Vierck*, 23 S. D. 166, 173, 120 N. W. 1098; *State v. Hubbard*, 20 S. D. 148, 104 N. W. 1120; *State v. Caddy*, 15 S. D. 167, 173, 87 N. W. 927; *State v. Finder*, 10 S. D. 103, 107, 72 N. W. 97. **Tenn.**—*Brinkley v. State*, 125 Tenn. 445, 145 S. W. 161; *Crockett v. State*, 125 Tenn. 131, 140 S. W. 1058; *Lang v. State*, 16 Lea 433, 1 S. W. 318; *De Lacy v. State*, 8 Baxt. 401. **Tex.**—*Bell v. State*, 70 Tex. Crim. 466, 156 S. W. 1194-1196; *Gentry v. State* (Tex. Crim.), 152 S. W. 635-636; *Foreman v. State* (Tex. Crim.), 57 S. W. 843; *Stapp v. State*, 3 Tex. App. 138-145. **Utah.**—*State v. Vance*, 39 Utah 602, 119 Pac. 309-310; *State v. Winslow*, 30 Utah 403-409, 85 Pac. 433; *People v. Gough*, 2 Utah 70-72. **Vt.**—*St.*, §5164. **Va.**—*Code*, §4044; *Cates v. Com.*, 111 Va. 837-838, 69 S. E. 520; *Givens v. Com.*, 29 Gratt. 830; *Hardy v. Com.*, 17 Gratt. 592-595. **Wash.**—*State v. McPhail*, 39 Wash. 199-203, 81 Pac. 683; *State v. Romans*, 21 Wash. 284, 57 Pac. 819. **W. Va.**—*State v. Meadows*, 18 W. Va. 658-673. **Eng.**—14 & 15 Vict. ch. 100, §9 (English statute); *Reg. v. Hapgood*, 11 Cox C. C. 471. **Can.**—*Queen v. Magee*, 7 N. Bruns. 14.
- [a] **Necessity of Charging Attempt in the Indictment.**—See: **Mass.**—*Com. v. Crowley*, 167 Mass. 434-442, 45 N. E. 766. **Miss.**—*Horton v. State*, 84 Miss. 473, 36 So. 1033. **N. C.**—*State v. Brown*, 113 N. C. 645, 18 S. E. 51.
- And see *infra*, XIII, II.
- 14. N. Y.**—*People v. Schleiman*, 197 N. Y. 383-385, 90 N. E. 950. **N. C.**—*State v. Matthews*, 142 N. C. 621, 55 S. E. 342; *State v. Green*, 119 N. C. 899, 26 S. E. 112; *State v. Brown*, 113 N. C. 645, 18 S. E. 51. **Ore.**—*Lord's Laws*, §1551; *State v. Goddard*, 69 Ore. 73, 133 Pac. 90, 138 Pac. 243-246; *State v. Ryan*, 15 Ore. 572, 16 Pac. 417.
- 15. State v. Groves**, 194 Mo. 452, 457, 92 S. W. 631.
- 16. Gen. St.**, 1889, ch. 31, §418; *State v. Mitchell*, 54 Kan. 516-518, 38 Pac. 810 (*distinguished in People v. Horn* [Cal.], 144 Pac. 641); *Mo. Rev. St.*, 1909, §4895; *State v. Bell*, 194 Mo. 264, 91 S. W. 898; *State v. White*, 35 Mo. 500; *Linville v. Green*, 125 Mo. App. 289, 297, 102 S. W. 67. See *Miss. Code*, 1892, §974; *Davis v. State*, 89 Miss. 21, 42 So. 542.
- 17. N. J. Comp. Laws**, p. 1824, §43; *State v. Schwarzbach*, 84 N. J. L. 205, 86 Atl. 423, *overruling Marley v. State*, 58 N. J. L. 207, 33 Atl. 205, *because of statute passed since that decision*.
- 18. State v. Watson**, 30 Kan. 281, 1 Pac. 770.
- 19. Lohman v. People**, 1 N. Y. 372, 4 How. Pr. 445, 49 Am. Dec. 346.
- 20. Lohman v. People**, 1 N. Y. 376, 4 How. Pr. 445, 49 Am. Dec. 346; *People v. Stoddham*, 1 Park. Crim. (N. Y.) 424-427; *People v. Jackson*, 4 Hill (N. Y.) 92.

cludes murder in the second degree,²¹ manslaughter,²² and assault.²³

b. *Adultery*.—An indictment charging adultery,²⁴ or fornication and adultery²⁵ will sustain a conviction of fornication. And the charge of adultery as a felony will support a conviction of adultery as a misdemeanor.²⁶

c. *Affray*.—An indictment charging an affray will sustain a conviction of assault and battery²⁷ if the indictment contain all the substantive allegations necessary to let in proof of the assault and battery.²⁸

d. *Arson*.—A charge of arson will support a conviction of every malicious burning made penal by law,²⁹ or any lower degree of arson.³⁰

e. *Assaults*.³¹—An indictment charging an assault will sustain a conviction of any lower degree included therein.³²

(I.) *Aggravated Assault*.—An indictment charging an aggravated assault will sustain a conviction of a simple assault,³³ but not of assault and battery.³⁴

(II.) *Felonious Assault*.—An indictment charging an assault with intent to commit any felony will sustain a conviction of any lesser degree of assault included therein.³⁵

21. *State v. Fleetwood*, 6 Penne. (Del.) 153, 65 Atl. 772.

22. *State v. Fleetwood*, 6 Penne. (Del.) 153, 65 Atl. 772.

23. *State v. Fleetwood*, 6 Penne. (Del.) 153, 65 Atl. 772.

24. *People v. Rouse*, 2 Mich. N. D. 209.

[a] There being no allegation the parties were unmarried, a conviction of fornication is improper. *Pena v. State*, 46 Tex. Crim. 458, 80 S. W. 1034; *Cosgrove v. State*, 37 Tex. Crim. 349, 39 S. W. 367, 60 Am. St. Rep. 82.

25. *State v. Cowell*, 26 N. C. 231; *German v. Com.*, 124 Pa. 536, 17 Atl. 20; *Dickey v. Com.*, 17 Pa. 126.

26. *Bryant v. State*, 76 Ala. 23.

See *infra*, XIII, E.

27. *Thompson v. State*, 79 Ala. 26; *McIntosh v. State*, 53 Ala. 610; *State v. Brown*, 82 N. C. 585; *State v. Allen*, 11 N. C. 128.

28. *Childs v. State*, 15 Ark. 204.

29. *Stapp v. State*, 3 Tex. App. 138, 145.

30. *Hennessey v. People*, 21 How. Pr. (N. Y.) 230-240; *People v. Didien*, 17 How. Pr. 238, N. Y. 223-239; *Freund v. People*, 5 Park. Crim. (N. Y.) 198; *State v. Thornton*, 66 Vt. 30.

[a] **Arson in the third degree** being the burning of a building with intent to defraud the insurance company is not an offense for which one can be convicted under a charge of arson. *Dedieu v. People*, 22 N. Y. 178, *reversing s. c.*, 4 Park. Crim. 593. See also *Elgin v. People*, 226 Ill. 486, 80 N. E. 1014; *Mai v. People*, 224 Ill. 414, 79 N. E. 633. But see *Hennessey v. People*, 21 How. Pr. (N. Y.) 239.

31. **Conviction of assault under charge of specific crime**, see *infra*, XIII, A, 4, the specific crimes.

32. **Mich.**—*Hanna v. People*, 19 Mich. 316. **N. Y.**—*People v. Taylor*, 3 N. Y. Crim. 297-302. **Wash.**—*State v. Steele*, 145 Pac. 581, charge assault in the second degree with a conviction of assault in the third degree.

33. **Mass.**—*Com. v. Walsh*, 132 Mass. 8-10; *Com. v. Burke*, 14 Gray 100. **N. D.**—*State v. Marks*, 3 N. D. 532, 58 N. W. 25. **S. D.**—*State v. Finder*, 10 S. D. 103, 72 N. W. 97. **Tex.**—*Yelton v. State* (Tex. Crim.), 170 S. W. 318.

34. *State v. Marks*, 3 N. D. 532, 58 N. W. 25.

35. **Cal.**—*People v. Demasters*, 105 Cal. 609, 39 Pac. 35, simple assault included. **Mich.**—*People v. Ellsworth*, 90 Mich. 442, 51 N. W. 534; *Hanna v. People*, 19 Mich. 316, 329. **Mo.**—*Rev.*

(III.) **Assault With a Deadly Weapon.**—An indictment charging an assault with a deadly weapon will sustain a conviction of simple assault,³⁶ assault and battery,³⁷ if a battery be charged,³⁸ or an assault with intent to do bodily harm.³⁹

(IV.) **Assault With Intent To Kill or Do Great Bodily Harm.**—An assault with intent to kill or do great bodily harm will sustain a conviction for assault and battery,⁴⁰ if the averments of the indictment include a battery,⁴¹ assault with a deadly weapon with intent to inflict a bodily injury,⁴² or simple assault,⁴³ or of any other included aggravated as-

St., 1899, §2370; *State v. Harris*, 209 Mo. 423, 441, 108 S. W. 28; *State v. Groves*, 194 Mo. 452, 458, 92 S. W. 631; *State v. Prosser*, 137 Mo. 624, 38 S. W. 1106; *State v. Baldrige*, 105 Mo. 319, 16 S. W. 890. **Nev.**—*Ex parte Curnow*, 21 Nev. 33-43, 24 Pac. 430. **N. Y.** *White v. People*, 32 N. Y. 465, simple assault. **Tex.**—*Ward v. State* (Tex. Crim.), 151 S. W. 1073-1077; *Foreman v. State* (Tex. Crim.), 57 S. W. 843; *Bean v. State*, 25 Tex. App. 346-355, 8 S. W. 278; *Green v. State*, 8 Tex. App. 71-74.

[a] Mo. Rev. St., 1879, §1655, (1) providing that an indictment for a felonious assault includes all lesser assaults is only intended to apply to cases in which the evidence justified such a conviction (*State v. Doyle*, 107 Mo. 36, 43, 17 S. W. 751), (2) or, in other words, when the lesser offense is necessarily proved in making proof of the greater offense charged. *State v. Melton*, 102 Mo. 683, 687, 15 S. W. 139.

[b] "Assaults, with various degrees of aggravation, must include the inferior degree of simple assault, or, if the higher degree is charged, including a battery, as in the present case, the simple assault and battery are included, and that the defendant may be convicted of the included offense." *Hanna v. People*, 19 Mich. 316, quoted in *People v. Ellsworth*, 90 Mich. 442-446, 51 N. W. 531.

36. Cal.—*Ex parte Donahue*, 65 Cal. 474, 4 Pac. 449. **Ill.**—*Kennedy v. People*, 122 Ill. 649, 13 N. E. 213. **N. C.** *State v. Green*, 119 N. C. 899, 26 S. E. 112. **S. D.**—*State v. Finner*, 10 S. D. 103, 72 N. W. 97.

37. *Chacon v. Territory*, 7 N. M. 241, 34 Pac. 448; *State v. Green*, 119 N. C. 899, 26 S. E. 112.

[a] An indictment charging an assault and battery with a deadly weapon

"with intent to kill" will support a conviction of assault and battery, armed with a dangerous weapon "with intent to do bodily harm." *People v. Odell*, 1 Dak. 197, 46 N. W. 601; *Territory v. Conrad*, 1 Dak. 363, 46 N. W. 605; *State v. Johnson*, 3 N. D. 159, 54 N. W. 547.

38. *State v. Klein*, 19 Wash. 368, 53 Pac. 364.

39. *People v. Congleton*, 44 Cal. 92.

40. **Ark.**—*Jones v. State*, 100 Ark. 195, 139 S. W. 1126. **Ia.**—*State v. Foster*, 33 Iowa 525. **Mich.**—*People v. Ellsworth*, 90 Mich. 442, 51 N. W. 531; *Turner v. Muskegon Circ. Judge*, 88 Mich. 359, 50 N. W. 310. **Neb.**—*Mulloy v. State*, 58 Neb. 204, 78 N. W. 525. **N. M.**—*Chacon v. Territory*, 7 N. M. 241, 34 Pac. 448. **N. D.**—*State v. Climie*, 12 N. D. 33, 94 N. W. 574, *distinguishing State v. Marks*, 3 N. D. 532, 58 N. W. 25. But see *State v. Marks*, 3 N. D. 532, 58 N. W. 25. **Ohio.**—*Stewart v. State*, 5 Ohio 241.

41. *People v. Ellsworth*, 90 Mich. 442, 447, 51 N. W. 531; *Alyea v. State*, 62 Neb. 143, 86 N. W. 1066; *Mulloy v. State*, 58 Neb. 204, 78 N. W. 525.

42. Even though it fails to aver "with a deadly weapon." *State v. Colver*, 17 Nev. 275-285, 20 Pac. 891.

43. **Ark.**—*Jones v. State*, 100 Ark. 195, 139 S. W. 1126; *Cameron v. State*, 13 Ark. 712. **Ill.**—*Kennedy v. People*, 122 Ill. 649, 13 N. E. 213. **Ia.**—*Orton v. State*, 4 Greene 140. **Minn.**—*State v. Gunnell*, 22 Minn. 51, under special statute. **Mo.**—*State v. Ostrum*, 147 Mo. App. 422, 126 S. W. 961; *State v. Wilson*, 126 Mo. App. 522, 103 S. W. 110. **N. Y.**—*White v. People*, 32 N. Y. 465. **N. D.**—*State v. Climie*, 12 N. D. 33, 94 N. W. 574; *State v. Marks*, 3 N. D. 532, 58 N. W. 25. **Ohio.**—*White v. State*, 13 Ohio St. 569; *Stewart v. State*, 5 Ohio 241. **Wash.**—*State v.*

sault,⁴⁴ but not a conviction of shooting at another.⁴⁵ An indictment, charging shooting at another with a firearm with intent to kill will authorize a conviction of assault with a dangerous weapon,⁴⁶ or of simple assault,⁴⁷ of an attempt to shoot another without inflicting a wound,⁴⁸ of shooting with intent to kill and wound,⁴⁹ or of shooting, without justifiable or excusable cause, at another with a firearm with intent to injure him,⁵⁰ or of wounding under circumstances that would have constituted manslaughter in the fourth degree if death had ensued,⁵¹ but not of unlawfully wounding, in the absence of proper averment.⁵²

(V.) **Assault With Intent To Maim.**—A charge of an assault with intent to maim and disfigure will support a conviction of assault with intent to inflict great bodily injury,⁵³ assault and battery,⁵⁴ or simple assault.⁵⁵

(VI.) **Assault With Intent To Murder.**—Under an indictment charging an assault with intent to murder the defendant may be convicted of an assault with intent to commit a lower degree of murder than that charged,⁵⁶ or assault and battery with such intent,⁵⁷ or an assault⁵⁸ with

Lillie, 60 Wash. 200, 110 Pac. 801.

44. *Quinn v. State* (Ark.), 169 S. W. 791.

45. *Spencer v. State*, 52 Tex. Crim. 289, 106 S. W. 386.

46. *State v. Bodnar*, 18 N. D. 484, 121 N. W. 614. This case *distinguishes* *State v. Mattison*, 13 N. D. 391, 100 N. W. 1091, and *State v. Cruikshank*, 13 N. D. 337, 100 N. W. 697, by declaring they were incorrectly reported by an omission in abstracting the record.

47. **La.**—*State v. Matthews*, 111 La. 962, 33 So. 48. **Ohio.**—*Mitchell v. State*, 42 Ohio St. 383; *White v. State*, 13 Ohio St. 529. **S. D.**—*State v. Horn*, 21 S. D. 237, 111 N. W. 552.

[a] **Shooting with intent to kill being alleged without the word assault** a refusal of an instruction that the jury may find accused guilty of assault and battery or assault is proper. *State v. Robertson*, 48 La. Ann. 1067, 20 So. 296.

48. *Usher v. Com.*, 2 Duv. (Ky.) 394. See *Harris v. Com.*, 15 Ky. L. Rep. 299.

49. *Robinson v. Com.*, 16 B. Mon. (Ky.) 609.

50. *State v. Horn*, 21 S. D. 237, 111 N. W. 552.

51. *State v. Byno*, 68 Kan. 347, 74 Pac. 1111. See *State v. Evans*, 36 Kan. 407, 11 Pac. 810.

52. *Rae v. Miller*, 14 Cox C. C.

(Eng.) 356, that the accused did cut, stab or wound was not alleged.

53. *State v. Akin*, 94 Iowa 50, 62 N. W. 667.

54. *Haslip v. State*, 4 Hayw. (Tenn.) 272.

55. **Ark.**—*McBride v. State*, 7 Ark. 374. **Cal.**—*People v. Demasters*, 105 Cal. 669-673, 39 Pac. 35. **Mass.**—*Com. v. McGrath*, 115 Mass. 150.

56. **Ind.**—*Wall v. State*, 23 Ind. 150. **Mo.**—See *State v. Prosser*, 137 Mo. 624, 38 S. W. 1106. **N. H.**—*State v. Williams*, 23 N. H. 321. **Tenn.**—*Fuerst v. State*, 115 Tenn. 357, 89 S. W. 955; *Stevens v. State*, 91 Tenn. 726, 20 S. W. 423; *State v. Ragsdale*, 10 Lea 671; *Smith v. State*, 2 Lea 614. **Wyo.**—*Brantley v. State*, 9 Wyo. 102-107, 61 Pac. 139.

57. *Booher v. State*, 156 Ind. 435-448, 60 N. E. 156; *State v. Fisher*, 103 Ind. 530-533, 3 N. E. 379; *Behymer v. State*, 95 Ind. 140; *State v. Throckmorton*, 53 Ind. 354-357; *Gillespie v. State*, 9 Ind. 380-385.

58. **Conn.**—*State v. Nichols*, 8 Conn. 496. **Fla.**—*Bryan v. State*, 45 Fla. 8, 34 So. 243; *Williams v. State*, 41 Fla. 295, 26 So. 184. **Ind.**—*Jarrell v. State*, 58 Ind. 293; *State v. Throckmorton*, 53 Ind. 354. **Ia.**—*State v. Schele*, 52 Iowa 608, 3 N. W. 632; *State v. Graham*, 51 Iowa 72-75, 50 N. W. 285; *State v. White*, 45 Iowa 325, *overruling State v.*

intent to commit manslaughter, assault with intent to kill,⁵⁰ an assault with intent to commit great bodily injury,⁵¹ although there is no averment of wilfulness or malice aforethought,⁵² a felonious or aggravated assault,⁵³ assault and battery with a weapon,⁵⁴ or assault with a deadly weapon,⁵⁵ if the assault is charged to have been made with a deadly

White, 41 Iowa 316. **La.**—*State v. Stouderman*, 6 La. Ann. 286-289. **Me.** *State v. Phinney*, 42 Me. 384-387; *State v. Waters*, 39 Me. 54-65. **N. H.**—*State v. Butman*, 42 N. H. 490. **Vt.**—*State v. Reed*, 40 Vt. 603-609. **Wyo.**—*Brantley v. State*, 9 Wyo. 102-107, 61 Pac. 139.

[a] An indictment for an assault with intent to commit the crime of murder under one statute will support a conviction under another statute of an assault with intent to kill which latter is only different from the former in that it is done without premeditation. *State v. Stouderman*, 6 La. Ann. 286-289; *State v. Reed*, 40 Vt. 603-609.

[b] In Mississippi it has been held that under their statutes there is a difference between an "assault and battery with a deadly weapon, with intent to kill," and a mere "assault with intent to commit manslaughter or other felony," and hence under an indictment charging the former there could not be a conviction of the latter. *Morman v. State*, 24 Miss. 54-56.

[c] **Conviction of Attempt To Commit Voluntary Manslaughter.**—*Crockett v. State*, 125 Tenn. 131, 140 S. W. 1058; *Fuerst v. State*, 115 Tenn. 357, 89 S. W. 955; *Stevens v. State*, 91 Tenn. 726, 20 S. W. 423.

59. **La.**—*State v. Stouderman*, 6 La. Ann. 286. **Me.**—*State v. Waters*, 39 Me. 54. **N. H.**—*State v. Butman*, 42 N. H. 490.

60. **Cal.**—*People v. Congleton*, 44 Cal. 92. **Ill.**—*Beckwith v. People*, 26 Ill. 500. **Ia.**—*State v. Schele*, 52 Iowa 608, 3 N. W. 632; *State v. Graham*, 51 Iowa 72, 50 N. W. 285. **Mich.**—*People v. Wright*, 144 Mich. 586, 108 N. W. 92; *People v. Townsend*, 120 Mich. 661, 79 N. W. 901; *People v. Prague*, 72 Mich. 178, 40 N. W. 243; *People v. Sweeney*, 55 Mich. 586, 22 N. W. 50. **Nev.** *State v. Robey*, 8 Nev. 312-321. **S. D.** *State v. Kapelino*, 20 S. D. 591, 598, 108 N. W. 335. **Utah.**—*State v. McDonald*, 14 Utah 173-179, 46 Pac. 872. **Wash.**—*State v. Young*, 22 Wash. 273-274, 60 Pac. 650, *distinguishing State*

v. Ackles, 8 Wash. 462, 36 Pac. 597, holding to the contrary. See also *State v. Largent*, 9 Wash. 691, 38 Pac. 751, based on *State v. Ackles, supra*. **Wis.** *Birker v. State*, 118 Wis. 108, 112, 94 N. W. 643, *overruling State v. Yanta*, 71 Wis. 669, 38 N. W. 189, and *modifies* the case of *Kilkelly v. State*, 43 Wis. 604.

But see *Carpenter v. People*, 5 Ill. 197.

61. *People v. Wright*, 144 Mich. 586, 108 N. W. 92.

62. *State v. Wilson*, 126 Mo. App. 302, 307, 103 S. W. 110; *Bolding v. State*, 23 Tex. App. 172-175, 4 S. W. 579; *Davis v. State*, 20 Tex. App. 302.

[a] **Manner or Means Need Not Be Alleged.**—An indictment for assault with intent to murder will support a conviction of an aggravated assault in the absence of an allegation as to the manner in which or the means with which the assault was committed. *Bolding v. State*, 23 Tex. App. 172-175, 4 S. W. 579; *Davis v. State*, 20 Tex. App. 302. Compare *Lindsey v. State*, 53 Fla. 56, 43 So. 87.

63. **Ala.**—*Medley v. State*, 156 Ala. 78, 47 So. 218. **Ga.**—*Harris v. State*, 3 Ga. App. 457, 60 S. E. 127. **N. M.** *Territory v. Alarid*, 15 N. M. 165, 106 Pac. 371.

64. **Ala.**—See *Hudson v. State*, 11 Ala. App. 116, 65 So. 732. **Ariz.**—*Territory v. Evans*, 4 Ariz. 257, 36 Pac. 209; *Territory v. West*, 4 Ariz. 212, 36 Pac. 207. **Cal.**—*People v. Arnett*, 126 Cal. 680, 59 Pac. 204; *People v. Gordon*, 99 Cal. 227, 33 Pac. 901; *People v. Pape*, 66 Cal. 366, 5 Pac. 621; *People v. McNutt*, 93 Cal. 658, 29 Pac. 243; *People v. Murat*, 45 Cal. 281-284; *People v. English*, 30 Cal. 215-218. **Fla.** *Lindsey v. State*, 53 Fla. 56-65, 43 So. 87; *Pitman v. State*, 25 Fla. 648-654, 6 So. 437; *Boswell v. State*, 20 Fla. 869. **Ill.**—*Beckwith v. People*, 26 Ill. 500. **La.**—*State v. De Laney*, 28 La. Ann. 434. **Mass.**—*Com. v. Clarke*, 162 Mass. 495, 39 N. E. 280. **Nev.**—*State v. Robey*, 8 Nev. 312-321. **Okl.**—*Gatliff v. Territory*, 2 Okla. 523-522, 37

weapon,⁶⁵ an attempt to main,⁶⁶ assault and battery,⁶⁷ in case the indictment charges an actual battery,⁶⁸ simple assault,⁶⁹ or the statutory

Pac. 809. Ore.—*State v. Branton*, 49 Ore. 86, 87 Pac. 535; *State v. Kelly*, 41 Ore. 20-21, 68 Pac. 1; *State v. Lavery*, 25 Ore. 402-408, 58 Pac. 107; *State v. McLennen*, 16 Ore. 69-61, 16 Pac. 879.

[a.] In Washington.—Upon an information for assault with a deadly weapon with intent to murder, under Ball. Code, §7057, a verdict finding the defendant guilty of "assault with a deadly weapon" does not warrant a sentence for an assault with intent to inflict bodily injury under Ball. Code, §7058, but only for a simple assault, as the intent is an essential element of the offense and must be found as a fact by the jury. There is no such offense as an assault with a deadly weapon in Washington. *State v. Sander*, 22 Wash. 209-200, 73 Pac. 355.

65. Ariz.—*Mapala v. Territory*, 9 Ariz. 199, 80 Pac. 389; *Territory v. Evans*, 4 Ariz. 257, 36 Pac. 209; *Territory v. West*, 4 Ariz. 212, 36 Pac. 207. Cal.—*People v. Arnett*, 126 Cal. 680, 59 Pac. 204; *People v. Murat*, 45 Cal. 281; *People v. Canard*, 6 Cal. 562. Utah.—*State v. Jahanavich*, 146 Pac. 289.

[a.] An indictment charging the forcible entry of a house in the night time, armed with a dangerous weapon, with the intent to kill will support a conviction of everything charged omitting that the accused was armed with a dangerous weapon, such not being the fact. *State v. Morris*, 27 Ia. Ann. 480-481.

66. *People v. Defour*, 100 Cal. 150-151, 34 Pac. 619.

67. Ala.—*Turkeyville v. State*, 40 Ala. 715. Fla.—*Whitman v. State*, 28 Fla. 289, 9 So. 694. See *Warren v. State*, 9 Fla. 404. Ill.—*State v. Graham*, 51 Ill. 71, 50 N. W. 187. Ky.—*Com. v. Yarnall*, 24 Ky. L. Rep. 144, 68 S. W. 500, 1891. Mich.—*See People v. Townsend*, 120 Mich. 601, 602, 79 N. W. 901; *People v. McDonald*, 9 Mich. 150-153. Mo.—*State v. Schless*, 93 Mo. 331, 6 S. W. 244. N. H.—*State v. Lincoln*, 49 N. H. 464-470. Tenn.—*Fuerst v. State*, 133 Tenn. 237, 99 S. W. 956; *Smith v. State*, 2 Tex. 613-616; *Curran v. State*, 2 Head 357; *State v. Bowling*, 10 How. 88. Wash.—*State v. Young*, 22 Wash. 223, 90 Pac. 659; *State v. Mc-*

Cormick, 20 Wash. 94, 54 Pac. 764; *State v. Michel*, 20 Wash. 162, 54 Pac. 995; *State v. Ackles*, 8 Wash. 462-465, 36 Pac. 597; *Clarke v. Territory*, 1 Wash. Ter. 68. Wis.—*State v. Felner*, 19 Wis. 561.

68. Ark.—*Jones v. State*, 100 Ark. 195, 139 S. W. 1126; *Sweedan v. State*, 19 Ark. 205-213. Ga.—*Goldin v. State*, 104 Ga. 549-551, 30 S. E. 749; *Bard v. State*, 55 Ga. 319. Ind.—*See State v. Throckmorton*, 53 Ind. 354-357. Ia.—*State v. Graham*, 51 Iowa 72, 50 N. W. 285. Kan.—*State v. Schreiber*, 41 Kan. 307-309, 21 Pac. 263. Miss.—*See Brown v. State*, 103 Miss. 664, 60 So. 727, commenting on *Hastings v. State*, 59 Miss. 541. See *Rucker v. State*, 24 So. 311. Utah.—*People v. Chalmers*, 5 Utah 201-203, 14 Pac. 131. Wash.—*State v. Dolan*, 17 Wash. 499-512, 50 Pac. 472. Wis.—*Kilkelly v. State*, 43 Wis. 604-608; *McKinney v. State*, 25 Wis. 378-383. Wyo.—*See Brantley v. State*, 9 Wyo. 102-107, 61 Pac. 139.

[a.] A conviction of assault and battery upon an indictment for assault with intent to murder which does not charge any striking, beating or wounding cannot be sustained if attacked (1) at the proper time and in the proper manner (*Goldin v. State*, 104 Ga. 549-551, 30 S. E. 749); (2) if not attacked the conviction is good. *Malone v. State*, 77 Ga. 767; *Trowbridge v. State*, 74 Ga. 431.

69. Ala.—*Sankey v. State*, 128 Ala. 51, 29 So. 578; *Mooney v. State*, 33 Ala. 419. Ark.—*Jones v. State*, 100 Ark. 195, 139 S. W. 1126. Cal.—*People v. Demasters*, 105 Cal. 669-673, 39 Pac. 25. Del.—*State v. Moore*, 1 Boyce (Del.) 142, 74 Atl. 1112. Ga.—*Wilson v. State*, 53 Ga. 205. Ill.—*Carpenter v. People*, 5 Ill. 197-198. Ind.—*State v. Throckmorton*, 53 Ind. 354. Ia.—*State v. Graham*, 51 Iowa 72-75, 50 N. W. 285; *State v. White*, 45 Iowa 325-327; *State v. Jarvis*, 21 Iowa 44-46; *State v. Shepard*, 19 Iowa 126-130. Kan.—*State v. Triplett*, 52 Kan. 678, 35 Pac. 815; *Guy v. State*, 1 Kan. 448-453. Mo.—*State v. Phinney*, 42 Me. 384-387. Mass.—*Com. v. Lang*, 10 Gray 11. Mich.—*People v. McDonald*, 9 Mich. 150. Minn.—*Boyd v. State*, 1 Minn. 321. Miss.—*Cip-*

offense of shooting at another,⁷⁰ pointing a weapon at another,⁷¹ stabbing,⁷² or felonious wounding.⁷³ But a charge of assault with intent to commit murder will not sustain a conviction of the statutory offense of "wounding, maiming and disfiguring,"⁷⁴ or an attempt to commit an assault.⁷⁵

(VII.) Assault With Intent To Ravish. — Assault with intent to ravish includes and will support a conviction of an assault,⁷⁶ unless the prosecutrix, although under age, consented,⁷⁷ assault and battery,⁷⁸

son v. State, 38 Miss. 295-312. **Mo.** State v. Brent, 100 Mo. 531, 13 S. W. 874; State v. Rambo, 95 Mo. 462, 8 S. W. 365; State v. Wilson, 126 Mo. App. 302, 307, 103 S. W. 110; State v. Grimes, 29 Mo. App. 470. **Mont.**—Territory v. Milroy, 8 Mont. 361, 364, 20 Pac. 650; Territory v. Dooley, 4 Mont. 295-298, 1 Pac. 747. **N. H.**—State v. Butman, 42 N. H. 490-493. **N. C.**—State v. Green, 119 N. C. 899, 26 S. E. 112. **Ohio.**—Vanvalkenburg v. State, 11 Ohio 404, 407. **Pa.**—Hunter v. Com., 79 Pa. 503-507, 21 Am. Rep. 83; Shouse v. Com., 5 Pa. 83-86. **Tenn.**—Fuerst v. State, 115 Tenn. 357, 89 S. W. 955; Stevens v. State, 91 Tenn. 726, 20 S. W. 423; Turley v. State, 2 Heisk 11-12; Carter v. State, 6 Coldw. 537; Carden v. State, 3 Head 267. **Vt.**—State v. Cox, 2 Aik. 181. **Wash.**—State v. Snider, 32 Wash. 299-306, 73 Pac. 355; State v. Young, 22 Wash. 273, 60 Pac. 650; State v. McCormick, 20 Wash. 94, 54 Pac. 764; State v. Dolan, 17 Wash. 499-512, 50 Pac. 472; State v. Ackles, 8 Wash. 462-465, 36 Pac. 597. **Wis.**—Kilkelly v. State, 43 Wis. 604-608. **Wyo.**—Brantley v. State, 9 Wyo. 102-107, 61 Pac. 139. **Can.**—See Queen v. Magee, 7 N. Bruns. 14-17.

But see Harris v. State, 3 Ga. App. 457, 60 S. E. 127, a conviction of a bare assault could not be sustained where the evidence showed a completed battery.

70. Watson v. State, 116 Ga. 697, 43 S. E. 32, 21 L. R. A. (N. S.) 1; Gaines v. State, 108 Ga. 772, 33 S. E. 632; Jenkins v. State, 92 Ga. 470, 17 S. E. 693; Wostenholms v. State, 70 Ga. 720; Moody v. State, 54 Ga. 600; Rhinhardt v. State, 7 Ga. App. 425, 66 S. E. 982.

71. Jenkins v. State, 92 Ga. 470, 17 S. E. 693; Livingston v. State, 6 Ga. App. 298, 64 S. E. 709.

72. Malone v. State, 77 Ga. 767.

73. State v. Groves, 194 Mo. 452, 92 S. W. 631.

74. State v. Melton, 102 Mo. 659, 687, 15 S. W. 139.

75. Wilson v. State, 53 Ga. 205. But see White v. State, 107 Ala. 132, 18 So. 226; Stevens v. State, 91 Tenn. 726, 20 S. W. 423.

76. Ala.—Pitman v. State, 148 Ala. 612, 42 So. 993; Payne v. State, 148 Ala. 609, 42 So. 988. Cal.—People v. Bradbury, 151 Cal. 675, 91 Pac. 497. See People v. Demasters, 105 Cal. 669, 39 Pac. 35; People v. Green, 1 Cal. App. 432, 82 Pac. 544. Ga.—Duggan v. State, 116 Ga. 846, 43 S. E. 253. Ia.—State v. Hutchinson, 95 Iowa 566, 64 N. W. 610; State v. Kyno, 86 Iowa 616, 53 N. W. 420; State v. McDevitt, 69 Iowa 549, 553, 29 N. W. 459; State v. Walters, 45 Iowa 389. La.—State v. Fontenette, 38 La. Ann. 61. Mass.—Com. v. Thompson, 116 Mass. 346-348; Com. v. Fischblatt, 4 Met. 354-356. Mich.—People v. McDonald, 9 Mich. 150. Minn.—State v. Vadnais, 21 Minn. 382. Mo.—State v. White, 52 Mo. App. 285. N. Y.—White v. People, 32 N. Y. 465. N. C.—State v. Perkins, 82 N. C. 681. Tex.—Caddell v. State (Tex. Crim.), 72 S. W. 1015; Brown v. State, 7 Tex. App. 569.

[a] Where an indictment charged the defendant with an assault, and an intent to abuse and carnally know a female child, it was held in Rex v. Dawson, 3 Stark. (Eng.) 62, that he might be convicted of an assault to abuse her simply, as the averment of such intention is divisible. Shouse v. Com., 5 Pa. 83-86.

77. People v. Akin (Cal. App.), 143 Pac. 795; People v. Gomez, 118 Cal. 326, 50 Pac. 427; Rex v. McIntyre, 3 Argus L. Rep. 85, charge of indecently assaulting child under age.

78. Ala.—Pitman v. State, 148 Ala. 612, 42 So. 993; Payne v. State, 148 Ala. 609, 42 So. 988. Ga.—Mitchell v.

if the indictment contains an allegation of battery,⁷⁹ an aggravated assault,⁸⁰ or of taking indecent liberties with the female,⁸¹ but not an attempt to commit an assault with intent to commit rape.⁸²

(VIII.) **Assault With Intent To Rob.**—One indicted for assault with intent to rob may be convicted of assault and battery,⁸³ or simple assault.⁸⁴

f. *Assault and Battery.*—In like manner a charge of an assault and battery will sustain a conviction of assault alone.⁸⁵

A charge of aggravated assault and battery will support a conviction of a simple assault and battery,⁸⁶ or an assault.⁸⁷ A charge of assault and

State, 6 Ga. App. 554, 65 S. E. 326. **Ia.**—State v. Hutchinson, 95 Iowa 566, 64 N. W. 610; State v. Kyne, 86 Iowa 616, 53 N. W. 420; State v. Walters, 45 Iowa 389-390. **La.**—State v. Fontenette, 38 La. Ann. 61. **Tex.**—Brown v. State, 7 Tex. App. 569.

[a] An assault and battery is necessarily involved in the crime of taking indecent liberties with a female under fourteen. *People v. Sanford*, 149 Mich. 266, 112 N. W. 910.

79. **Ga.**—Goldin v. State, 104 Ga. 549-551, 30 S. E. 749. But see *Bell v. State*, 103 Ga. 397-401, 30 S. E. 294. **Ia.**—State v. Woodworth, 150 N. W. 25; State v. Johnson, 133 Iowa 38, 110 N. W. 170; State v. Miller, 124 Iowa 429, 433, 100 N. W. 334; State v. Desmond, 109 Iowa 72, 80, 80 N. W. 214; State v. McAvoy, 73 Iowa 557, 35 N. W. 630; State v. McDevitt, 69 Iowa 549, 553, 29 N. W. 459. **Mich.**—*People v. Sanford*, 149 Mich. 266, 112 N. W. 910.

[a] Where the indictment charges an assault with intent to rape and also actual carnal abuse then there may be a conviction of assault and battery or of simple assault. *State v. Hutchinson*, 95 Iowa 566, 64 N. W. 610.

[b] **Allegation of Violence.**—To justify a conviction of assault and battery under an indictment charging assault with intent to rape it must be averred that the attempt was accompanied with actual violence. *State v. Desmond*, 109 Iowa 72, 80 N. W. 214.

80. *Brown v. State*, 7 Tex. App. 569.

81. *State v. West*, 39 Minn. 321, 40 N. W. 249.

82. There is no such offense as an attempt to commit an assault with intent to rape. *Brown v. State*, 7 Tex. App. 569.

83. **Ky.**—*Barnard v. Com.*, 94 Ky. 285, 22 S. W. 219. **Mass.**—*Com. v. Crowley*, 167 Mass. 434-442, 45 N. E. 766. See *Com. v. Holmes*, 165 Mass. 457, 43 N. E. 189. **Ohio.**—*Hanson v. State*, 43 Ohio St. 376, 1 N. E. 136; *Howard v. State*, 25 Ohio St. 399.

84. **Cal.**—*People v. Demasters*, 105 Cal. 669, 39 Pac. 35. **Ky.**—*Dickerson v. Com.*, 2 Bush 1. **Mass.**—See also *Com. v. Crowley*, 167 Mass. 434, 45 N. E. 766. **Ohio.**—*Howard v. State*, 25 Ohio St. 399. **Tex.**—*Foreman v. State* (Tex. Crim.), 57 S. W. 843.

85. **Ga.**—*Harris v. State*, 3 Ga. App. 457, 60 S. E. 127. **Ind.**—*Siebert v. State*, 95 Ind. 471-474; *Dickinson v. State*, 70 Ind. 247-251. **Kan.**—*State v. Brechbill*, 10 Kan. App. 575, 62 Pac. 251. **Mich.**—*People v. Haley*, 48 Mich. 495, 12 N. W. 671. **Pa.**—*Hunter v. Com.*, 79 Pa. 503-506, 21 Am. Rep. 83. **Tenn.**—*Smith v. State*, 2 Lea 614-620.

86. **Dak.**—*Territory v. Conrad*, 1 Dak. 348, 46 N. W. 605; *People v. Odell*, 1 Dak. 197, 46 N. W. 601. **Ky.**—*Parrott v. Com.*, 20 Ky. L. Rep. 761-764, 47 S. W. 452. **N. D.**—*State v. Climie*, 12 N. D. 33, 94 N. W. 574; *State v. Johnson*, 3 N. D. 150-154, 54 N. W. 547. **Ohio.**—*Barber v. State*, 39 Ohio St. 660; *Heller v. State*, 23 Ohio St. 582. **S. C.**—*State v. Knox*, 98 S. C. 114, 82 S. E. 278. **Va.**—*Montgomery v. Com.*, 98 Va. 840-843, 36 S. E. 371; *Canada v. Com.*, 22 Gratt. 899-905. **Wash.**—*State v. Klein*, 19 Wash. 368, 53 Pac. 364; *Clark v. Territory*, 1 Wash. Ter. 68.

[a] An indictment for riotous assault and battery will sustain a conviction of assault and battery. *Hunter v. Com.*, 79 Pa. 503-506, 21 Am. Rep. 83; *Shouse v. Com.*, 5 Pa. 83-86.

87. **Dak.**—*Territory v. Conrad*, 1

battery with intent to commit murder will sustain a conviction of simple assault,⁸⁸ assault and battery,⁸⁹ assault with intent to commit murder,⁹⁰ or voluntary manslaughter.⁹¹ And so a charge of assault and battery with intent to kill will justify a conviction of aggravated assault.⁹² A charge of attempt to provoke an assault and battery will sustain a conviction of an attempt to provoke an assault.⁹³

g. Attempts.—A conviction of an attempt may ordinarily be had under an indictment charging the completed offense.⁹⁴ This general rule has been applied in numerous classes of offenses, as in the case of a charge of adultery,⁹⁵ arson,⁹⁶ burglary,⁹⁷ embezzlement,⁹⁸ enticing away of laborers,⁹⁹ escape,¹ illegal voting,² incest,³ larceny,⁴ mur-

Dak. 348, 46 N. W. 605; *People v. Odell*, 1 Dak. 197, 46 N. W. 601. **Del.** See *State v. Dennis*, 2 Marv. 433, 43 Atl. 261. **Mich.**—*People v. Warner*, 53 Mich. 78, 18 N. W. 568. **Tex.**—*Jay v. State*, 41 Tex. Crim. 451, 55 S. W. 355.

88. Ind.—*Booher v. State*, 156 Ind. 435, 60 N. E. 156; *State v. Fisher*, 103 Ind. 530, 3 N. E. 379; *Behymer v. State*, 95 Ind. 140; *State v. Throckmorton*, 53 Ind. 354; *Gillespie v. State*, 9 Ind. 380. **Kan.**—*State v. Cooper*, 31 Kan. 505, 3 Pac. 429. **Miss.**—*Wood v. State*, 64 Miss. 761, 2 So. 247; *Bedell v. State*, 50 Miss. 492; *Gipson v. State*, 38 Miss. 295.

89. Ind.—*Booher v. State*, 156 Ind. 435-448, 60 N. E. 156; *State v. Fisher*, 103 Ind. 530-533, 3 N. E. 379; *Behymer v. State*, 95 Ind. 140; *State v. Throckmorton*, 53 Ind. 354-357; *Gillespie v. State*, 9 Ind. 380-385. **Kan.**—*State v. Cooper*, 31 Kan. 505, 3 Pac. 429. **Miss.**—*Wood v. State*, 64 Miss. 761-775, 2 So. 247; *Bedell v. State*, 50 Miss. 492; *Gipson v. State*, 38 Miss. 295-312.

90. Keeling v. State, 107 Ind. 563, 8 N. E. 559.

91. Booher v. State, 156 Ind. 435-448, 60 N. E. 156; *State v. Fisher*, 103 Ind. 530-533, 3 N. E. 379; *Behymer v. State*, 95 Ind. 140; *State v. Throckmorton*, 53 Ind. 354-357; *Gillespie v. State*, 9 Ind. 380-385. But see *Morman v. State*, 24 Miss. 54.

92. State v. Maloney, 7 N. D. 119, 72 N. W. 927.

93. Marshall v. State, 123 Ind. 128, 23 N. E. 1141.

94. See supra, XIII, A, 2; and see also the specific crimes under XIII, A, 3.

95. State v. Schwarzbach, 84 N. J.

L. 268, 86 Atl. 423. See *supra*, XIII, A, 3, b.

96. Ala.—*Benbow v. State*, 128 Ala. 1, 29 So. 553. **Ky.**—*Young v. Com.*, 12 Bush 243. **N. Y.**—*People v. Didieu*, 17 How. Pr. 224-226.

See *supra*, XIII, A, 3, d.

[a] **A conviction of an attempt to commit arson in any degree proper.** *People v. Long*, 2 Edm. Sel. Cas. (N. Y.) 129.

[b] **Arson in the third degree is not embraced in the crime of arson and a conviction of an attempt to commit arson in the third degree is not permissible.** *Benbow v. State*, 128 Ala. 1-4, 29 So. 553.

97. People v. Lowen, 109 Cal. 381, 42 Pac. 32; *Donaldson v. State*, 10 Ohio C. C. 613. See *infra*, XIII, A, 3, i.

[a] **Attempt To Commit Larceny.** Larceny is not included in the crime of burglary and under an information charging burglary the accused cannot be convicted of an attempt to commit larceny. *People v. Curtis*, 76 Cal. 57, 17 Pac. 941.

98. State v. Hodges, 45 Kan. 389-394, 26 Pac. 676. See *infra*, XIII, A, 3, k.

99. Burke v. State, 74 Ala. 399.

1. Ex parte Cook, 13 Cal. App. 399, 110 Pac. 352; *In re Myrtle*, 2 Cal. App. 383, 84 Pac. 335.

2. State v. Ryan, 60 Mo. App. 487.

3. State v. Winslow, 30 Utah 403-409, 85 Pac. 433.

4. Ala.—*Edmonds v. State*, 70 Ala. 8-10, 45 Am. Rep. 67; *Wolf v. State*, 41 Ala. 412. **Cal.**—*People v. Vaughn* (Cal. App.), 117 Pac. 116, grand larceny by trick. **Ga.**—*Lowe v. State*, 112 Ga. 189, 37 S. E. 401; *Clifford v. State*, 10 Ga. 422. **Tenn.**—*De Lacy v. State*, 8

der,⁵ rape,⁶ robbery,⁷ sodomy,⁸ stabbing,⁹ or a charge of white slavery.¹⁰

Baxt. 461. **Tex.**—Bell *v.* State, 70 Tex. Crim. 466, 156 S. W. 1194 (larceny from person, a conviction of attempt to commit larceny); Stapp *v.* State, 3 Tex. App. 138-145. See note under Bell *v.* State, *supra*. **Vt.**—St., §4942.

See *infra*, XIII, A, 3, o.

[a] **Even Though an Attempt Is a Distinct Offense.**—De Lacy *v.* State, 8 Baxt. (Tenn.) 401.

5. People *v.* Schleiman, 197 N. Y. 283, 90 N. E. 950, 27 L. R. A. (N. S.) 1075; Stapp *v.* State, 3 Tex. App. 138. See *infra*, XIII, A, 3, n.

[a] **Conviction of Attempt To Commit Manslaughter.**—People *v.* Schleiman, 197 N. Y. 383-385, 90 N. E. 950, 27 L. R. A. (N. S.) 1075; Stapp *v.* State, 3 Tex. App. 138-146.

6. **Ala.**—Hutto *v.* State, 169 Ala. 19, 53 So. 809; Lewis *v.* State, 30 Ala. 53, 68 Am. Dec. 113. **Cal.**—People *v.* Horn, 144 Pac. 641; People *v.* Akin (Cal. App.), 143 Pac. 795; People *v.* Ah Lung, 2-Cal. App. 278-279, 83 Pac. 296. **Conn.**—State *v.* Parmelee, 9 Conn. 259; State *v.* Shepherd, 7 Conn. 54. **Ga.**—Stephen *v.* State, 11 Ga. 225. **Ia.**—State *v.* McLaughlin, 44 Iowa 82. **Kan.**—State *v.* Frazier, 53 Kan. 87, 36 Pac. 58, 42 Am. St. Rep. 274; *In re* Lloyd, 51 Kan. 561, 33 Pac. 307; State *v.* Decker, 36 Kan. 717, 14 Pac. 283. **Ky.**—Nider *v.* Com., 140 Ky. 684, 131 S. W. 1024, 1913E, Ann. Cas. 1246; Begley *v.* Com., 32 Ky. L. Rep. 890, 107 S. W. 243. **Minn.**—State *v.* Masteller, 45 Minn. 128, 47 N. W. 541. **Miss.**—Horton *v.* State, 84 Miss. 473, 36 So. 1633. **Neb.**—Evers *v.* State, 84 Neb. 708, 121 N. W. 1005. **Nev.**—State *v.* Pickett, 11 Nev. 255-259, 21 Am. Rep. 754. **Ohio.**—State *v.* Baltimore, 107 N. E. 334, attempted rape with her consent. **Pa.**—Com. *v.* George, 12 Pa. Super. 1-7. **Tex.**—Brown *v.* State, 7 Tex. App. 569. **Va.**—Cates *v.* Com., 111 Va. 837-841, 69 S. E. 520. See *Mingo v. Com.*, 85 Va. 638, 8 S. E. 474; Givens *v.* Com., 29 Gratt. 830. **Eng.**—Reg. *v.* Hapgood, 11 Cox C. C. (Eng.) 471.

[a] **Aiding Attempt.**—H was indicted for rape and W for aiding and abetting. The court held a conviction was proper of H for attempt to commit a rape and of W of aiding H in

the attempt. Reg. *v.* Hapgood, 11 Cox C. C. (Eng.) 471.

[b] **Conviction of Simple Assault.** **Ala.**—Hutto *v.* State, 169 Ala. 19, 53 So. 809; Kirby *v.* State, 5 Ala. App. 128, 59 So. 374. **Ia.**—State *v.* Trusty, 118 Iowa 498, 92 N. W. 677; State *v.* Wolf, 112 Iowa 458, 84 N. W. 536; State *v.* Peterson, 110 Iowa 647, 648, 82 N. W. 329; State *v.* Hutchinson, 95 Iowa 566, 64 N. W. 610; State *v.* Pennell, 56 Iowa 29, 8 N. W. 686; State *v.* Vinsant, 49 Iowa 241; State *v.* McLaughlin, 44 Iowa 82, 87; State *v.* Peters, 56 Iowa 263, 9 N. W. 219. **Mass.**—Com. *v.* Dean, 109 Mass. 349-351; Com. *v.* Fischblatt, 4 Met. 354-356. **Mich.**—People *v.* Courier, 79 Mich. 366, 44 N. W. 571; Hall *v.* People, 47 Mich. 636-638, 11 N. W. 414. **N. J.**—Farrell *v.* State, 54 N. J. L. 416-419, 24 Atl. 723; State *v.* Johnson, 30 N. J. L. 185. **N. C.**—State *v.* Lance, 166 N. C. 411, 81 S. E. 1092. **Wis.**—Murphy *v.* State, 108 Wis. 111, 83 N. W. 1112. **Can.**—Reg. *v.* Edwards, 29 Ont. 451-454.

See *infra*, XIII, A, 3, t.

[a] **Adding a count charging assault and battery with intent to commit rape is not necessary to authorize conviction of an attempt under an indictment containing a single count charging rape.** Com. *v.* George, 12 Pa. Super. 1-7.

7. State *v.* Franklin, 69 Kan. 798, 77 Pac. 588.

[a] **Conviction of Simple Assault.** **Ala.**—Rambo *v.* State, 134 Ala. 71, 32 So. 650; Cook *v.* State, 134 Ala. 137, 32 So. 696. **Ohio.**—Howard *v.* State, 25 Ohio St. 399. **Pa.**—See Com. *v.* Stiver, 1 Pa. Co. Ct. 526. **Tex.**—Foreman *v.* State (Tex. Crim.), 57 S. W. 843. **Va.**—Hardy *v.* Com., 17 Gratt. 592-599. **W. Va.**—State *v.* Howes, 26 W. Va. 110-114.

See *infra*, XIII, A, 3, y.

8. **Cal.**—People *v.* Oates, 142 Cal. 12, 75 Pac. 337; People *v.* Swist, 136 Cal. 520, 69 Pac. 223. **Mo.**—State *v.* Frank, 103 Mo. 120-122, 15 S. W. 330. **N. C.**—State *v.* Savage, 161 N. C. 245, 76 S. E. 238. **Wash.**—State *v.* Romans, 21 Wash. 284, 57 Pac. 819.

9. Ward *v.* State, 56 Ga. 408. See *infra*, XIII, A, 3, aa.

10. State *v.* Jankowski, 82 N. J. L. 229, 82 Atl. 309.

h. *Bandolerismo or Brigandage*.—An indictment charging bandolerismo will sustain a conviction of robbery with homicide.¹¹

i. *Burglary*.—Burglary may be committed with or without larceny. If the averments of an indictment or information for burglary include a larceny, the defendant may be convicted of larceny alone;¹² but there can be no conviction for larceny,¹³ or of receiving stolen

11. In *United States v. De Guzman*, 19 Phil. Isl. 359-362, Moreland, J., says: "The crime of *bandolerismo* as set out in the above information, includes the crime of robbery with homicide. We have repeatedly held that an accused may, the proofs warranting it, be convicted of any crime described and charged by the facts set out in the information irrespective of the characterization of the crime made by the prosecuting officer."

12. **U. S.**—*United States v. Read*, 2 Cranch C. C. 198, 27 Fed. Cas. No. 16,126; *United States v. Dixon*, 1 Cranch C. C. 414, 25 Fed. Cas. No. 14,968.

Ala.—*Robinson v. State*, 84 Ala. 434, 4 So. 774; *Borum v. State*, 66 Ala. 468; *Bell v. State*, 48 Ala. 684, 17 Am. Rep. 40. **Ark.**—*Monk v. State*, 105 Ark. 121, 150 S. W. 133. **Ga.**—*Ray v. State*, 121 Ga. 189, 48 S. E. 903; *Green v. State*, 119 Ga. 120, 45 S. E. 990; *Barlow v. State*, 77 Ga. 448; *Lockhart v. State*, 3 Ga. App. 480, 60 S. E. 215; *Hutchins v. State*, 3 Ga. App. 300, 59 S. E. 848.

Ill.—See *Ruth v. People*, 99 Ill. 185.

Kan.—*State v. Brandon*, 7 Kan. 106.

La.—*State v. Lewis*, 129 La. 800, 56 So. 893; *State v. Morgan*, 39 La. Ann. 214, 1 So. 456. But see *State v. Robertson*, 48 La. Ann. 1026, 20 So. 167; *State v. Ford*, 30 La. Ann. 311. **Mass.**—*Com. v. Lowery*, 149 Mass. 67, 20 N. E. 697; *Com. v. Hope*, 22 Pick. 1-7. **Mo.**—*State v. Woods*, 137 Mo. 6, 38 S. W. 722; *State v. Kelsoe*, 76 Mo. 505; *State v. Davis*, 73 Mo. 129; *State v. Alexander*, 56 Mo. 131. **Neb.**—*Lawhead v. State*, 46 Neb. 607-609, 65 N. W. 779; *Aiken v. State*, 41 Neb. 263, 59 N. W. 888.

N. H.—*State v. Webster*, 39 N. H. 96-98; *State v. Nelson*, 8 N. H. 163-165. **N. Y.**—*White v. People*, 32 N. Y. 465; *Dedieu v. People*, 22 N. Y. 178-184; *Haskins v. People*, 16 N. Y. 344, 348; *People v. Jackson*, 3 Hill 92. **N. C.**—*State v. Fleming*, 107 N. C. 905-909, 12 S. E. 131; *State v. Grisham*, 2 N. C. 13. **Ohio.**—*Holtz v. State*, 30 Ohio St.

486, 490. **Pa.**—*Hunter v. Com.*, 79 Pa. 503-506; *Hollister v. Com.*, 60 Pa. 103-106. See *Becker v. Com.*, 9 Atl. 510; *Dinkey v. Com.*, 17 Pa. 126-129; *Shouse v. Com.*, 5 Pa. 83-86. **Tenn.**—*Cronan v. State*, 113 Tenn. 539-542, 82 S. W. 477; *Davis v. State*, 3 Coldw. 77-82. **Tex.**—*Shepherd v. State*, 42 Tex. 501. **Va.**—*Clarke v. Com.*, 25 Gratt. 908; *Vaughan v. Com.*, 17 Gratt. 576. **W. Va.**—*State v. Reece*, 27 W. Va. 375. **Wyo.**—*Ackerman v. State*, 7 Wyo. 504, 54 Pac. 228.

[a] Under the Tennessee statutes, the word "burglary" is treated as a generic term covering several offenses falling under §§6535-6538 of Shannon's Code, and hence an indictment for burglary will support a conviction of such of those offenses as the evidence proves. *Cronan v. State*, 113 Tenn. 539-543, 82 S. W. 477. See *Davis v. State*, 3 Coldw. 77-83.

[b] An indictment for burglary will support a conviction of every species of housebreaking and of theft from a house. *Stapp v. State*, 3 Tex. App. 138-145.

[c] A conviction of larceny from the house may be had if the larceny is sufficiently charged. **Ga.**—*Brown v. State*, 90 Ga. 454-456, 16 S. E. 204; *Polite v. State*, 78 Ga. 347; *Williams v. State*, 60 Ga. 88. **Ill.**—*Yoe v. People*, 49 Ill. 410-414. **La.**—See *State v. Lewis*, 129 La. 800-810, 56 So. 893. **Miss.**—*Brown v. State*, 103 Miss. 664, 60 So. 727; *Roberts v. State*, 55 Miss. 421. **Mo.**—*State v. Alexander*, 56 Mo. 131.

13. **Ala.**—See *Bell v. State*, 48 Ala. 684, 17 Am. Rep. 40. **Cal.**—*People v. Garnett*, 29 Cal. 622. **Ia.**—*State v. Leonard*, 135 Iowa 371, 112 N. W. 784. See *State v. Shaffer*, 59 Iowa 290, 13 N. W. 306; *State v. Ridley*, 48 Iowa 370. **Ky.**—*Thomas v. Com.*, 150 Ky. 374, 150 S. W. 376. **La.**—*State v. Ford*, 30 La. Ann. 311. **Minn.**—*State v. Hackett*, 47 Minn. 425, 59 N. W. 472, 28 Am. St. Rep. 380. **Mo.**—See *State v. Moore*, 117 Mo. 395, 22 S. W. 1086.

goods,¹⁴ in the absence of averments charging it. A conviction of the offense of entering a dwelling in the night time without breaking¹⁵ or of the felonious breaking and entering,¹⁶ or the non-burglary breaking into a dwelling-house,¹⁷ of theft alone,¹⁸ or of entering a car with intent to steal,¹⁹ or of any lower degree of burglary lower than that charged²⁰ may be had on an indictment charging burglary, but a conviction of the statutory offense of breaking and entering buildings in the daytime is improper.²¹ An indictment charging the breaking and entering of a railroad car with intent to steal will support a conviction of trespass,²² or of larceny.²³ But on an indictment for

[a] In *Brown v. State*, 103 Miss. 601, 60 So. 727, the court says, in substance, in the indictment "in the charge of burglary there was only a charge that the breaking and entering was with the intent to steal, and not with stealing," hence when the accused "was put on trial, there was not before the court any charge against him for larceny. The charge of burglary does not necessarily include larceny. It cannot be stated that the essential ingredients of larceny were in the affidavit in this case. The affidavit did not advise appellant sufficiently of the accusation against him. He should not have been convicted of petit larceny on this plain charge of burglary."

[b] Under an indictment charging burglary and petit larceny there can not be a conviction of burglary and grand larceny. *McCullough v. State*, 132 Ind. 427, 31 N. E. 1116.

14. *Ray v. State*, 126 Ala. 9, 28 So. 634.

15. *State v. Maxwell*, 42 Iowa 208-213.

16. *Ky.—Com. v. Hurd*, 109 Ky. 8, 58 S. W. 369. *Neb.—Harlin v. State*, 92 Neb. 298, 138 N. W. 146, *distinguishing In re McVey*, 50 Neb. 481, 70 N. W. 51, owing to a change in statute in the interim. *Tenn.—Cronan v. State*, 113 Tenn. 329-344, 82 S. W. 477.

[c] An indictment for burglary in the third degree will sustain a conviction of entering a building with the intent to commit a felony, larceny or malicious mischief. *People v. Miller*, 143 App. Div. 251, 125 N. Y. Supp. 549.

17. *State v. Fleming*, 107 N. C. 905-909, 19 S. E. 131.

18. *La.—State v. Stouderman*, 6 La. Ann. 286-289. **R. I.**—*State v. Colter*, 6

R. I. 195. **Tex.**—*Dunham v. State*, 9 Tex. App. 330; *Stapp v. State*, 3 Tex. App. 138-145. **Eng.**—2 Hale P. C. 302.

19. *State v. Tough*, 12 N. D. 425, 96 N. W. 1025.

20. **Ariz.**—*Vincent v. State*, 145 Pac. 241. **Cal.**—*People v. Lowen*, 109 Cal. 381, 42 Pac. 32; *People v. Barnhart*, 59 Cal. 381-383; *People v. Jefferson*, 52 Cal. 452. **Kan.**—*State v. Behee*, 17 Kan. 402-405. **La.**—*State v. Miller*, 45 La. Ann. 1170, 14 So. 136. **Me.**—*State v. Hood*, 51 Me. 363. **Mo.**—*Contra, State v. Alexander*, 56 Mo. 131. **N. Y.**—*Sullivan v. People*, 27 Hun 35-37. **N. C.**—*State v. Fleming*, 107 N. C. 905-909, 12 S. E. 131. **N. D.**—*State v. Campbell*, 7 N. D. 58-68, 72 N. W. 935.

[a] Unless the definition of the lower degree excludes the higher and the averments of the latter would not therefore cover the former. *State v. Alexander*, 56 Mo. 131.

[b] A verdict of attempt to commit burglary in the second degree, on a charge of first degree burglary, will not be reversed, because the defendant is not injured. *People v. Lowen*, 109 Cal. 381, 42 Pac. 32.

[c] But a charge of burglary in the nighttime will not sustain a conviction of burglary in the day time. *State v. Copenhaver*, 35 Mont. 342-344, 89 Pac. 61. See *Bromley v. People*, 150 Ill. 297-302, 37 N. E. 209. But see cases *supra*, this note.

21. **Kan.**—*State v. Behee*, 17 Kan. 402, 405. **Neb.**—*In re McVey*, 50 Neb. 481, 70 N. W. 51. **Tex.**—See *Bravo v. State*, 20 Tex. App. 188.

22. *Price v. Com.*, 129 Ky. 716, 112 S. W. 855.

23. *State v. Shapiro*, 29 R. I. 133, 69 Atl. 340.

burglary one cannot be convicted of an assault with intent to rape even though it is charged the crime was committed with intent to commit rape.²⁴

j. *Duelling*.—On a charge of challenging to a duel there may be a conviction for an affray.²⁵

k. *Embezzlement*.—An indictment charging embezzlement will not sustain a conviction of larceny,²⁶ except by virtue of statute.²⁷ Nor can a verdict convicting for a breach of trust be sustained under a charge of embezzlement.²⁸ But a charge of a particular sort of embezzlement will support a conviction of any kind of embezzlement included in the charge.²⁹

l. *Forgery*.—Forgery is not included in the offense of uttering, hence there may be no conviction of forgery on an indictment for uttering,³⁰ and vice versa.³¹ But an indictment for forgery will sustain a conviction of the common-law offense of a cheat.³² But an indictment for one degree will not sustain a conviction of another, though lower, degree, where the degrees are so defined as to make the lower a distinct offense not included in the higher degree.³³

m. *Gambling*.—Under a charge of keeping a gambling device one may be convicted of betting.³⁴

n. *Homicide*.—A person charged with murder in the first degree may be convicted of any lower grade or degree of murder.³⁵ So also

24. *State v. Ryan*, 15 Ore. 572, 16 Pac. 417.

25. *State v. Fritz*, 133 N. C. 725, 45 S. E. 957.

26. *Mass.*—*Com. v. Kelley*, 184 Mass. 320, 68 N. E. 346; *Com. v. King*, 9 Cush. 284. *Mo.*—*State v. Burks*, 159 Mo. 568, 574, 60 S. W. 1100, *overruling State v. Broderick*, 70 Mo. 622. *Wash.* *State v. Weydeman*, 3 Wash. 399, 28 Pac. 749.

Conviction of embezzlement on charge of larceny, see *infra*, XIII, A, 3, o.

27. *State v. Poland*, 33 La. Ann. 1161.

[a] Under the statute upon an indictment for embezzlement the accused may be found guilty of embezzlement and then "on conviction" he is to be adjudged guilty of larceny and to be punished in the same manner as if he had stolen the articles which he has embezzled. *State v. Broderick*, 7 Mo. App. 19, 21.

28. *State v. Reonnals*, 14 La. 278.

29. An information charging embezzlement as the agent, servant, employe and bailee will support a conviction of the lesser crime of embezzling as bailee only. *State v. Lille*, 21 Kan. 728, 729.

30. *State v. Bigelow*, 101 Iowa 430, 70 N. W. 600; *Hooper v. State*, 30 Tex. App. 412, 17 S. W. 1066, 28 Am. St. Rep. 926.

31. *King v. State*, 43 Fla. 211, 31 So. 254; *Hooper v. State*, 30 Tex. App. 412, 17 S. W. 1066, 28 Am. St. Rep. 926.

32. *State v. McLeran*, 1 Aik. (Vt.) 311, 313.

33. *State v. Willard*, 228 Mo. 328, 128 S. W. 749. See *supra*, XIII, A, 1.

34. *State v. Way*, 76 Kan. 928, 93 Pac. 159.

35. *Ala.*—*Gregory v. State*, 148 Ala. 566, 42 So. 829; *Smith v. State*, 142 Ala. 14-29, 39 So. 329; *Stoball v. State*, 116 Ala. 454-460, 23 So. 162; *Hosey v. State*, 5 So. 549; *Henry v. State*, 33 Ala. 389-401; *Rector v. State*, 11 Ala. App. 333, 66 So. 857, under a charge of unlawfully and with malice aforethought killing a human being but without premeditation or deliberation, a conviction of any degree of murder except the first is proper. *Ark.*—*Alison v. State*, 74 Ark. 444-451, 86 S. W. 409; *Allen v. State*, 37 Ark. 433; *Wright v. State*, 35 Ark. 639-656; *McPherson v. State*, 29 Ark. 225. *Cal.*—*People v. De La Cour Soto*, 63 Cal. 165; *People*

- v. Dolan*, 9 Cal. 576. **Colo.**—*Henwood v. People*, 54 Colo. 188, 193, 129 Pac. 1010. **Conn.**—*State v. Dowd*, 19 Conn. 388. **Del.**—*State v. Naylor*, 90 Atl. 880, 889; *State v. Brelawski*, 3 Boyce 416, 84 Atl. 950; *State v. Reese*, 2 Boyce 434, 79 Atl. 217; *State v. Russo*, 1 Boyce 538, 77 Atl. 743; *State v. Blackburn*, 7 Penne. 479, 75 Atl. 536; *State v. Uzzo*, 6 Penne. 212, 217, 65 Atl. 775; *State v. Fleetwood*, 6 Penne. 153, 159, 65 Atl. 772; *State v. Brinte*, 4 Penne. 551, 560, 58 Atl. 258; *State v. Buchanan*, *Houst. Crim. Cas.* 79, 90. **Fla.**—*Pyke v. State*, 47 Fla. 93, 96, 36 So. 577; *Green v. State*, 43 Fla. 556, 560, 30 So. 656; *Morrison v. State*, 42 Fla. 149, 174, 28 So. 97; *Lewis v. State*, 42 Fla. 253, 257, 28 So. 397; *McCoy v. State*, 40 Fla. 494, 24 So. 485. **Ga.**—*Watson v. State*, 116 Ga. 607, 43 S. E. 32; *Davis v. State*, 14 Ga. App. 764, 82 S. E. 297; *Spence v. State*, 7 Ga. App. 825, 68 S. E. 443. **Idaho.**—*In re McLeod*, 23 Idaho 257, 128 Pac. 1106, 43 L. R. A. (N. S.) 813; *State v. Phinney*, 13 Idaho 307, 89 Pac. 634, 12 L. R. A. (N. S.) 935; *State v. Ellington*, 4 Idaho 529, 43 Pac. 60; *People v. Ah Choy*, 1 Idaho 317-319. **Ind.**—*Reed v. State*, 141 Ind. 116, 120, 40 N. E. 525; *Goff v. Sheriff*, 26 Ind. 196; *State v. Throckmorton*, 53 Ind. 354, 357; *Wall v. State*, 23 Ind. 150; *Gillespie v. State*, 9 Ind. 380, 385. **Ia.**—*State v. Bertoch*, 112 Iowa 195, 198, 83 N. W. 967; *State v. Baldwin*, 79 Iowa 714, 45 N. W. 297; *State v. Clemons*, 51 Iowa 274, 278, 1 N. W. 546. **Kan.**—*See State v. Mowry*, 37 Kan. 369, 378, 15 Pac. 282; *State v. Lillie*, 21 Kan. 728, 729; *State v. Huber*, 8 Kan. 447; *State v. Reddick*, 7 Kan. 143; *Craft v. State*, 3 Kan. 445. **Md.**—*Davis v. State*, 39 Md. 355, 374; *Weighorst v. State*, 7 Md. 442, 451. **Mass.**—*Com. v. Min Sing*, 202 Mass. 121, 132, 88 N. E. 918; *Com. v. Desmarceau*, 16 Gray 1. **Mich.**—*People v. Prague*, 72 Mich. 178, 180, 40 N. W. 240; *People v. Doe*, 1 Mich. 451, 457. **Minn.**—*State v. Smith*, 56 Minn. 78-85, 37 N. W. 325. **Mo.**—*State v. Lewis*, 175 S. W. 60; *State v. Rollins*, 226 Mo. 594, 126 S. W. 478; *State v. Bobbitt*, 215 Mo. 10, 32, 114 S. W. 511; *State v. Parnell*, 206 Mo. 723, 105 S. W. 742; *State v. Mosley*, 115 Mo. 641, 651, 22 S. W. 575; *State v. Talmage*, 107 Mo. 543, 549, 17 S. W. 990; *State v. Sloan*, 47 Mo. 604, 615. **Mont.**—*State v. Crean*, 43 Mont. 47, 114 Pac. 603, 1912C, Ann. Cas. 424. **Neb.**—*Russell v. State*, 66 Neb. 497, 500, 92 N. W. 751; *Curry v. State*, 4 Neb. 545-552. **Nev.**—*State v. Millain*, 3 Nev. 409-442. **N. J.** *Graves v. State*, 45 N. J. L. 347, 358, 46 Am. Rep. 778. **N. M.**—*Territory v. McGinnis*, 10 N. M. 269, 275, 61 Pac. 208, *overruling Borrego v. Territory*, 8 N. M. 446, 46 Pac. 349; *Tenorio v. Territory*, 1 N. M. 279, 284. **N. Y.**—*People v. Schleiman*, 197 N. Y. 383, 385, 90 N. E. 950, 27 L. R. A. (N. S.) 1075; *People v. McDonnell*, 92 N. Y. 657; *Keefe v. People*, 40 N. Y. 348; *Morrisett v. People*, 21 How. Pr. 203; *People v. Connors*, 13 Misc. 582, 586, 35 N. Y. Supp. 472. **N. C.**—*State v. Matthews*, 142 N. C. 621, 623, 55 S. E. 342, murder in the second degree. **Ohio.**—*Lindsey v. State*, 69 Ohio St. 215, 69 N. E. 126; *Donaldson v. State*, 10 Ohio C. C. 613, 614; *Blair v. State*, 5 Ohio C. C. 496. *See Dick v. State*, 3 Ohio St. 89; *Parks v. State*, 3 Ohio St. 101. **Okla.**—*Jones v. State*, 8 Okla. Crim. 576, 584, 129 Pac. 446; *Kent v. State*, 8 Okla. Crim. 188, 126 Pac. 1040; *Byars v. State*, 7 Okla. Crim. 650, 667, 126 Pac. 252; *Rhea v. Territory*, 3 Okla. Crim. 230, 105 Pac. 314. **Ore.**—*Burggraf v. Brocha*, 45 Pac. 639; *State v. Ellsworth*, 30 Ore. 145, 159, 47 Pac. 199; *State v. Wintzingerode*, 9 Ore. 153, 157; *State v. Grant*, 7 Ore. 414, 422. **S. D.**—*State v. Hubbard*, 20 S. D. 148, 151, 104 N. W. 1120. **Tenn.**—*Crockett v. State*, 125 Tenn. 131, 140 S. W. 1058. **Tex.**—*Pressley v. State*, 30 Tex. 160; *Gentry v. State* (Tex. Crim.), 152 S. W. 635; *Riptoe v. State* (Tex. Crim.), 42 S. W. 381; *Peterson v. State*, 12 Tex. App. 650; *Stapp v. State*, 3 Tex. App. 138. **Utah.**—*State v. Campbell*, 24 Utah 103, 107, 66 Pac. 771; *People v. Shafer*, 1 Utah 260, 264. **Vt.**—*See State v. Bradley*, 67 Vt. 465, 32 Atl. 238. **Va.**—*Benton v. Com.*, 9- Va. 782, 791, 21 S. E. 495; *Livingston v. Com.*, 14 Gratt. 592, 596. **Wash.**—*State v. McPhail*, 39 Wash. 199, 202, 81 Pac. 683; *State v. Underwood*, 35 Wash. 558, 568, 77 Pac. 863; *State v. Howard*, 33 Wash. 250, 260, 74 Pac. 382; *State v. Greer*, 11 Wash. 244, 247, 39 Pac. 874; *Freidrich v. Territory*, 2 Wash. 358, 369, 26 Pac. 976. **W. Va.**—*State v. Douglass*, 41 W. Va. 537, 23 S. E. 724. **Wis.**—*Giskie v. State*, 71 Wis. 612, 38 N. W. 334. *See State v. Belden*, 33 Wis. 120.

See 11 STANDARD PROC. 634, et seq.

[a] As Applicable to Murder by

a charge of murder justifies a conviction of voluntary or involuntary manslaughter,³⁶ or, where manslaughter is divided into degrees, of any

Poisoning, etc.—The statute authorizing a verdict for a lesser degree upon the charge of a greater is applicable also to indictments charging murder by means of poisoning, lying in wait, starving, etc. *State v. Matthews*, 142 N. C. 621, 55 S. E. 342.

[b] **Killing in Perpetrating Felony.** In *People v. Schleiman*, 197 N. Y. 383, 386, 90 N. E. 950, 27 L. R. A. (N. S.) 1075, Bartlett, J., says: "The accusation which the jury passed upon was an accusation of killing while engaged in the perpetration of a felony (burglary), a crime in which it is not necessary to prove any design to effect death. Under such circumstances, the power to convict of a lesser degree of felonious homicide which belongs to the jury in cases where the degree depends upon the intent cannot properly be exercised; because an intent to kill is not a necessary ingredient of the offense in this kind of murder." Compare *Morrisett v. People*, 21 How. Pr. (N. Y.) 203.

[c] **Indictment for murder in statutory form** prescribed in Alabama criminal code, will sustain conviction of any degree of murder. *Smith v. State*, 142 Ala. 14, 29, 39 So. 329.

36. **U. S.**—*Stevenson v. United States*, 162 U. S. 313, 16 Sup. Ct. 839, 40 L. ed. 980; *Logan v. United States*, 144 U. S. 263, 307, 12 Sup. Ct. 617, 631, 36 L. ed. 429; *United States v. Meagher*, 37 Fed. 875; *United States v. Carr*, 1 Woods 480, 25 Fed. Cas. No. 14,732; *United States v. Leonard*, 2 Fed. 669, 18 Blatchf. 187. **Ala.**—*Smith v. State*, 142 Ala. 14, 39 So. 329; *Linnehan v. State*, 120 Ala. 293, 25 So. 6; *Stoball v. State*, 116 Ala. 454, 460, 23 So. 162; *Jackson v. State*, 77 Ala. 18; *Henry v. State*, 33 Ala. 389. **Ark.**—*Tharp v. State*, 99 Ark. 188, 137 S. W. 1097; *Allison v. State*, 74 Ark. 444, 451, 86 S. W. 409; *Fagg v. State*, 50 Ark. 506, 8 S. W. 829; *Wright v. State*, 35 Ark. 639, 656; *McPherson v. State*, 29 Ark. 225. **Cal.**—*People v. McFarlane*, 138 Cal. 481, 484, 71 Pac. 568, 72 Pac. 48, 61 L. R. A. 245; *People v. Pearne*, 118 Cal. 154, 157, 50 Pac. 376; *People v. Muhlner*, 115 Cal. 303, 47 Pac. 128; *People v. Wetzel*, 9 Cal. App. 223, 98 Pac. 549; *People v. Huntington*,

8 Cal. App. 612, 97 Pac. 760; *People v. Borrego*, 7 Cal. App. 613, 95 Pac. 381. **Colo.**—See *Henwood v. People*, 54 Colo. 188, 193, 129 Pac. 1010; *Garvey's Case*, 7 Colo. 384, 3 Pac. 903, 49 Am. Rep. 358. **Conn.**—*State v. Parmelee*, 9 Conn. 259; *State v. Nichols*, 8 Conn. 496, 498. **Del.**—*State v. Naylor*, 90 Atl. 880, 889; *State v. Brelawski*, 3 Boyce 416, 84 Atl. 950; *State v. Reese*, 2 Boyce 434, 79 Atl. 217; *State v. Uzzo*, 6 Penne. 212, 217, 65 Atl. 775; *State v. Fleetwood*, 6 Penne. 153, 159, 65 Atl. 772; *State v. Brinte*, 4 Penne. 551, 560, 53 Atl. 258; *State v. Buchanan*, *Houst. Crim. Cas.* 79, 90. **Fla.**—*Sallas v. State*, 61 Fla. 59, 54 So. 773; *Green v. State*, 43 Fla. 556, 560, 30 So. 656; *Lewis v. State*, 42 Fla. 253, 257, 28 So. 397; *McCoy v. State*, 40 Fla. 494, 24 So. 485; *Brown v. State*, 31 Fla. 207, 12 So. 640. **Ga.**—*Watson v. State*, 116 Ga. 607-612, 43 S. E. 32; *Reynolds v. State*, 1 Ga. 222; *Davis v. State*, 14 Ga. App. 764, 82 S. E. 297; *Williams v. State*, 13 Ga. App. 83, 78 S. E. 854-855. **Idaho.**—*In re McLeod*, 23 Idaho 257, 128 Pac. 1106, 43 L. R. A. (N. S.) 813; *State v. Alcorn*, 7 Idaho 599, 64 Pac. 1014, 97 Am. St. Rep. 252; *In re Alcorn*, 7 Idaho 101, 60 Pac. 561. **Ill.**—*Foglia v. People*, 229 Ill. 286, 82 N. E. 262; *Howard v. People*, 185 Ill. 552, 57 N. E. 441; *Steiner v. People*, 187 Ill. 244, 58 N. E. 383; *Earl v. People*, 73 Ill. 329; *Greschia v. People*, 53 Ill. 295; *Yoe v. People*, 49 Ill. 410, 414; *Carpenter v. People*, 5 Ill. 197. **Ind.**—*Pigg v. State*, 145 Ind. 560, 566, 43 N. E. 309; *Reed v. State*, 141 Ind. 116, 120, 40 N. E. 525; *State v. Fisher*, 103 Ind. 530, 532, 3 N. E. 379; *Barnett v. State*, 100 Ind. 171; *Powers v. State*, 87 Ind. 144-155; *Dukes v. State*, 11 Ind. 557, 71 Am. Dec. 370. **Ia.**—*State v. Smith*, 132 Iowa 645, 109 N. W. 115; *State v. Moore*, 129 Iowa 514, 106 N. W. 16; *State v. Clemons*, 51 Iowa 274, 278, 1 N. W. 546; *State v. Tweedy*, 11 Iowa 350, 353. **Kan.**—*State v. Huber*, 8 Kan. 447; *Craft v. State*, 3 Kan. 450. **Ky.**—*Buckner v. Com.*, 14 Bush 601; *Conner v. Com.*, 13 Bush 714; *Wood v. Com.*, 9 Ky. L. Rep. 872, 7 S. W. 391; *Com. v. Couch*, 32 Ky. L. Rep. 638, 106 S. W. 830, 16 L. R. A. (N. S.) 327. **La.**—*State v. Kinchen*, 126 La. 39, 52 So.

185; *State v. Cook*, 117 La. 114, 116, 41 So. 434; *State v. Perry*, 116 La. 231, 235, 40 So. 686; *State v. Salter*, 48 La. Ann. 197, 19 So. 265; *State v. Stouderman*, 6 La. Ann. 286, 289; *State v. Moore*, 8 Rob. 518. **Md.**—See *Weighor v. State*, 7 Md. 442. **Mass.**—*Com. v. Roby*, 12 Pick. 496. **Mich.**—*People v. Rogulski*, 148 N. W. 189; *People v. McArron*, 121 Mich. 1, 79 N. W. 944; *People v. Prague*, 72 Mich. 178, 40 N. W. 243; *People v. Knapp*, 26 Mich. 112. **Minn.**—*State v. Smith*, 56 Minn. 78, 57 N. W. 325; *State v. Cantreny*, 34 Minn. 1, 24 N. W. 458; *State v. Wiles*, 26 Minn. 381, 4 N. W. 615; *State v. Lessing*, 16 Minn. 75. See *State v. Lalinger*, 4 Minn. 368. **Miss.**—*Brown v. State*, 98 Miss. 786, 794, 54 So. 305, 34 L. R. A. (N. S.) 811; *Heward v. State*, 13 Smed. & M. 261; *King v. State*, 5 How. 730. **Mo.**—*State v. Ludwig*, 70 Mo. 412; *Plummer v. State*, 6 Mo. 231. **Mont.**—*State v. Crean*, 43 Mont. 47, 53, 114 Pac. 603, 1912C, Ann. Cas. 424; *State v. Nielson*, 38 Mont. 451, 455, 100 Pac. 229. **Neb.**—*Curry v. State*, 4 Neb. 545, 552. **Nev.**—*In re Somers*, 31 Nev. 531, 533, 103 Pac. 1073, 135 Am. St. Rep. 700, 24 L. R. A. (N. S.) 504. **N. H.**—*State v. Webster*, 39 N. H. 96, 98. **N. M.**—*United States v. Densmore*, 12 N. M. 99, 75 Pac. 31. **N. Y.**—*Keefe v. People*, 40 N. Y. 348, 355; *White v. People*, 32 N. Y. 465; *People v. Darragh*, 141 App. Div. 408, 120 N. Y. Supp. 522; *Burns v. People*, 1 Park. Crim. 182. **N. C.**—*State v. Fleming*, 107 N. C. 905-909, 12 S. E. 131. **Ohio.**—*Donaldson v. State*, 10 Ohio C. C. 613, 614; *State v. Noble*, 1 Ohio Dec. 1; *Birch v. State*, 1 Ohio Dec. 453. **Okla.**—*Smith v. Territory*, 14 Okla. 162, 167, 77 Pac. 187; *Jones v. Territory*, 4 Okla. 45, 43 Pac. 1072; *Jones v. State*, 8 Okla. Crim. 576, 129 Pac. 446; *Turner v. State*, 8 Okla. Crim. 11, 31, 126 Pac. 452; *Byars v. State*, 7 Okla. Crim. 650, 126 Pac. 252; *Rhea v. Territory*, 3 Okla. Crim. 230, 105 Pac. 314. **Ore.**—*Ex parte Jung Shing*, 145 Pac. 637; *State v. Martin*, 54 Ore. 409, 100 Pac. 1193, 103 Pac. 512; *State v. Ellsworth*, 30 Ore. 145, 159, 47 Pac. 199; *State v. Grant*, 7 Ore. 414, 422; *State v. Pittsburgh*, 2 Ore. 227, 235. **Pa.**—*Com. v. Hiland*, 1 Pa. C. C. 532, 535; *Hunter v. Com.*, 79 Pa. 503, 506; *Dinkey v. Com.*, 17 Pa. 126, 129; *Shouse v. Com.*, 5 Pa. 83, 86; *Com. v. Gable*, 7 Serg. & R. 423. **R. I.**—*State v. Fitzsimon*, 18 R. I. 236, 239, 27 Atl. 446, 49 Am. St. Rep. 766. **S. C.**—*State v. Causer*, 87 S. C. 516, 70 S. E. 161; *State v. Revels*, 86 S. C. 213, 68 S. E. 523; *State v. Tucker*, 86 S. C. 211, 68 S. E. 523. See *State v. Gilliam*, 66 S. C. 419, 45 S. E. 6; *State v. Gaffney*, Rice 431, 435. **Tenn.**—*Nelson v. State*, 10 Humph. 518; *Slaughter v. State*, 6 Humph. 410. **Tex.**—*Gentry v. State* (Tex. Crim.), 152 S. W. 635. **Vt.**—*State v. Averill*, 85 Vt. 115, 81 Atl. 461, 467, 1914B, Ann. Cas. 1005; *State v. Reed*, 40 Vt. 603, 609. **Va.**—*Benton v. Com.*, 91 Va. 782, 791, 21 S. E. 495; *Livingston v. Com.*, 14 Gratt. 592, 596. **Wash.**—*State v. Lewis*, 80 Wash. 532, 141 Pac. 1025; *State v. Underwood*, 35 Wash. 558, 568, 77 Pac. 863; *State v. Yandell*, 34 Wash. 409, 75 Pac. 988; *State v. Howard*, 33 Wash. 250, 260, 74 Pac. 382; *State v. Greer*, 11 Wash. 244, 247, 39 Pac. 874; *White v. Territory*, 3 Wash. Ter. 397, 19 Pac. 37. **Wis.**—*Giskie v. State*, 71 Wis. 612, 614, 38 N. W. 334; *Kilkelly v. State*, 43 Wis. 604, 608. **Eng.**—2 Hale P. C. 302; *Reg. v. Grimes*, 15 N. S. W. L. 209, 10 W. N. 211.

[a] **Where Manslaughter Is a Misdemeanor.**—In Pennsylvania it seems that one indicted for murder cannot be convicted of involuntary manslaughter, inasmuch as the latter is made a misdemeanor by statute. *Hilands v. Com.*, 114 Pa. 372, 6 Atl. 267; *Walters v. Com.*, 44 Pa. 135; *Com. v. Gable*, 7 Serg. & R. 423; *Com. v. Hiland*, 1 Pa. Co. Ct. 532, 536; *Com. v. Bilderback*, 2 Pars. Eq. Cas. 447, 450. See *infra*, XIII, E.

[b] **The short form statutory information for murder will sustain a conviction of involuntary manslaughter.** *People v. Rogulski* (Mich.), 148 N. W. 189.

[c] **A charge of murder by attempting a criminal abortion will sustain a conviction for manslaughter.** *People v. Huntington*, 8 Cal. App. 612, 97 Pac. 760; *Earl v. People*, 73 Ill. 329.

[d] **An indictment for murder (1) in the second degree will support a conviction of manslaughter** (*State v. Noble*, 1 Ohio Dec. 1; *Birch v. State*, 1 Ohio Dec. 453); (2) in the second degree. *State v. Chenault*, 212 Mo. 132, 136, 110 S. W. 696.

[e] **If there is some evidence bearing on that issue, one indicted for mur-**

degree of manslaughter.³⁷ Likewise it is proper under such charge to convict of negligent homicide,³⁸ of simple assault,³⁹ or of assault⁴⁰ and

der may be convicted of manslaughter. *United States v. Densmore*, 12 N. M. 99, 75 Pac. 31.

[f] **Indictment for murder in code form** sustains conviction of manslaughter. *Smith v. State*, 142 Ala. 14, 29, 39 So. 329.

[g] **Under an indictment charging murder in the first degree by means of poison** there may be a conviction of voluntary manslaughter, although it may be difficult to conjecture a case where the crime of manslaughter can be said to be committed by means of administering poison. *Hasenfuss v. State*, 156 Ind. 246, 59 N. E. 463.

37. **Ala.**—*Linnehan v. State*, 120 Ala. 293, 25 So. 6, manslaughter in the second degree. **Fla.**—*Brown v. State*, 31 Fla. 207, 12 So. 640, conviction in second degree proper. **Kan.**—*State v. Huber*, 8 Kan. 447, 450; *State v. Reddick*, 7 Kan. 143; *Craft v. State*, 3 Kan. 445; *Roy v. State*, 2 Kan. 405, 409. **Minn.**—*Rev. Laws*, 1905, §5371; *State v. Wiles*, 26 Minn. 381, 4 N. W. 615; *State v. Lessing*, 16 Minn. 75. **Mo.** *Rev. St.*, 1899, §2369; *State v. O'Hearn*, 237 Mo. 206, 140 S. W. 866; *State v. Colvin*, 226 Mo. 446-475, 126 S. W. 448; *State v. Rollins*, 226 Mo. 524-534, 126 S. W. 478. **N. Y.**—*People v. Schleiman*, 197 N. Y. 383-385, 90 N. E. 950, 27 L. R. A. (N. S.) 1075. See *People v. McDonnell*, 92 N. Y. 657 (manslaughter in the first degree); *People v. McDonnell*, 1 N. Y. Crim. 366 (manslaughter in the first degree); *People v. Connors*, 13 Misc. 582, 586, 35 N. Y. Supp. 472. But see *Morrisett v. People*, 21 How. Pr. 203, 209. **S. D.**—*State v. Stumbaugh*, 28 S. D. 50, 132 N. W. 666, 670; *State v. Horn*, 21 S. D. 237, 239, 111 N. W. 552; *State v. Hubbard*, 20 S. D. 148, 149, 104 N. W. 1120.

38. *Gentry v. State* (Tex. Crim.), 152 S. W. 635; *Bradshaw v. State* (Tex. Crim.), 50 S. W. 359.

39. **U. S.**—See *Logan v. United States*, 144 U. S. 263, 307, 12 Sup. Ct. 617, 631, 36 L. ed. 429. **Ala.**—*Horn v. State*, 98 Ala. 23, 29, 13 So. 329; *Jones v. State*, 79 Ala. 23. **Del.**—*State v. Naylor*, 90 Atl. 880, 889; *State v. Fleetwood*, 6 Penne. 153, 159, 65 Atl. 772. **Ga.**—*Watson v. State*, 116 Ga. 607-

612, 43 S. E. 32, 21 L. R. A. (N. S.)

1. **Ia.**—*State v. Parker*, 66 Iowa 586, 589, 24 N. W. 225. **N. C.**—*State v. Lance*, 166 N. C. 411, 81 S. E. 1092, 1093. **Ohio.**—*Donaldson v. State*, 10 Ohio C. C. 613, 614; *Blair v. State*, 5 Ohio C. C. 496, 502. **Tex.**—*Gentry v. State* (Tex. Crim.), 152 S. W. 635. **Utah.**—*People v. Robinson*, 6 Utah 101, 105, 21 Pac. 403.

Contra.—**Mich.**—*People v. Adams*, 52 Mich. 24, 17 N. W. 226. **Miss.**—*Moore v. State*, 59 Miss. 25, 27. **N. Y.**—*People v. McDonald*, 159 N. Y. 309, 314, 54 N. E. 46; *People v. Connors*, 13 Misc. 582, 35 N. Y. Supp. 472.

40. **Ala.**—*Horn v. State*, 98 Ala. 23, 29, 13 So. 329; *Jones v. State*, 79 Ala. 23. **Ga.**—*Watson v. State*, 116 Ga. 607, 612, 43 S. E. 32, 21 L. R. A. (N. S.) 1. **Kan.**—*State v. O'Kane*, 23 Kan. 244. **Ky.**—*Barnard v. Com.*, 94 Ky. 285-286, 22 S. W. 219. **Mich.**—*People v. Prague*, 72 Mich. 178-180, 40 N. W. 243. **N. Y.**—*Hennessey v. People*, 21 How. Pr. 239, 244. **Ohio.**—*Marts v. State*, 26 Ohio St. 162, 169; *Donaldson v. State*, 10 Ohio C. C. 613, 614; *Blair v. State*, 5 Ohio C. C. 496, 3 Ohio C. D. 242. **Okl.**—*Baysinger v. State*, 15 Okla. 386, 82 Pac. 728; *Turner v. State*, 8 Okla. Crim. 11-34, 126 Pac. 452. **Tenn.**—*Lang v. State*, 16 Lea 433, 1 S. W. 318.

[a] Upon an indictment for murder where death has ensued, the accused cannot be convicted of a simple assault and battery, though he may be of manslaughter. *Burns v. People*, 1 Park. Crim. (N. Y.) 182, 186.

[b] In **Indiana** an assault and battery is not included in any of the degrees of homicide so as to authorize under a charge of the latter a conviction of the former. *Reed v. State*, 141 Ind. 116, 40 N. E. 525; *Gillespie v. State*, 9 Ind. 380; *Wright v. State*, 7 Ind. 324; *Wright v. State*, 5 Ind. 527.

[c] In **Pennsylvania**, the right upon an indictment for murder to convict the defendant of assault and battery is by implication forbidden by statute. See Act March 31, 1860, Pub. Laws 407; *Com. v. Adams*, 2 Pa. Super. 46.

[d] If included in the Charge. *State v. O'Kane*, 23 Kan. 244.

battery, if the battery is properly alleged,⁴¹ or of assault of any degree or grade,⁴² such as an aggravated assault,⁴³ maliciously cutting and wounding,⁴⁴ assault with a deadly weapon,⁴⁵ assault with intent to murder,⁴⁶ or to maim,⁴⁷ or to commit great bodily injury,⁴⁸ of pointing or aiming a firearm,⁴⁹ or the statutory offense of shooting at another,⁵⁰ and of robbery in a proper case.⁵¹ But on an indictment for murder there can be no conviction of rape,⁵² or procuring an abortion,⁵³ or the statutory offense of wilfully stabbing or shooting another not designing thereby to produce or cause his death.⁵⁴

Where a statutory form is used which is not broad enough to include assault there can be no conviction of assault.⁵⁵ But such a form may be broad enough to sustain a conviction for any degree of murder or lower grade of homicide.⁵⁶

41. *Scott v. State*, 60 Miss. 268; *Moore v. State*, 59 Miss. 25; 27.

42. *People v. Schiavi*, 96 App. Div. 479, 483, 89 N. Y. Supp. 564, under §441, Code Crim. Proc. *Contra*, *People v. McDonald*, 159 N. Y. 309, 54 N. E. 46; *People v. Connors*, 13 Misc. 582, 586, 35 N. Y. Supp. 472; *Green v. State*, 8 Tex. App. 71, 74; *Stapp v. State*, 3 Tex. App. 138, 144. *Compare* *State v. Blaine*, 64 Wash. 122, 116 Pac. 660.

43. *Ariz.*—*Mapula v. Territory*, 9 *Ariz.* 199, 202, 80 Pac. 389. *Okla.*—*Turner v. State*, 8 *Okla. Crim.* 11, 34, 126 Pac. 452. *Tex.*—*Gentry v. State* (*Tex. Crim.*), 152 S. W. 635; *Bean v. State*, 25 *Tex. App.* 346, 355, 8 S. W. 278; *Green v. State*, 8 *Tex. App.* 71.

44. *Bush v. Com.*, 78 Ky. 268; *Housman v. Com.*, 33 Ky. L. Rep. 311, 110 S. W. 236.

45. *In re McLeod*, 23 *Idaho* 257, 128 Pac. 1106, 43 L. R. A. (N. S.) 813.

46. *Ala.*—*Thomas v. State*, 125 *Ala.* 45, 46, 27 So. 929; *Daughdrill v. State*, 113 *Ala.* 7, 35, 21 So. 378; *Jones v. State*, 79 *Ala.* 23 25; *McWilliams v. State* (*Ala. App.*), 67 So. 735. *Ark.*—*Davis v. State*, 45 *Ark.* 464. *Ga.*—*Smith v. State*, 126 *Ga.* 544, 55 S. E. 475. *Ia.*—*State v. Parker*, 66 *Iowa* 586, 589, 24 N. W. 225. *Nev.*—*Ex parte Carnow*, 21 *Nev.* 33, 43, 24 Pac. 430. *Okla.*—*Turner v. State*, 8 *Okla. Crim.* 11, 34, 126 Pac. 452. *Tex.*—*Gentry v. State* (*Tex. Crim.*), 152 S. W. 635; *Bean v. State*, 25 *Tex. App.* 346, 355; *Peterson v. State*, 19 *Tex. App.* 659; *Green v. State*, 8 *Tex. App.* 71, 74; *Stapp v. State*, 3 *Tex. App.* 138, 144. *Utah.*

State v. Vance, 39 *Utah* 602, 119 Pac. 309, 311.

[a] **If Included in the Charge.** *Ala.*—*Thomas v. State*, 125 *Ala.* 45, 27 So. 929; *Daughdrill v. State*, 113 *Ala.* 7, 21 So. 378. *Ariz.*—*Mapula v. Territory*, 9 *Ariz.* 199, 80 Pac. 389. *Ark.*—*Davis v. State*, 45 *Ark.* 464. *Ga.*—*Smith v. State*, 126 *Ga.* 544, 55 S. E. 475. *Ia.*—*State v. Parker*, 66 *Iowa* 586, 24 N. W. 225. *Tex.*—*Peterson v. State*, 12 *Tex. App.* 659; *Stapp v. State*, 3 *Tex. App.* 138. *Utah.*—*State v. Vance*, 39 *Utah* 602, 119 Pac. 309.

47. *State v. Parker*, 66 *Iowa* 586, 589, 24 N. W. 225.

48. *State v. Parker*, 66 *Iowa* 586, 589, 24 N. W. 225.

49. *Thomas v. State*, 73 Miss. 46, 19 So. 195, seemingly in conflict with *Lucas v. State*, 71 Miss. 471, 14 So. 537.

50. *Watson v. State*, 116 *Ga.* 607, 43 S. E. 32, 21 L. R. A. (N. S.) 1; *Corley v. State*, 95 *Ga.* 465, 20 S. E. 212.

51. **Under an indictment charging murder committed in an attempt to commit robbery.** *Blair v. State*, 5 *Ohio* C. C. 496.

52. *Ex parte Dela*, 25 *Nev.* 346, 60 Pac. 217, 83 Am. St. Rep. 603.

53. *State v. Belyea*, 9 N. D. 353, 83 N. W. 1.

54. *Woods v. Com.*, 9 Ky. L. Rep. 872, 7 S. W. 391.

55. *In re McLeod*, 23 *Idaho* 257, 128 Pac. 1106, 43 L. R. A. (N. S.) 813; *Scott v. State*, 60 Miss. 268; *Moore v. State*, 59 Miss. 25. See also *People v. Adams*, 52 *Mich.* 24, 17 N. W. 226.

56. *Smith v. State*, 142 *Ala.* 14, 39 So. 329.

On an indictment for manslaughter one may be convicted of involuntary manslaughter,⁵⁷ any lower degree of manslaughter than that charged⁵⁸ and not inconsistent with it,⁵⁹ of assault,⁶⁰ or of assault and battery,⁶¹ but an indictment charging manslaughter in the second degree will not support a conviction of abortion.⁶²

c. Larceny.—A charge of larceny of a particular kind or under particular circumstances will justify a conviction of larceny generally,⁶³ or of some other or simpler form of larceny necessarily included in the charge.⁶⁴ A charge of larceny from the person will sustain a conviction of grand larceny,⁶⁵ or of simple or petit larceny.⁶⁶ An indictment for grand larceny will sustain a conviction of petit larceny,⁶⁷ or of any

57. *Isham v. State*, 38 Ala. 213; *State v. Griffin*, 34 La. Ann. 37. But see *State v. Lay*, 93 Ind. 341, 343.

58. *People v. Schiavi*, 96 App. Div. 479, 483, 89 N. Y. Supp. 564; *People v. Butler*, 3 Park. Crim. (N. Y.) 377, 383.

[a] Under common-law form of indictment a conviction in any degree is proper. *People v. Butler*, 3 Park. Crim. (N. Y.) 377.

59. *Dedieu v. People*, 22 N. Y. 178.

60. *State v. Woods*, 7 Penne. (Del.) 499, 77 Atl. 490.

[a] Conviction of assault in any degree is proper. *People v. Schiavi*, 96 App. Div. 479, 483, 89 N. Y. Supp. 564.

61. Ala.—*Beason v. State*, 5 Ala. App. 103, 59 So. 712. N. H.—*State v. Webster*, 39 N. H. 96, 98. Vt.—*State v. Scott*, 24 Vt. 127.

[a] Even though the indictment contain no count specially charging the assault and battery. *State v. Scott*, 24 Vt. 127.

[b] But not where the indictment does not necessarily involve an assault and battery. *State v. Scaduto*, 74 N. J. L. 289, 65 Atl. 908; *State v. Thomas*, 65 N. J. L. 598, 48 Atl. 1007, reversing 64 N. J. L. 532, 45 Atl. 913.

62. *State v. Sonner*, 253 Mo. 440, 161 S. W. 723; *State v. Dargatz*, 244 Mo. 218, 148 S. W. 889; *State v. Belyea*, 9 N. D. 353-362, 83 N. W. 1.

63. A charge of larceny in a dwelling house or other building will support a conviction of simple larceny. *Com. v. Mahar*, 8 Gray (Mass.) 469; *State v. Reyner*, 50 Ore. 224-229, 91 Pac. 301; *State v. Savage*, 36 Ore. 191-196, 60 Pac. 610, 61 Pac. 1128.

[a] An indictment for larceny from

a store in the night time (1) will support a conviction of larceny (*State v. Nordman*, 101 Iowa 446, 70 N. W. 621), (2) but not a conviction of larceny in the day time. *Com. v. McLaughlin*, 11 Cush. (Mass.) 598; *Hopkins v. Com.*, 3 Met. (Mass.) 460.

64. Under the Oregon statute an indictment charging a larceny from a shop and containing the unnecessary allegation of the value of the property will support a conviction of petit larceny if the jury find that the building where the theft was committed was not a shop or other enumerated building as prescribed by said statute. *State v. Hanlon*, 32 Ore. 95, 48 Pac. 353. See *State v. Taylor*, 3 Ore. 10, 12.

[a] The charge of horse stealing does not include the offense of riding a horse of another without his consent. *State v. Gouvernale*, 112 La. 956, 36 So. 817; *State v. Fruge*, 106 La. 694, 31 So. 323.

65. *State v. Steifel*, 106 Mo. 129, 134, 17 S. W. 227; *State v. Clem*, 49 Wash. 273-275, 94 Pac. 1079.

66. Minn.—*State v. Eno*, 8 Minn. 220. Ore.—*State v. Reyner*, 50 Ore. 224, 229, 91 Pac. 301; *State v. Taylor*, 3 Ore. 10, 12. Wash.—*State v. Clem*, 49 Wash. 273, 275, 94 Pac. 1079.

But see *Stone v. State*, 115 Ala. 121, 22 So. 275; *Black v. State*, 52 Tex. Crim. 8, 104 S. W. 897; *Roberts v. State*, 83 Tex. Crim. 83, 24 S. W. 395, holding there can be no conviction of ordinary theft under a charge of theft from the person.

67. Ala.—*Phillips v. State*, 167 Ala. 75, 52 So. 746; *Storrs v. State*, 129 Ala. 101, 29 So. 778; *Morris v. State*, 97 Ala. 82, 12 So. 276. Ark.—*Monk v. State*, 105 Ark. 12, 150 S. W. 133. Cal.

degree of larceny.⁶⁸ But a charge of larceny will not sustain a conviction of some other distinct offense,⁶⁹ unless necessarily included within it.⁷⁰ Thus under a charge of larceny a conviction for receiving stolen goods,⁷¹ cheating by false pretenses,⁷² theft by means of false pretext,⁷³ or trespass,⁷⁴ cannot be sustained. Nor will a charge of lar-

People *v.* Wetzel, 9 Cal. App. 223, 98 Pac. 549. Fla.—Long *v.* State, 42 Fla. 525, 28 So. 775. Ga.—Lavender *v.* State, 107 Ga. 707, 33 S. E. 420; Brown *v.* State, 90 Ga. 454, 16 S. E. 204. Ill. Carpenter *v.* People, 5 Ill. 197, 198. Ind.—State *v.* Murphy, 8 Blackf. 498. Ia.—See State *v.* Nordman, 101 Iowa 446, 70 N. W. 621. La.—State *v.* Stouderman, 6 La. Ann. 286, 289. Mich.—People *v.* Jacks, 76 Mich. 218, 42 N. W. 1134. Mo.—State *v.* Gabriel, 88 Mo. 631, 643; State *v.* Walken, 133 Mo. App. 247, 113 S. W. 221. N. Y.—People *v.* McCallam, 103 N. Y. 587, 599, 9 N. E. 502; People *v.* McLamoney, 30 Hun 505; People *v.* Hayes, 136 N. Y. Supp. 854. S. C.—State *v.* Wood, 1 Mill 29, 33. See State *v.* Major, 14 Rich. 76, under general charge of larceny. Tenn.—Hall *v.* State, 7 Lea 685. Va.—See Benton *v.* Com., 91 Va. 782, 791, 21 S. E. 495. Wash.—State *v.* Chen, 49 Wash. 273, 94 Pac. 1079. Eng. 2 Hale P. C. 302.

[a] As Affected by Value of Property Shown.—Under an indictment for grand larceny there can only be a conviction of petit larceny "when the evidence shows the value of the property taken would constitute a case of petit larceny." State *v.* Gabriel, 88 Mo. 631, 643.

68. Mich.—People *v.* Jacks, 76 Mich. 218, 222, 42 N. W. 1134. Minn.—State *v.* Snyder, 113 Minn. 244, 247, 129 N. W. 375; State *v.* Miller, 45 Minn. 521, 48 N. W. 401; State *v.* Wiles, 26 Minn. 381, 4 N. W. 615. N. Y.—People *v.* McCallam, 103 N. Y. 587, 599, 9 N. E. 502. Va.—Wright *v.* Com., 82 Va. 183, 189.

[a] Grand and Petit Larceny.—In those states in which grand and petit larceny are designated as different degrees of the same offense, larceny in an office, when the value of the property so taken brings the crime within the higher grade, necessarily includes grand larceny; simple larceny embraces within its subdivisions grand larceny.

State *v.* Savage, 36 Ore. 191, 195, 60 Pac. 610, 61 Pac. 1128.

69. Pocket picking and larceny being distinct offenses, one indicted for the former cannot be convicted of the latter. State *v.* Whitten, 82 Ohio St. 174, 92 N. E. 79.

70. An attempt to commit larceny from the person by assaulting and pocket picking includes simple assault. State *v.* Houghton, 46 Ore. 12, 75 Pac. 822.

71. Ark.—Hughey *v.* State, 109 Ark. 389, 159 S. W. 1129. Fla.—Adams *v.* State, 60 Fla. 1, 53 So. 451, 1912B, Ann. Cas. 1209. Ill.—Watts *v.* People, 204 Ill. 233, 68 N. E. 563. Ind.—Owen *v.* State, 52 Ind. 379. La.—State *v.* Moultrie, 33 La. Ann. 1146. Mass. Com. *v.* King, 9 Cush. 284. Mich. In re Franklin, 77 Mich. 615, 43 N. W. 997. Mo.—State *v.* Raftery, 252 Mo. 72, 158 S. W. 585. N. Y.—See People *v.* Friedman, 149 App. Div. 873, 134 N. Y. Supp. 153; People *v.* Brien, 53 Hun 496, 635, 6 N. Y. Supp. 198. Okla. Ex parte Harris, 8 Okla. Crim. 397, 128 Pac. 156. Tex.—Kauffman *v.* State (Tex. Crim.), 159 S. W. 58; Gaither *v.* State, 21 Tex. App. 527, 1 S. W. 456; Brown *v.* State, 15 Tex. App. 581, overruling Parchman *v.* State, 2 Tex. App. 228. See Chandler *v.* State, 15 Tex. App. 587. Eng.—Reg. *v.* Perkins, 5 Cox C. C. 554.

72. State *v.* Dobbins, 152 Iowa 632, 132 N. W. 805, 42 L. R. A. (N. S.) 735; State *v.* Loser, 132 Iowa 419, 429, 104 N. W. 337; State *v.* Vickery, 19 Tex. 326.

73. Taylor *v.* State, 25 Tex. App. 96, 7 S. W. 861.

74. Sevy *v.* State, 71 Ga. 361; State *v.* Byers, 2 Overt. (Tenn.) 110. But see Morton *v.* State, 1 Lea (Tenn.) 498, every larceny includes a trespass to the person or property of the owner of the thing stolen.

[a] Nor is the reverse, that under trespass one may be convicted of larceny, true. Sevy *v.* State, 71 Ga. 361.

deny support a conviction of embezzlement,⁷⁵ except where so provided by statute.⁷⁶

p. *Libel*.—An indictment charging printing and publishing a libel will sustain a conviction of publishing only.⁷⁷

q. *Maintaining Blind Tiger*.—On an indictment charging the running of a "blind tiger" one cannot be convicted of an ordinary violation of the local option law.⁷⁸

r. *Malicious Mischief*.—One indicted for a particular kind of malicious mischief cannot be convicted of a separate and distinct kind.⁷⁹

s. *Mayhem*.—An indictment charging maiming or mayhem will support a conviction of assault,⁸⁰ assault and battery,⁸¹ aggravated assault and battery,⁸² wounding,⁸³ or disfiguring;⁸⁴ and one charging malicious mayhem will support a conviction of simple mayhem.⁸⁵

t. *Rape*.—Under an indictment charging rape it is proper to return a verdict of conviction for assault and battery,⁸⁶ of felonious

75. *Ill.*—Kibs v. People, 81 Ill. 599. *Mass.*—Com. v. Kelley, 184 Mass. 320, 68 N. E. 346; Com. v. Berry, 99 Mass. 428, 96 Am. Dec. 767; Com. v. King, 9 Cush. 284; Com. v. Simpson, 9 Met. 138. See Com. v. Pratt, 132 Mass. 246. *Tex.*—Huntsman v. State, 12 Tex. App. 619, overruling Whitworth v. State, 11 Tex. App. 414.

But see People v. Johnson, 91 Cal. 265, 272, 27 Pac. 663, concurring opinion of Beatty, C. J.

76. State v. Thompson, 144 Mo. 314, 320, 46 S. W. 191; State v. Broderick, 70 Mo. 622, overruling State v. Stone, 68 Mo. 101; State v. Broderick, 7 Mo. App. 19.

[a] *In England*.—(1) Under 24 & 25 Viet., ch. 96, §72, there may be a verdict of embezzlement on a larceny charge if the evidence shows embezzlement and vice versa. Reg. v. Rudge, 13 Cox C. C. 17, 31 L. T. 590. (2) Before the larceny act one indicted for larceny might be convicted of embezzlement, yet he could not be convicted of larceny if there was only evidence of embezzlement. Reg. v. Gorbett, 7 Cox C. C. 221, 26 L. J. M. C. 47, 3 Jur. (N. S.) 371.

Constitutionality of statute, see *infra*, XIII, L.

77. Wright v. Com., 82 Va. 183, 189. 78. Gorman v. State, 52 Tex. Crim. 24, 105 S. W. 200.

79. Brewer v. State, 28 Tex. App. 565, 13 S. W. 1004; McCleskey v. State (Tex. App.), 13 S. W. 997; McRay v.

State, 18 Tex. App. 331; Payne v. State, 17 Tex. App. 40.

80. Queen v. Gardner, 14 N. S. W. S. C. 445, verdict of assault on charge of unlawfully and maliciously wounding. See also Queen v. Jenkins, Knox (Eng.) 295.

81. *Ark.*—State v. Nichols, 38 Ark. 550. *Ind.*—State v. Fisher, 103 Ind. 530, 3 N. E. 379. *Ia.*—Benham v. State, 1 Iowa 542. *Ohio*.—State v. Johnson, 58 Ohio St. 417, 426, 51 N. E. 40, 65 Am. St. Rep. 769. *Tenn.*—Carden v. State, 3 Head 267. *Tex.*—Stapp v. State, 3 Tex. App. 138, 145.

82. Guest v. State, 19 Ark. 405; Stapp v. State, 3 Tex. App. 138, 145.

[a] *But Not for Assault With Intent To Murder*.—Davis v. State, 22 Tex. App. 45, 2 S. W. 630.

83. Stapp v. State, 3 Tex. App. 138, 145.

[a] An indictment charging "malicious cutting with intent to kill" will not support a conviction of "malicious cutting with intent to wound" as the latter is not an inferior degree to the crime charged but is of the same degree, and may be punished with equal severity. Barber v. State, 39 Ohio St. 660.

84. Stapp v. State, 3 Tex. App. 138, 145.

85. State v. Fisher, 103 Ind. 530, 3 N. E. 379. See also Montgomery v. Com., 98 Va. 840, 36 S. E. 371; Canada v. Com., 22 Gratt. 899, 904.

86. *Ala.*—Hutto v. State, 169 Ala.

assault,⁸⁷ of incest,⁸⁸ of fornication, in some jurisdictions,⁸⁹ or the offense of carnal knowledge of a female,⁹⁰ if properly alleged,⁹¹ or of adultery if properly alleged.⁹² A general charge of rape will also support a conviction of assault with intent to commit rape.⁹³ And an

19, 53 So. 809; *Oakley v. State*, 135 Ala. 29, 35, 33 So. 693; *Richardson v. State*, 54 Ala. 158; *Kirby v. State*, 5 Ala. App. 128, 59 So. 374. Ind.—*Gordon v. State*, 177 Ind. 689, 98 N. E. 627; *Jones v. State*, 118 Ind. 39, 20 N. E. 634; *State v. Fisher*, 103 Ind. 530-532, 3 N. E. 379; *Richie v. State*, 58 Ind. 355; *Mills v. State*, 52 Ind. 187. Ia.—*State v. Barkley*, 129 Iowa 484, 105 N. W. 506; *State v. Trusty*, 118 Iowa 498, 500, 92 N. W. 677; *State v. Wolf*, 112 Iowa 458, 84 N. W. 536; *State v. Hutchinson*, 95 Iowa 566, 64 N. W. 610; *State v. Kyne*, 86 Iowa 616-618, 53 N. W. 420; *State v. Casford*, 76 Iowa 330-332, 41 N. W. 32. Mass.—*Com. v. Thompson*, 116 Mass. 346-348; *Com. v. Fischblatt*, 4 Met. 354; *Com. v. Drum*, 19 Pick. 479. Mich. *People v. Abbott*, 97 Mich. 484, 56 N. W. 862, 37 Am. St. Rep. 360. N. J. *State v. Jackson*, 65 N. J. L. 105, 46 Atl. 764; *Farrell v. State*, 54 N. J. L. 416, 24 Atl. 723. Wash.—*State v. Keen*, 10 Wash. 93, 38 Pac. 880. Wis. *Vogel v. State*, 138 Wis. 315, 119 N. W. 190.

[a] Even though there has been an entry of *nolle prosequi* "as to so much of this indictment as charges rape," a conviction of simple assault is proper under an indictment charging rape. *Com. v. Dean*, 109 Mass. 349, 351.

[b] But not where conviction of misdemeanor under a charge of felony is improper. *State v. Durham*, 72 N. C. 447. See *infra*, XIII, E.

[c] An averment of force and violence is essential to sustain a conviction of assault and battery. *State v. Butler*, 157 Iowa 163, 138 N. W. 383; *State v. Johnson*, 133 Iowa 38, 110 N. W. 170; *State v. Miller*, 124 Iowa 429, 100 N. W. 844. See also *State v. Keen*, 10 Wash. 93, 38 Pac. 880.

[d] An order of court compelling an election to place the accused on trial for rape instead of assault and battery is a nullity and does not take out of the case the assault and battery necessarily included in the charge of rape. *Mills v. State*, 52 Ind. 187.

87. *Hall v. People*, 47 Mich. 636, 11

N. W. 414; *State v. Bagan*, 41 Minn. 285, 43 N. W. 5.

88. *Com. v. Goodhue*, 2 Met. (Mass.) 193; *State v. Tevis*, 234 Mo. 276, 136 S. W. 339.

89. *Fenston v. Com.*, 82 Ky. 549, 554; *Com. v. Parker*, 146 Pa. 343, 23 Atl. 323; *Com. v. Lewis*, 140 Pa. 561, 21 Atl. 501. *Contra*, *Speer v. State*, 60 Ga. 381; *Vogel v. State*, 138 Wis. 315, 119 N. W. 190; *State v. Shear*, 51 Wis. 460, 8 N. W. 287.

90. *Eads v. Com.*, 162 Ky. 89, 172 S. W. 104; *Fenston v. Com.*, 82 Ky. 554; *Fagan v. Com.*, 18 Ky. L. Rep. 714, 38 S. W. 431; *Forriston v. Com.*, 7 Ky. L. Rep. 55. *Compare* *Vasser v. State*, 55 Ala. 264.

[a] Conviction of detaining a female against her will with intent to have carnal knowledge of her. *Fagan v. Com.*, 18 Ky. L. Rep. 714, 38 S. W. 431.

91. *Com. v. Murphy*, 2 Allen (Mass.) 163. See also *State v. Shear*, 51 Wis. 460-462, 8 N. W. 287.

92. *Com. v. Squires*, 97 Mass. 59. But see *State v. Hooks*, 69 Wis. 182, 33 N. W. 57, 2 Am. St. Rep. 728.

93. Ala.—*Oakley v. State*, 135 Ala. 29, 35, 33 So. 693; *Richardson v. State*, 54 Ala. 158. Ark.—*Paxton v. State*, 108 Ark. 316, 157 S. W. 396; *Green v. State*, 91 Ark. 562, 121 S. W. 949; *Pratt v. State*, 51 Ark. 167, 10 S. W. 233. Cal.—*People v. Babcock*, 160 Cal. 537, 540, 117 Pac. 549. Fla.—*Schang v. State*, 43 Fla. 561, 31 So. 346. Ga. *Johnson v. State*, 14 Ga. 55. Ill.—*Prinderville v. People*, 42 Ill. 217. Ind.—See *Polson v. State*, 137 Ind. 519, 522, 35 N. E. 907. Ia.—*State v. Barkley*, 129 Iowa 484, 105 N. W. 506; *State v. Trusty*, 118 Iowa 498-500, 92 N. W. 677; *State v. Casford*, 76 Iowa 330-332, 41 N. W. 32; *State v. Pennell*, 56 Iowa 29-31, 8 N. W. 686; *State v. Peters*, 56 Iowa 263, 9 N. W. 219; *State v. McLaughlin*, 44 Iowa 82-87. Kan.—*State v. Guthridge*, 88 Kan. 846, 129 Pac. 1143. Ky.—*Fagan v. Com.*, 18 Ky. L. Rep. 714, 38 S. W. 431. La.—*State v. May*, 42 La. Ann. 82, 7 So. 60. Mass.

indictment charging the crime of taking indecent and improper liberties with a female will sustain a conviction of assault and battery.⁹⁴

u. *Receiving Stolen Goods*.—A charge of receiving stolen goods will not sustain a conviction of larceny,⁹⁵ but a charge of *receiving stolen goods* of sufficient value to constitute a felony will sustain a conviction of receiving stolen goods of a less value, constituting a misdemeanor.⁹⁶

v. *Rescue*.—If accused of forcibly freeing a person under arrest, the defendant may be convicted of assault and battery, the latter being charged.⁹⁷

w. *Resisting an Officer*.—One accused of resisting an officer may be convicted of an assault,⁹⁸ or assault and battery.⁹⁹

x. *Riot*.—A person indicted for riot cannot be convicted of assault,¹ or assault and battery,² but under an indictment charging riot, and a riotous assault and battery,³ or an assault committed riotously,⁴ one may be convicted respectively of assault and battery or assault.

y. *Robbery*.—An indictment for robbery will sustain a conviction of any lower degree or crime necessarily included in that charged,⁵

Com. v. Fischblatt, 4 Met. 354, 356; Com. v. Cooper, 15 Mass. 187. **Mich.** People v. Murphy, 145 Mich. 524, 528, 108 N. W. 1009; People v. Dowell, 136 Mich. 306, 309, 99 N. W. 23; People v. Abbott, 97 Mich. 484, 488, 56 N. W. 862, 37 Am. St. Rep. 360; People v. Miller, 96 Mich. 119, 55 N. W. 675; People v. Courier, 79 Mich. 366, 44 N. W. 571. **Minn.**—State v. Bagan, 41 Minn. 285, 43 N. W. 5; O'Connell v. State, 6 Minn. 412. **Mo.**—State v. Scott, 172 Mo. 536, 544, 72 S. W. 897. **Neb.**—Evers v. State, 84 Neb. 708, 121 N. W. 1005. **N. C.**—State v. Lance, 166 N. C. 411, 81 S. E. 1092. **Okla.**—Pittman v. State, 8 Okla. Crim. 58, 126 Pac. 696; Vickers v. United States, 1 Okla. Crim. 452, 98 Pac. 467. **Pa.**—Harman v. Com., 12 Serg. & R. 69, 72. **R. I.**—State v. Fitzsimon, 18 R. I. 236-239, 27 Atl. 446, 49 Am. St. Rep. 766. **Tex.**—Brown v. State, 7 Tex. App. 569. **Utah.**—State v. Blythe, 20 Utah 378, 381, 58 Pac. 1108. **Wash.**—State v. Marselle, 43 Wash. 273, 277, 86 Pac. 586. **Wis.**—Murphy v. State, 108 Wis. 111, 83 N. W. 1112; State v. Mueller, 85 Wis. 203, 55 N. W. 165.

Conviction of attempt under a charge of completed offense, see *supra*, XIII, A, 2; XIII, A, 3, g.

[a] But on a charge of statutory rape on a female under the age of consent force is not an element of the charge, and a conviction of an assault

with intent," etc., cannot be had. People v. Akin (Cal. App.), 143 Pac. 795; State v. Pickett, 11 Nev. 255, 259, 21 Am. Rep. 754.

[b] Conviction of assault and battery with intent to commit rape. Murphy v. State, 120 Ind. 115, 22 N. E. 106.

94. People v. Sanford, 149 Mich. 266, 112 N. W. 910.

95. People v. Pollack, 154 App. Div. 716, 139 N. Y. Supp. 831; People v. Brien, 53 Hun 496, 635, 6 N. Y. Supp. 198; Gaither v. State, 21 Tex. App. 527, 1 S. W. 456.

96. State v. Greenspan, 70 Mo. App. 468. See *infra*, XIII, E.

97. Rose v. State, 33 Ind. 167.

98. People v. Warner, 53 Mich. 78, 18 N. W. 568; People v. Haley, 48 Mich. 495, 497, 12 N. W. 671; State v. Webster, 39 N. H. 96, 98.

99. State v. Gorham, 55 N. H. 152, 163. See also Martin v. Laurel, 63 So. 670.

1. Ferguson v. People, 90 Ill. 510; Freeland v. People, 16 Ill. 380; Price v. People, 9 Ill. App. 36.

2. Ferguson v. People, 90 Ill. 510. See Freeland v. People, 16 Ill. 380.

3. Shouse v. Com., 5 Pa. 83, 87.

4. Com. v. Hall, 142 Mass. 454, 8 N. E. 324.

5. Ga.—Long v. State, 12 Ga. 203;

such as assault and battery,⁶ assault with intent to rob,⁷ pocket-picking, or stealing from the person.⁸ It will also sustain a conviction of larceny,⁹ or grand larceny;¹⁰ but not a conviction of assault with intent

Harris v. State, 1 Ga. App. 136, 57 S. E. 937. **Minn.**—*State v. O'Neil*, 71 Minn. 399, 73 N. W. 1091. **N. Y.** *People v. Thompson*, 198 N. Y. 396, 398, 91 N. E. 838.

See 2 Hale P. C. 302. But see *State v. Farrar*, 38 Mo. 457; *State v. Davidson*, 38 Mo. 374; *State v. Jenkins*, 36 Mo. 372.

[a] **Aiding and Abetting.**—*Terhune v. Com.*, 144 Ky. 370, 138 S. W. 274.

6. **Ala.**—*Rambo v. State*, 134 Ala. 71, 32 So. 650; *Cook v. State*, 134 Ala. 137, 32 So. 696; *Smith v. State*, 11 Ala. App. 153, 65 So. 693. **Ia.**—*State v. Kegan*, 62 Iowa 106, 17 N. W. 179. **N. Y.**—*Murphy v. People*, 3 Hun 114. **Ohio.**—*Howard v. State*, 25 Ohio St. 399. **Pa.**—See *Com. v. Stiver*, 1 Pa. Ct. Ct. 526. **Va.**—*Hardy v. Com.*, 17 Gratt. 592, 600.

[a] **Aggravated Assault.**—If an indictment for robbery contained the allegation, under the recent statute, that it was committed with a firearm, the same being a deadly weapon, and also alleged an assault with such deadly weapon, then a conviction for an aggravated assault might be maintained under such indictment, because it would contain all the essential elements creating one character of an aggravated assault, otherwise it would not. *Foreman v. State* (Tex. Crim.), 57 S. W. 843, 844.

7. **Ala.**—*Rambo v. State*, 134 Ala. 71, 32 So. 650; *Cook v. State*, 134 Ala. 137, 32 So. 696; *Smith v. State*, 11 Ala. App. 153, 65 So. 693. **Mich.**—*People v. Blanchard*, 136 Mich. 146, 98 N. W. 983. **Ohio.**—See *Blair v. State*, 5 Ohio C. C. 496, 502.

See *supra*, XIII, A, 2; XIII, A, 3, g.

8. *State v. Miller*, 71 Kan. 491, 80 Pac. 947; *State v. Dunn*, 66 Kan. 483, 71 Pac. 811; *State v. Pickering*, 57 Kan. 326, 46 Pac. 314; *Brown v. State*, 25 Ohio C. C. 130.

[a] An indictment charging the statutory crime of pocket-picking will not support a conviction of larceny. *State v. Whitten*, 82 Ohio St. 174, 92 N. E. 79.

9. **Ala.**—*Cook v. State*, 134 Ala. 137, 32 So. 696; *Rambo v. State*, 134 Ala.

71, 32 So. 650; *Morris v. State*, 97 Ala. 82, 12 So. 276; *Allen v. State*, 58 Ala. 98. **Ark.**—*Haley v. State*, 49 Ark. 147, 4 S. W. 746. **Cal.**—*People v. Chuey Ying Git*, 100 Cal. 437, 34 Pac. 1080; *People v. Nelson*, 56 Cal. 77; *People v. Jones*, 53 Cal. 58. **Ill.**—*Burke v. People*, 148 Ill. 70, 35 N. E. 376. **Ind.** *Duffy v. State*, 154 Ind. 250, 56 N. E. 209; *Vaneleave v. State*, 150 Ind. 273, 49 N. E. 1060; *Rains v. State*, 137 Ind. 83, 36 N. E. 532; *Hickey v. State*, 23 Ind. 21; *State v. Kennedy*, 7 Blackf. 233. **Ia.**—*State v. Taylor*, 140 Iowa 470, 118 N. W. 747; *State v. Wasson*, 126 Iowa 320, 322, 101 N. W. 1125; *State v. Reasby*, 100 Iowa 231, 69 N. W. 451; *State v. Mikesell*, 70 Iowa 176, 30 N. W. 474; *State v. Graff*, 66 Iowa 482, 24 N. W. 6. **Kan.**—*State v. Miller*, 71 Kan. 491, 80 Pac. 947; *State v. Pickering*, 57 Kan. 326, 46 Pac. 314. **Ky.** *Com. v. Prewitt*, 82 Ky. 240; *Sullivan v. Com.*, 9 Ky. L. Rep. 420, 5 S. W. 365. **La.**—*State v. Stouderman*, 6 La. Ann. 286, 289, theft. **Mo.**—*State v. Parker*, 170 S. W. 1121; *State v. Smith*, 190 Mo. 706, 90 S. W. 440; *State v. Keeland*, 90 Mo. 337, 2 S. W. 442; *State v. Davidson*, 38 Mo. 374; *State v. Jenkins*, 36 Mo. 372. **Neb.**—*Bunge v. State*, 87 Neb. 557, 127 N. W. 899; *Brown v. State*, 33 Neb. 354, 50 N. W. 154, 34 Neb. 448, 51 N. W. 1028; *Stevens v. State*, 19 Neb. 647, 28 N. W. 304. **N. H.**—*State v. Webster*, 39 N. H. 96, 98. **N. Y.**—*People v. Kennedy*, 57 Hun 532, 11 N. Y. Supp. 244; *People v. Langton*, 32 Hun 461; *People v. Jackson*, 3 Hill 92. **N. C.**—*State v. Nicholson*, 124 N. C. 820, 32 S. E. 813. **Tenn.**—*Smith v. State*, 2 Lea 614, 618; *Tucker v. State*, 3 Heisk. 484. **Wash.** *State v. Dengel*, 24 Wash. 49, 53, 63 Pac. 1104. See *State v. Johnson*, 19 Wash. 410, 53 Pac. 667. **Wis.**—*McEntee v. State*, 24 Wis. 43.

Compare *People v. Powler*, 142 Mich. 225, 105 N. W. 611; *People v. Blanchard*, 136 Mich. 146, 98 N. W. 983; *Kemp v. State*, 89 Miss. 445, 42 So. 606.

10. *Allen v. State*, 58 Ala. 98.

[a] **Absence of Evidence.**—An indictment for robbery will not sustain a conviction of larceny when there is

to murder¹¹ or of riot,¹² since they are not included offenses.

z. Seduction.—An indictment for seduction will support a conviction of adultery¹³ or fornication.¹⁴

aa. Stabbing.—Under an indictment for stabbing one may be convicted of assault,¹⁵ or assault and battery.¹⁶

B. CONVICTION OF HIGHER OFFENSE.—A conviction of a higher offense than that charged is error although the higher offense may be shown by the evidence.¹⁷

C. CONVICTING JOINT DEFENDANTS OF DIFFERENT DEGREES.—Where several persons are jointly accused of the crime, it is proper to find them guilty of different degrees of the offense,¹⁸ if the verdict is not thereby rendered inconsistent.¹⁹

D. RIGHT TO CONVICT OF MISDEMEANOR.—At common law the right to convict of a lesser offense was subject to the qualification that under an indictment for a felony the accused could not be convicted²⁰

not one scintilla of evidence of larceny, even though an overwhelming case of robbery is made out. *Kemp v. State*, 89 Miss. 445, 42 So. 606.

11. *Munson v. State*, 21 Tex. App. 329, 17 S. W. 251.

12. *Cochran v. State*, 4 Okla. Crim. 379, 111 Pac. 974.

13. *Wood v. State*, 48 Ga. 192, 294, 15 Am. Rep. 664.

14. *Ga.*—*Hopper v. State*, 54 Ga. 389; *Wood v. State*, 48 Ga. 192, 15 Am. Rep. 664; *Boggs v. State*, 11 Ga. App. 92, 74 S. E. 716. *Mich.*—See *People v. Rouse*, 2 Mich. N. P. 209. *Pa.*—*Hunter v. Com.*, 79 Pa. 503, 506; *Dinkev v. Com.*, 17 Pa. 126, 55 Am. Dec. 542.

[a] **Even Though There Is No Allegation That Defendant Is a Single Man.**—*Hopper v. State*, 54 Ga. 389. But see *State v. Shear*, 51 Wis. 460, 462, 8 N. W. 287.

15. *Sessions v. State*, 115 Ga. 18, 41 S. E. 259; *Ward v. State*, 56 Ga. 408; *Whilden v. State*, 25 Ga. 396, 71 Am. Dec. 181; *Montgomery v. Com.*, 98 Va. 840, 36 S. E. 371. But see *State v. Valentine*, 6 Yerg. (Tenn.) 533.

16. *Hollis v. State*, 13 Ga. App. 307, 79 S. E. 85; *Sessions v. State*, 115 Ga. 18, 22, 41 S. E. 259; *Rives v. State*, 74 Ga. 375; *Ward v. State*, 56 Ga. 408; *Whilden v. State*, 25 Ga. 396, 71 Am. Dec. 181. But see *State v. Valentine*, 6 Yerg. (Tenn.) 533.

[a] One accused of stabbing can lawfully be convicted of assault and battery, in a case where there is evidence of an assault and battery inde-

pendently of the stabbing. *Hollis v. State*, 13 Ga. App. 307, 79 S. E. 85.

17. *Ariz.*—*Vincent v. State*, 145 Pac. 241. *Ind.*—*McCollough v. State*, 132 Ind. 427, 31 N. E. 1116. *Me.*—*State v. Leavitt*, 87 Me. 72, 32 Atl. 787. *N. Y.*—*People v. Fellingner*, 24 How. Pr. 341. *Ore.*—*Ex parte Jung Sing*, 145 Pac. 637.

18. *United States v. Harding*, 1 Wall. Jr. 129, 26 Fed. Cas. No. 15,301; *White v. People*, 32 N. Y. 465.

19. **Conviction of Grand and Petit Larceny.**—"If two are indicted together for stealing the same goods, one cannot be convicted of *grand* and the other of *petit* larceny, for the subject of the theft cannot have different values according to the agency of one or the other party; if guilty at all they must both be guilty of the same grade of offense." *State v. Major*, 14 Rich. (S. C.) 76; *State v. Wilson*, 3 McCord (S. C.) 187 (holding the same principle applies to burglary); *State v. Larumbo*, Harp. (S. C.) 183.

[a] **Illustrations.**—(1) One may be convicted of petit treason, the other of murder; or one may be convicted of murder and the other of manslaughter. *State v. Wilson*, 3 McCord (S. C.) 187. See also *United States v. Harding*, 1 Wall. Jr. 129, 26 Fed. Cas. No. 15,301. (2) One may be convicted of assault and battery, the other of assault. *White v. People*, 32 N. Y. 465.

20. *Ark.*—*Cameron v. State*, 13 Ark. 712, 715. *Cal.*—*People v. McDaniels*, 137 Cal. 192, 197, 69 Pac. 1006, 92 Am.

of a misdemeanor, but this qualification has, in the United States,²¹

St. Rep. 81, 59 L. R. A. 578. **Ga.**—Watson v. State, 116 Ga. 607, 608, 43 S. E. 32, 21 L. R. A. (N. S.) 1. **Ill.**—Herman v. People, 131 Ill. 594, 599, 22 N. E. 471, 9 L. R. A. 182. **Kan.**—State v. O'Kane, 23 Kan. 244, 248. **La.**—State v. Perry, 116 La. 231, 235, 40 So. 686. **Tex.**—Stapp v. State, 3 Tex. App. 138, 144. **Eng.**—See Hawks Pl. Crown, vol. II, p. 622, and cases cited.

[a] The reason for this qualification was that a person charged with a misdemeanor was entitled to certain privileges to which a person indicted for a felony was not entitled. The privileges were the right to appear by counsel and to have a copy of the indictment and a special jury. But in most, if not all, the states of this country the reasons for this distinction never existed; with us the rights of the accused on a trial for a felony are as well protected as upon a trial for a misdemeanor. Indeed, in Georgia, a person accused of a felony has some rights and privileges which a person charged with a misdemeanor does not have. **Ga.**—Watson v. State, 116 Ga. 607, 608, 43 S. E. 32, 21 L. R. A. (N. S.) 1. **Mich.**—Hanna v. People, 19 Mich. 316, 318. **Tex.**—Stapp v. State, 3 Tex. App. 138, 144. See: **Cal.**—People v. McDaniels, 137 Cal. 192, 197, 69 Pac. 1006, 92 Am. St. Rep. 81, 59 L. R. A. 578. **Ill.**—Herman v. People, 131 Ill. 594, 599, 22 N. E. 471, 9 L. R. A. 182. **La.**—State v. Perry, 116 La. 231, 235, 40 So. 686.

21. **Ala.**—Storrs v. State, 129 Ala. 101, 103, 29 So. 778; Jones v. State, 79 Ala. 23, 25; Sanders v. State, 55 Ala. 43, 46; Henry v. State, 33 Ala. 389, 401; McWilliams v. State (Ala. App.), 67 So. 735; Beason v. State, 5 Ala. App. 103, 59 So. 712. **Ariz.**—Mapula v. Territory, 9 Ariz. 199, 80 Pac. 389. **Ark.**—Monk v. State, 105 Ark. 12, 150 S. W. 133; State v. Nichols, 38 Ark. 550, 552. **Colo.**—Foster v. People, 1 Colo. 193. **Del.**—State v. Fleetwood, 6 Penne. 153, 159, 65 Atl. 772. **Ga.**—Watson v. State, 116 Ga. 607, 610, 43 S. E. 32, 21 L. R. A. (N. S.) 1; Wood v. State, 48 Ga. 192, 294, 15 Am. Rep. 664. **Ill.**—Herman v. People, 131 Ill. 594, 599, 22 N. E. 471, 9 L. R. A. 182. **Ind.**—See State v. Throckmorton, 53 Ind.

354, 357. **Kan.**—State v. Hodges, 45 Kan. 389, 394, 26 Pac. 676; State v. O'Kane, 23 Kan. 244, 248. **Ky.**—Housman v. Com., 128 Ky. 818, 110 S. W. 236; Com. v. Wells, 33 Ky. L. Rep. 964, 112 S. W. 568. **La.**—State v. Perry, 116 La. 231, 235, 40 So. 686. **Mass.**—See Com. v. Drum, 19 Pick. 479; Com. v. Roby, 12 Pick. 496, 507; Com. v. Cooper, 15 Mass. 187. **Mich.**—Hanna v. People, 19 Mich. 316, 320. **Miss.**—Brown v. State, 103 Miss. 664, 60 So. 727; Hastings v. State, 59 Miss. 541, 542; Moore v. State, 59 Miss. 25, 27; Gipson v. State, 38 Miss. 295, 312. **N. H.**—State v. Lincoln, 49 N. H. 464, 470. **N. J.**—State v. Johnson, 30 N. J. L. 185, 188. **N. Y.**—See Dedieu v. People, 22 N. Y. 178, 184; People v. Jackson, 3 Hill 92; People v. Scheuren, 148 App. Div. 324, 132 N. Y. Supp. 1025. **Pa.**—Hunter v. Com., 79 Pa. 503, 507, 21 Am. Rep. 83. But see Hilands v. Com., 114 Pa. 372, 6 Atl. 267; Walters v. Com., 44 Pa. 135; Com. v. Gable, 7 Serg. & R. 423. **S. C.**—State v. Gaffney, Rice 431. **Tenn.**—Brinkley v. State, 125 Tenn. 445, 145 S. W. 161; Crockett v. State, 125 Tenn. 131, 140 S. W. 1058; Lang v. State, 16 Lea 433, 1 S. W. 318; Hall v. State, 7 Lea 685; Smith v. State, 2 Lea 614, 616; Carden v. State, 3 Head 267. **Tex.**—Green v. State, 8 Tex. App. 71. **Utah.**—People v. Chalmers, 5 Utah 201, 204, 14 Pac. 131. **Vt.**—State v. Smith, 43 Vt. 324, 326; State v. Scott, 24 Vt. 127, 130. But see State v. Wheeler, 3 Vt. 344, 23 Am. Dec. 212. **Va.**—Canada v. Com., 22 Gratt. 899, 905; Hardy v. Com., 17 Gratt. 592, 615. **W. Va.**—State v. Howes, 26 W. Va. 110, 113.

[a] The provision that no person shall be acquitted of a misdemeanor where the proofs show a felony applies usually to those cases where the felony includes the misdemeanor, and is made up of the latter and some additional but not contradictory element. People v. Chappell, 27 Mich. 486.

[b] In Monk v. State, 105 Ark. 12, 150 S. W. 133, the court says: "From an early day it has been held that, upon an indictment for a felony, the accused may be convicted of a misdemeanor, where both offenses belong to the same generic class, where the

been generally abandoned, and the same is true in England.²²

E. **PRINCIPALS CONVICTED AS ACCESSORIES.**—Although by common law one charged as principal could not be convicted as accessory and vice versa,²³ this is sometimes permitted by statute.²⁴

F. **TO WHAT CRIMES RULE APPLIES.**—The statutes permitting a conviction of a lesser degree of offense on the charge of a greater apply both to offenses in existence at the enactment thereof,²⁵ and to offenses subsequently created.²⁶

G. **RIGHT TO CONVICT AS AFFECTED BY THE ALLEGATIONS OF THE INDICTMENT AND INFORMATION.**—1. **Generally.**—Unless the greater offense is of such a character that it includes within itself all the essential elements of the lesser,²⁷ the indictment must on its face show every essential element of the lesser offense in order to sustain a conviction of the lesser crime,²⁸ but it is not necessary that the indict-

commission of the higher may involve the commission of the lower offense, and where the indictment for the higher offense contains all the substantive allegations necessary to let in proof of the misdemeanor."

22. **In England** by Lord Denman's Act (St., 1 Vict., ch. 85, §11). See: **Cal.**—People *v.* McDaniels, 137 Cal. 192, 197, 69 Pac. 1006, 92 Am. St. Rep. 81, 59 L. R. A. 578. **La.**—State *v.* Perry, 116 La. 231, 235, 40 So. 686. **Mich.**—Hanna *v.* People, 19 Mich. 316-319.

23. State *v.* Cassidy, 12 Kan. 550, 556; State *v.* Green, 119 N. C. 899, 26 S. E. 112.

24. State *v.* Cassidy, 12 Kan. 550, 556; Territory *v.* McGinnis, 10 N. M. 269, 275, 61 Pac. 208.

25. See: **Mo.**—State *v.* Johnson, 81 Mo. 60. **Neb.**—Mulloy *v.* State, 58 Neb. 204, 210, 78 N. W. 525. **Nev.**—*Ex parte* Finnegan, 27 Nev. 57, 71 Pac. 642.

26. Mulloy *v.* State, 58 Neb. 204, 210, 78 N. W. 525. See also *Ex parte* Finnegan, 27 Nev. 57, 71 Pac. 642.

27. **Fla.**—See Lindsey *v.* State, 53 Fla. 56, 64, 43 So. 87. **Ga.**—Smith *v.* State, 126 Ga. 544, 545, 55 S. E. 475; Watson *v.* State, 116 Ga. 607, 612, 43 S. E. 32, 21 L. R. A. (N. S.) 1. **Ia.**—State *v.* Desmond, 109 Iowa 72, 79, 80 N. W. 214; State *v.* McAvoy, 73 Iowa 557, 35 N. W. 630. **Kan.**—State *v.* Way, 76 Kan. 928, 930, 93 Pac. 159, 14 L. R. A. (N. S.) 603. **Mich.**—See Turner *v.* Muskegon Circ. Judge, 88 Mich. 359, 50 N. W. 310. **Miss.**—Brown *v.* State, 103 Miss. 664, 60 So. 727; Moore *v.* State, 59 Miss. 25. **Neb.**—Mulloy *v.* State, 58 Neb. 204, 208, 78 N. W. 525.

N. J.—State *v.* Jankowski, 82 N. J. L. 229, 82 Atl. 309, 311. **N. Y.**—Hennessey *v.* People, 21 How. Pr. 239, 243. **Tex.**—Peterson *v.* State, 12 Tex. App. 650, 655. **Va.**—Hardy *v.* Com., 17 Gratt. 592, 615.

28. **Ark.**—Monk *v.* State, 105 Ark. 12, 150 S. W. 133; Jones *v.* State, 100 Ark. 195, 198, 139 S. W. 1126; Davis *v.* State, 45 Ark. 464; Childs *v.* State, 15 Ark. 201; Cameron *v.* State, 13 Ark. 712. **Fla.**—Lindsey *v.* State, 53 Fla. 56, 63, 43 So. 87. **Ga.**—Smith *v.* State, 126 Ga. 544, 545, 55 S. E. 475; Watson *v.* State, 116 Ga. 607, 612, 43 S. E. 32, 21 L. R. A. (N. S.) 1. **Idaho.**—In re McLeod, 23 Idaho 257, 128 Pac. 1106, 43 L. R. A. (N. S.) 813. **Ia.**—State *v.* Desmond, 109 Iowa 72, 79, 80 N. W. 214; State *v.* McAvoy, 73 Iowa 557, 35 N. W. 630. **Kan.**—State *v.* Way, 76 Kan. 928, 93 Pac. 159, 14 L. R. A. (N. S.) 603; State *v.* Burwell, 34 Kan. 312, 8 Pac. 470. **La.**—State *v.* Porter, 48 La. Ann. 1539, 21 So. 125. **Mass.**—Com. *v.* Squires, 97 Mass. 59, 61; Com. *v.* Murphy, 2 Allen 163. **Miss.**—Brown *v.* State, 103 Miss. 664, 60 So. 727; Scott *v.* State, 60 Miss. 268; Moore *v.* State, 59 Miss. 25. **Mo.**—State *v.* Shoemaker, 7 Mo. 177, 180. **Mont.**—State *v.* Cream, 43 Mont. 47, 53, 114 Pac. 603, 1912C, Ann. Cas. 424. **Neb.**—Mulloy *v.* State, 58 Neb. 204, 78 N. W. 525. **N. J.**—State *v.* Thomas, 65 N. J. L. 598, 45 Atl. 913; Farrell *v.* State, 54 N. J. L. 416, 419, 24 Atl. 723; State *v.* Johnson, 30 N. J. L. 185. **N. Y.**—Dedien *v.* People, 22 N. Y. 178, 185, cited, commented upon and slightly overruled in Keefe *v.* People, 40 N. Y. 345-354-355; Hennessey *v.* People, 21

ment specifically charge such lesser offense,²⁹ or the particular circumstances characterizing such offense,³⁰ for the necessary words to charge the lesser crime will be gathered from the whole indictment and its meaning.³¹ Nor is it required that the various degrees of the crime be specified.³²

How. Pr. 239-243. **N. D.**—*State v. Bel-yea*, 9 N. D. 353, 83 N. W. 1. **Tex.** *Foreman v. State* (Tex. Crim.), 57 S. W. 843-844; *Huntsman v. State*, 12 Tex. App. 619. But see *Peterson v. State*, 12 Tex. App. 650. **Utah**—*People v. Chalmers*, 5 Utah 201, 204, 14 Pac. 131. **Va.**—See *Wright v. Com.*, 82 Va. 183, 189; *Canada v. Com.*, 22 Gratt. 899, 908; *Hardy v. Com.*, 17 Gratt. 592, 615. **Wis.**—*Birker v. State*, 118 Wis. 108, 110, 94 N. W. 643; *State v. Shear*, 51 Wis. 460, 462, 8 N. W. 287. **Can.** *Queen v. Magee*, 7 N. Bruns. 14, 17.

[a] The allegation in the indictment charging the higher offense must be in such form as to charge the lower in order to sustain a conviction of the latter. *People v. Chalmers*, 5 Utah 201, 204, 14 Pac. 131.

[b] After striking out that portion of the charge of which defendant was acquitted, the residue must substantially charge the offense of which accused was convicted. *Com. v. Murphy*, 2 Allen (Mass.) 163.

29. **Ga.**—*Reynolds v. State*, 1 Ga. 222. **Ill.**—*Kennedy v. People*, 122 Ill. 649, 655, 13 N. E. 213; *Carpenter v. People*, 5 Ill. 197. **Ind.**—*Mills v. State*, 52 Ind. 187. **La.**—*State v. Will*, 49 La. Ann. 1337, 22 So. 378. **N. Y.**—*Keefe v. People*, 40 N. Y. 348. **Wis.**—*Birker v. State*, 118 Wis. 108, 111, 94 N. W. 643.

[a] In construing the statute providing for a conviction of a lower degree of the crime charged the court in *Birker v. State*, 118 Wis. 108-111, 94 N. W. 643, quotes with approval from *Keefe v. People*, 40 N. Y. 355, as follows: "The true construction of the statute is, that when the act for which the accused is indicted is the same act for which he is convicted, the conviction of the lower degree is proper, although the indictment contains averments constituting the offense of the highest degree of the species of crime, and omits to state the particular intent and circumstances characterizing a lower degree of the same crime."

[b] **Need Not Specify Lesser Offense.**—If the indictment charges an offense which includes a lesser, as mayhem, which includes assault and battery, there may be a conviction of the latter even though there are no words in the indictment stating that the lesser offense was committed; for instance the indictment need not state that while the defendant was committing the mayhem that he "assaulted" the person also. *Benham v. State*, 1 Iowa 542, 545.

[c] **No special count charging an attempt** need be added, in order to authorize a conviction thereof. **Ala.** *Tarrant v. State* (Ala. App.), 67 So. 626. **Ga.**—*Clifford v. State*, 10 Ga. 422. **Miss.**—*Horton v. State*, 84 Miss. 473, 36 So. 1033. **Ohio.**—*State v. Baltimore*, 107 N. E. 334. **Pa.**—*Com. v. George*, 12 Pa. Super. 1, 7. But see *Com. v. Crowley*, 167 Mass. 434, 45 N. E. 766.

[d] **Where the offenses are of the same character**, differing only in degree they may be united in the same indictment, under different counts and a conviction had of either. *Com. v. McLaughlin*, 12 Cush. (Mass.) 612, 614.

30. *People v. McDonnell*, 92 N. Y. 657; *Keefe v. People*, 40 N. Y. 348, 355; *People v. McDonnell*, 1 N. Y. Crim. 366; *Birker v. State*, 118 Wis. 108, 94 N. W. 643.

31. *Bard v. State*, 55 Ga. 319; *Benham v. State*, 1 Iowa 542.

[a] Under an indictment for an assault with intent to murder the charge was an unlawful cutting, stabbing and wounding with a knife and there was a conviction for an assault. The accused objected that the assault was not charged to have been "unlawfully" done. The court held that if it were necessary to aver that the assault was unlawful, taking all the indictment together, it does charge such unlawfulness with certainty. *Baird v. State*, 55 Ga. 319.

32. *State v. Campbell*, 24 Utah 103, 107, 66 Pac. 771.

2. Where Insufficient To Charge the Higher Crime.—An indictment although insufficient to support the greater charge may support a conviction of a lesser crime,³³ but this rule is not universal.³⁴

II. RIGHT TO CONVICT AS AFFECTED BY THE EVIDENCE.—**WHEN DOUBT EXISTS AS TO DEGREE.**—When it appears that the accused has committed a crime, and there is reasonable ground of doubt as to which of two or more degrees he is guilty he may be convicted of the lowest of these degrees only.³⁵

Evidence Sufficient for Conviction of Higher Degree.—Even though the evidence sustains a conviction of the offense charged,³⁶ and the instructions call for a conviction of such offense only,³⁷ the jury cannot be prevented from convicting of a lower degree.

33. Ala.—*Higginbotham v. State*, 50 Ala. 133; *Wood v. State*, 50 Ala. 144. **Ark.**—*Cameron v. State*, 13 Ark. 712, 716. **Kan.**—*State v. Triplett*, 52 Kan. 678, 35 Pac. 815. **Mass.**—*Com. v. Crowley*, 167 Mass. 434, 442, 45 N. E. 766; *Com. v. Kennedy*, 131 Mass. 584, 585; *Com. v. Hathaway*, 14 Gray 392; *Com. v. Kirby*, 2 Cush. 577, 582. **Miss.**—*Martin v. Laurel*, 63 So. 670. **N. Y.**—*Lohman v. People*, 1 N. Y. 379, 383, 49 Am. Dec. 340. **Ore.**—*State v. Martin*, 54 Ore. 403, 408, 100 Pac. 1106, 103 Pac. 512. See *State v. Steeves*, 29 Ore. 85, 87, 43 Pac. 947. **Tenn.**—*Davis v. State*, 3 Coldw. 77, 82. **Tex.**—*State v. Archer*, 34 Tex. 646. **Wash.**—See *State v. Gaasch*, 56 Wash. 381, 105 Pac. 817. **W. Va.**—*State v. Reece*, 27 W. Va. 375; *State v. Howes*, 26 W. Va. 110, 113.

[a] **Surplusage.**—If an indictment fails to allege a substantive felony, as where the acts, though alleged to have been done with a felonious intent, do not constitute a felony the allegations of felonious intent may be rejected as surplusage and the defendant put upon trial for the misdemeanor. *Cameron v. State*, 13 Ark. 712, 716.

34. Territory v. Dooley, 4 Mont. 295, 298, 1 Pac. 747; *Queen v. Magee*, 7 N. Bruns. (Can.) 14, 16.

[a] There can be no conviction for larceny under a bad indictment for robbery. *Clary v. State*, 33 Ark. 561, 566.

35. Ind.—*Burns' Rev. St.*, 1894, §1824; *Reynolds v. State*, 147 Ind. 3, 9, 46 N. E. 31; *Newport v. State*, 110 Ind. 299, 301, 39 N. E. 926. **Minn.** *Comp. St.*, p. 782, §2; *State v. Laliyer*, 4 Minn. 368. **Okla.**—*Wilson's St.*, §5490; *Smith v. Territory*, 14 Okla. 162,

167, 77 Pac. 187; *Turner v. State*, 8 Okla. Crim. 11, 33, 126 Pac. 452. **Ore.** *Hill's Ann. Laws*, §1359; *State v. Branton*, 49 Ore. 86, 87 Pac. 535, 536; *State v. Lavery*, 35 Ore. 402, 405, 53 Pac. 107; *State v. Cody*, 18 Ore. 506, 519, 23 Pac. 891, 24 Pac. 895; *State v. Grant*, 7 Ore. 414, 422. **S. D.**—*Rev. Code Crim. Proc.*, §357; *State v. Vierck*, 23 S. D. 166, 120 N. W. 1098, 139 Am. St. Rep. 1040.

36. Ala.—*Buchanan v. State*, 10 Ala. App. 103, 65 So. 205. **Ark.**—*Pratt v. State*, 51 Ark. 167, 10 S. W. 233; *Fagg v. State*, 50 Ark. 506, 8 S. W. 829; *Green v. State*, 38 Ark. 304, 310; *Allen v. State*, 37 Ark. 433. **Mich.**—*Comp. Laws*, §7919; *People v. Blanchard*, 136 Mich. 146, 98 N. W. 983; *People v. Chappell*, 27 Mich. 486. See *People v. Rouse*, 2 Mich. N. P. 209. **Mo.**—*Rev. St.*, 1909, §4903; *State v. McMullin*, 170 Mo. 608, 630, 71 S. W. 221. **Tex.** *Fuller v. State*, 30 Tex. App. 559, 17 S. W. 1108; *Blocker v. State*, 27 Tex. App. 16, 10 S. W. 439. **Utah.**—*State v. Blythe*, 20 Utah 378-381, 58 Pac. 1108. **Wash.**—*State v. Underwood*, 35 Wash. 558, 567, 77 Pac. 863.

[a] Even though, from the evidence it may appear that the offense of rape was actually completed, still the jury had the power to convict the defendant of the lesser offense, however illegal such conviction may seem; and such action of the jury cannot be regarded as injurious to the defendant, but only as advantageous to him. *Pratt v. State*, 51 Ark. 167, 10 S. W. 233; *State v. Blythe*, 20 Utah 378, 381, 58 Pac. 1108.

37. Fagg v. State, 50 Ark. 506, 8 S. W. 829.

It is no cause for reversal that the evidence shows or tends to show that the defendant is guilty of a higher degree of the offense than that of which he is convicted,³⁸ and the fact that the defendant is guilty of a higher offense than that charged in the indictment is no defense,³⁹ for the prosecuting attorney may, in the first instance, file an information charging a person guilty of a less offense than that for which he should have been charged,⁴⁰ or he may, after an indictment has been found for an offense, elect to prosecute for a lower grade of the same offense, necessarily included therein.⁴¹

Must Be Some Evidence of Lower Crime.—In determining the question whether a conviction for the lower offense can be sustained, the court should look at the evidence submitted at the trial as well as to the language of the charge in the indictment.⁴² The verdict should be really and logically justified by the facts proved.⁴³ The trial judge may set aside a verdict and grant a new trial where the evidence shows either innocence or guilt of a grade or degree higher than that of which defendant was convicted.⁴⁴

I. CONSTITUTIONALITY OF STATUTES.—The constitutional right of the accused to be informed of the nature and cause of the accusation against him is not violated by the statute permitting a conviction of the lesser offense,⁴⁵ for the accused who has notice of the major offense

38. *Gipe v. State*, 165 Ind. 433, 439, 75 N. E. 881, 112 Am. St. Rep. 238, 1 L. R. A. (N. S.) 419; *Mo. Rev. St.*, 1899, §2535; *State v. Babbitt*, 215 Mo. 19, 35, 114 S. W. 511; *State v. West*, 202 Mo. 128, 140, 100 S. W. 478; *State v. Keeland*, 90 Mo. 337, 2 S. W. 442.

39. *Mass.*—*Com. v. Andrews*, 132 Mass. 263, 265; *Com. v. Walker*, 108 Mass. 309. *Mo.*—*State v. Hamey*, 168 Mo. 167, 200, 67 S. W. 620, 57 L. R. A. 846; *State v. Gates*, 130 Mo. 351, 32 S. W. 971; *State v. Jones*, 106 Mo. 302, 310, 17 S. W. 366; *State v. Lowe*, 93 Mo. 547-574, 5 S. W. 889. See *State v. Fitzporter*, 16 Mo. App. 282, 285. *N. H.*—*State v. Archer*, 54 N. H. 465, 468, and cases cited therein.

[a] Under an indictment for manslaughter it is no defense that the actual crime was murder. *Com. v. Walker*, 108 Mass. 309, 314; *Com. v. McPike*, 3 Cush. (Mass.) 181, 50 Am. Dec. 727.

40. *State v. Hatcher*, 136 Mo. 641, 643, 38 S. W. 719; *State v. Jones*, 106 Mo. 302, 311, 17 S. W. 366.

[a] In *State v. Jones*, 106 Mo. 302, 311, 17 S. W. 366, the court says: "He (the accused) cannot complain, if the state waives the right to proceed for the graver offense, provided always

it includes the one with which he is charged, and he is fully informed of the charge of which the state seeks to convict him."

41. *State v. Hatcher*, 136 Mo. 641, 643, 38 S. W. 719.

[a] The power is inherent in the state's prosecutor to elect to prosecute for a lower grade of an offense charged and thus to nolle any portion of an indictment. *State v. Hatcher*, 136 Mo. 641, 643, 38 S. W. 719.

42. *Ex parte Curnow*, 21 Nev. 33, 39, 24 Pac. 430; *Hardy v. Com.*, 17 Gratt. (Va.) 592, 615.

43. *Sparf v. United States*, 156 U. S. 51, 103, 15 Sup. Ct. 273, 39 L. ed. 343; *People v. Thompson*, 198 N. Y. 396, 401, 91 N. E. 838; *People v. Schleiman*, 197 N. Y. 383, 385, 90 N. E. 950, 27 L. R. A. (N. S.) 1075.

44. See *People v. Blakeman*, 34 N. Y. Supp. 262; and the title "New Trial."

45. *La.*—*State v. Moore*, 8 Rob. 518, 523. *Mass.*—*Com. v. Lang*, 10 Gray 11, 14. *Miss.*—*Washington v. State*, 76 Miss. 270, 24 So. 309, *overruling* *Lucas v. State*, 71 Miss. 471, 14 So. 537. *Mo.*—*State v. Thompson*, 144 Mo. 314, 322, 46 S. W. 191; *State v. Bark*, 89 Mo. 635, 640, 2 S. W. 10. *N. J.*—*State v. Jankowski*, 82 N. J. L. 229, 82 Atl.

is held to be informed as to all its parts, the greater including the lesser.⁴⁶ But a statute authorizing a conviction of embezzlement on a charge of larceny has been held unconstitutional,⁴⁷ though one permitting conviction of embezzlement on a charge of larceny has been upheld.⁴⁸

XIV. EFFECT OF, AND OBJECTIONS TO DEFECTS.—A. QUASHING OR SETTING ASIDE.—1. **Grounds in General.**—a. *Necessity of Appearing on Pleading or Record.*—A motion to quash or set aside an indictment is, according to some authorities, an appropriate method of questioning only such defects as are apparent from the pleading itself,¹ or on the face of the record,² though according to others this

309, 311; *State v. Thomas*, 65 N. J. L. 598, 45 Atl. 913. N. Y.—*People v. Didien*, 17 How. Pr. 224, 226. Tex. *Contra*, *Huntsman v. State*, 12 Tex. App. 619, *overruling Whitworth v. State*, 11 Tex. App. 414.

[a] **Not an Ex Post Facto Law.** *State v. Johnson*, 81 Mo. 60.

46. *Com. v. Lang*, 10 Gray (Mass.) 11, 14.

47. Mo.—*State v. Burks*, 159 Mo. 568, 60 S. W. 1100. N. J.—*Howland v. State*, 58 N. J. L. 18, 32 Atl. 257. Tex.—*Huntsman v. State*, 12 Tex. App. 619, *overruling Whitworth v. State*, 11 Tex. App. 414.

Contra.—*State v. Williams*, 40 La. Ann. 732, 5 So. 16.

48. *State v. Thompson*, 144 Mo. 314, 46 S. W. 191.

1. Fla.—*Brown v. State*, 9 Fla. 422. Ind.—*Hoffman v. State*, 176 Ind. 284, 95 N. E. 1002; *Ford v. State*, 112 Ind. 373, 14 N. E. 241; *Mathis v. State*, 94 Ind. 562; *Willey v. State*, 46 Ind. 363; *Bell v. State*, 42 Ind. 335; *State v. Freeman*, 6 Blackf. 248. Kan.—*Gen. St.*, 1909, §6804. La.—*Rev. St.*, 1904, §1064; *State v. Conega*, 121 La. 522, 46 So. 614. N. J.—*See State v. Rickey*, 9 N. J. L. 293. Ohio.—*See also Lindsey v. State*, 69 Ohio St. 215, 69 N. E. 126; *Barlett v. State*, 28 Ohio St. 669. Pa. *Pardon's Dig.*, vol. 1, p. 1031; *Com. v. Newcomer*, 49 Pa. 478; *Com. v. Church*, 1 Pa. 105. S. C.—*Criminal Code*, 1902, §57; *State v. Maddox*, 80 S. C. 452, 61 S. E. 904; *State v. Weaver*, 74 S. C. 417, 54 S. E. 615; *State v. Young*, 30 S. C. 395, 9 S. E. 355. Vt.—*St.*, 1906, §2203. Can.—32 *Viet.*, ch. 29; *Reg. v. Mason*, 22 L. C. C. P. 246.

[a] "A motion to quash reaches all defects apparent on the face of the

affidavit or indictment." *Swiney v. State*, 119 Ind. 478, 21 N. E. 1102.

[b] **"Matters Apparent Upon Face of Indictment."**—In *Cooper v. State*, 79 Ind. 206, the court said: "The indictment copied into the record reveals the lack of the requisite endorsement. The defect is apparent upon an inspection of the pleading. It must therefore be regarded as a defect apparent upon the face of the indictment. The term 'Matters appearing upon the face of the indictment' means such matters as are found within 'the eight corners of the paper.'"

[c] **Unconstitutionality of Statute.** A motion to quash an indictment against a railroad company for failure to equip its locomotive with an automatic bell ringer as provided by statute, on the ground that such statute is in violation of the constitution of the United States and laws of congress relating to interstate commerce, presents no question to the court where it does not appear on the face of the indictment that defendant's road or locomotive was operated outside of the state. *Pittsburg, etc. R. Co. v. State*, 178 Ind. 498, 99 N. E. 801.

2. Mass.—*Com. v. Hayden*, 163 Mass. 453, 40 N. E. 846, 47 Am. St. Rep. 468, 28 L. R. A. 318; *Com. v. Donahue*, 126 Mass. 51. Ohio.—*Rev. St.*, §13,621; *Lindsey v. State*, 69 Ohio St. 215, 69 N. E. 126; *Kerr v. State*, 36 Ohio St. 614; *Geiger v. State*, 3 Ohio C. D. 141; *Evans v. State*, 9 Ohio Dec. 222; *State v. Schuman*, 8 Ohio Dec. 703; *State v. Morrill*, 7 Ohio Dec. 52; *State v. Bancer*, 1 Ohio Dec. 199. Pa.—*See McCullough v. Com.*, 67 Pa. 30. Vt.—*State v. Ward*, 60 Vt. 142, 14 Atl. 187. Wyo.—*Comp. St.*, 1910, §6186; *Koppala v. State*, 15

motion may be based upon defects or irregularities which can be shown only by extrinsic evidence.³

b. *Substantial Rights Must Be Affected*.—To justify the quashing of an indictment or information, it must at least appear that the defendant was deprived of some substantial right.⁴

Wyo. 398, 89 Pac. 576, 93 Pac. 662; Wilbur v. Ter., 3 Wyo. 268, 21 Pac. 698; Cook v. Ter., 3 Wyo. 110, 4 Pac. 887.

[a] In *State v. Zeigler*, 46 N. J. L. 307, the court said: "A motion to quash, however, raised no question except such as are apparent on the face of the record. *State v. Rickey*, 4 Halst. 293. If the motion is based on objections to the indictment, the court will only look at the charges therein made, to determine whether an indictable offense is set out to which the defendant ought to be compelled to answer. In making this examination the court will view the indictment in the light of such public acts as they take judicial notice of without being pleaded."

3. **U. S.**—*Breese v. United States*, 143 Fed. 259, 74 C. C. A. 388 (in North Carolina); *United States v. Kilpatrick*, 16 Fed. 765. **Miss.**—Code, 1906, §1427; *State v. Coulter*, 104 Miss. 764, 61 So. 706; *State v. Mitchell*, 95 Miss. 120, 48 So. 963; *Norton v. State*, 72 Miss. 128, 16 So. 264, 18 So. 916, 48 Am. St. Rep. 538; *Gates v. State*, 71 Miss. 871, 16 So. 342. **Pa.**—*Com. v. Bolger*, 229 Pa. 597, 79 Atl. 113, affirming 42 Pa. Super. 115; *Com. v. Bradley*, 126 Pa. 199, 17 Atl. 600; *Com. v. Robertson*, 47 Pa. Super. 472.

See also *infra*, the particular grounds for quashing.

[a] In *People v. Glen*, 173 N. Y. 475, 66 N. E. 112, the court said: "From time immemorial our common-law courts have exercised the power to set aside and quash indictments on motion, not only for defects in form, but for irregularities and errors that were proved by extrinsic evidence."

4. **Cal.**—*People v. Rodrigo*, 69 Cal. 601, 11 Pac. 381. **Ga.**—*Crawford v. State*, 4 Ga. App. 789, 62 S. E. 501. **Ill.**—*People v. Arnold*, 248 Ill. 169, 93 N. E. 786; *McWhorter v. People*, 92 Ill. 369. **Ind.**—*Musgrave v. State*, 133 Fed. 297, 32 N. E. 886; *Knight v. State*, 84 Ind. 73. **Ia.**—*State v. De Bord*, 88 Iowa 103, 55 N. W. 79; *State v.*

Hughes, 58 Iowa 165, 11 N. W. 706; *State v. Brandt*, 41 Iowa 593; *State v. Carney*, 20 Iowa 82; *State v. Emeigh*, 18 Iowa 122. **Kan.**—*State v. Smith*, 38 Kan. 194, 16 Pac. 254; *State v. Hughes*, 35 Kan. 626, 12 Pac. 28; *State v. Redford*, 32 Kan. 198, 4 Pac. 98; *State v. Baird*, 10 Kan. 54, delay in filing. **Me.**—Rev. St., 1903, ch. 132, §13; *State v. Goddard*, 69 Me. 181. **Md.**—Pub. Gen. Laws, art. 27, §438; *Pontier v. State*, 107 Md. 384, 68 Atl. 1059. **Mass.**—See Rev. Laws, 1902, ch. 218, §34. **Mich.**—Comp. Laws, 1897, §11,908. **Minn.**—*State v. Slocum*, 111 Minn. 328, 126 N. W. 1096. **Ohio.** *State v. Bauer*, 1 Ohio N. P. 103, 1 Ohio Dec. 199.

[a] In *State v. Fletcher*, 18 Mo. 425, the court said: "The practice of sustaining motions to quash indictments for every trivial objection, or for every formal defect, tends to the great perversion of justice, and to the increase of offense." But in the same opinion the court also said: "It is most prudent to quash an indictment when the court sees, clearly, that a judgment on it must be arrested; there is no reason to incur the costs of a trial when it is manifest the indictment is too defective to support a judgment of conviction. In such cases, the sooner the proceedings are stopped, the better."

[b] **In Federal Courts.**—No indictment found and presented by a grand jury in any district or circuit or other court of the United States shall be deemed insufficient by reason of any defect or imperfection in matter of form only, which shall not tend to prejudice the defendant. *Breese v. United States*, 226 U. S. 1, 33 Sup. Ct. 1, 57 L. ed. 97; *United States v. Rosenthal*, 121 Fed. 862; *United States v. Terry*, 39 Fed. 355; *United States v. Bornemann*, 35 Fed. 824; *United States v. Molloy*, 31 Fed. 19.

[c] That defendant was denied the privilege of examining a grand juror will not authorize the court to set aside the indictment found, without a

c. *Prescribed by Statute.*—(I.) Generally. — Statutes sometimes provide that no objection can be taken to an indictment on the ground that any member of the grand jury was not legally qualified, or that the grand jurors were not legally drawn or summoned, or any other ground going to the formation of the grand jury,² except that the

showing of prejudice. *State v. Fowler*, 52 Iowa 103, 2 N. W. 983.

[d] **Absence of an averment of incorporation** of the company whose property was burglarized is not sufficient ground for a motion to quash. *Hamilton v. State*, 34 Ohio St. 82; *Burke v. State*, 34 Ohio St. 79.

[e] **A substantial variance in the name of a grand juror** as it appears in the caption and in the panel is no ground to quash an indictment. It is a mere misprision of the clerk, which is, of course, amendable. *State v. Norton*, 23 N. J. L. 33.

5. Ala.—Code, 1907, §7572. And see *Spivey v. State*, 172 Ala. 391, 56 So. 232; *Pate v. State*, 150 Ala. 10, 43 So. 343; *Dunn v. State*, 143 Ala. 67, 39 So. 147; *Stoneking v. State*, 118 Ala. 68, 24 So. 47; *Linehan v. State*, 116 Ala. 471, 22 So. 662; *Linehan v. State*, 113 Ala. 70, 21 So. 497; *James v. State*, 53 Ala. 380; *Kirkwood v. State*, 3 Ala. App. 15, 57 So. 504. III. St., ch. 38, §9, disqualification of any grand juror. Ia.—See *State v. Wheeler*, 129 Iowa 100, 105 N. W. 374. Ky. Gen. St., 1909, §2248, disqualification. Me.—Rev. St., 1903, ch. 132, §13. Tex. *Merkel v. State* (Tex. Crim.), 171 S. W. 738 (challenge to array or juror, only way of raising objection); *Ybarra v. State* (Tex. Crim.), 164 S. W. 10; *Oliver v. State* (Tex. Crim.), 159 S. W. 235; *Sheppard v. State* (Tex. Crim.), 148 S. W. 314; *McCline v. State*, 64 Tex. Crim. 19, 141 S. W. 977, discrimination. Va.—Code, 1904, §3985. Wash. Rem. & Ball. Code Proc., 1910, §2099. W. Va.—Code, 1913, §5548; *State v. Martin*, 38 W. Va. 568, 18 S. E. 748 (foreman of grand jury is one of the jury commissioners of the court); *State v. Henderson*, 29 W. Va. 147, 1 S. E. 225, grand juror not a freeholder.

[a] That a grand juror had not paid his taxes or "was a party to any suit pending and at issue" no ground for quashing. N. C. Pub. Laws, 1907, p. 63; *State v. Banner*, 149 N. C. 519, 63 S. E. 84.

[b] **The failure of the jury commissioners to take a special statutory oath** before drawing the grand jury is not ground for quashing the indictment. *Sims v. State*, 146 Ala. 109, 41 So. 413.

[c] **The fact that more than the legal number of names were drawn**, from which names the grand jury was formed, constitutes no ground for quashing the indictment. *Sanders v. State*, 148 Ala. 603, 41 So. 466.

[d] **The exemption of persons over sixty years of age** is a personal privilege which may be waived, and furnishes no ground for quashal. *Spigener v. State*, 62 Ala. 383.

[e] **Discrimination in Selection of Grand Jurors.**—Under provisions of this nature the fact that the jury commissioners, in selecting the grand jury took only such persons as they wanted to act as grand jurors and refused to put upon the venire the names of many persons who were qualified jurors, and who, if the jury had been properly drawn, would have appeared on the grand jury venire, and the fact that the commissioners allowed their political preference to govern them in drawing the jury and selected the venire because its members were favorable to a certain candidate, is not available as a basis for a motion to quash. *Bluett v. State*, 151 Ala. 41, 44 So. 84.

[f] **Error Apparent.**—Where error going to the organization of the grand jury which found and returned an indictment is apparent of record, and is fatal, an objection thereto may be made by motion to quash. *Spivey v. State*, 172 Ala. 391, 56 So. 232.

[g] **But where there is some order of the court or some action of the presiding judge, appearing of record, and relating to the organization of the grand jury which is without any warrant in the statute or is contrary to its provisions, as contradistinguished from any acts of the court's officers while ministerially executing such order when lawfully made, objection may be made**

jurors were not drawn in the presence⁶ of the officers designated by law, or unless it appears to the court that the defendant has been injured thereby;⁷ and under some statutes neither this objection nor any other can be taken to the formation of a special grand jury summoned by the direction of the court.⁸

Statutes in some jurisdictions have enumerated certain other matters which shall not be considered as sufficient grounds for quashing or setting aside the accusation, viz.: mistake in the name of the court or county in the title thereof;⁹ want of an allegation of the time or place of any material fact, when the venue and time have been once stated;¹⁰ want of a proper or perfect venue;¹¹ that dates and numbers are represented by figures;¹² an omission to allege that the grand jurors were impaneled, sworn or charged,¹³ or a failure to set forth that the indictment is upon the oaths and affirmations of the jurors;¹⁴ omitting to state the time at which the offense was committed in any case in which time is not the essence of the offense, or stating the time imperfectly, unless time is of the essence of the offense;¹⁵ stating

by motion to quash. *Nordan v. State*, 143 Ala. 13, 39 So. 406; *Carlisle v. Watts*, 78 Ala. 486.

[h] **Irregularity subsequent to organization** not covered by statute. *Nordan v. State*, 143 Ala. 13, 39 So. 406. Compare *People v. Hunter*, 54 Cal. 65; *State v. Wheeler*, 129 Iowa 100, 105 N. W. 374.

6. Ala.—Code, 1907, §7572; *Watts v. State*, 177 Ala. 24, 59 So. 270; *Spivey v. State*, 172 Ala. 391, 56 So. 232; *Dunn v. State*, 143 Ala. 67, 39 So. 147.

[a] **Alleged Disqualification of Judge.**—The fact that the judge who drew and organized the grand jury was under bond to await the action of the same grand jury under a charge of having committed a misdemeanor in violating the state game laws is no ground for quashing the indictments found by such jury. *Wright v. State*, 2 Ala. App. 24, 58 So. 68.

7. Me. Rev. St., 1903, ch. 132, §13. See *infra*, XIV, A, 1.

8. Ala. Code, 1907, §7572; *Watts v. State*, 177 Ala. 24, 59 So. 270; *Spivey v. State*, 172 Ala. 391, 56 So. 232; *Reynolds v. State*, 1 Ala. App. 24, 55 So. 1016.

9. Ind.—Burns' St., 1914, §2063; *Rivers v. State*, 141 Ind. 16, 42 N. E. 1021. See also *Cronkhite v. State*, 11 Ind. 307. Kan.—Gen. St., 1909, §6686. Md.—Pub. Gen. Laws, art. 27, §138.

10. Ind.—Burns' St., 1914, §2063. Kan.—Gen. St., 1909, §6686. N. C.—State v. Long, 143 N. C. 670, 57 S. E.

349. Wash.—Rem. & Ball. Code Proc., 1910, §2066. Wyo.—Comp. St., 1910, §6165; *McGinnis v. State*, 16 Wyo. 72, 91 Pac. 936.

11. La.—Rev. Laws, 1904, §1063; *State v. Lewis*, 133 La. 1095, 63 So. 597. N. J.—Comp. St., 1910, p. 1831. N. C.—Rev. 1905, §3255; *State v. Long*, 143 N. C. 670, 57 S. E. 349. Vt.—Pub. St., 1906, §2272. Va.—Pollard's Code, 1904, §3999.

12. Ind.—Burns' St., 1914, §2063; *Hampton v. State*, 8 Ind. 336. Kan.—Gen. St., 1909, §6686. Wyo.—Comp. St., 1910, §6165; *McGinnis v. State*, 16 Wyo. 72, 91 Pac. 936.

13. Ind.—Burns' St., 1914, §2063. Kan.—Gen. St., 1909, §6686. Va.—Pollard's Code, 1904, §3999. Wash.—Rem. v. Ball. Code Proc., 1910, §2066. Wyo.—Comp. St., 1910, §6165.

14. W. Va. Code, 1913, §5559.

15. Ind.—Burns' St., 1914, §2063; *Shell v. State*, 148 Ind. 50, 47 N. E. 144; *Fleming v. State*, 136 Ind. 149, 36 N. E. 154; *Myers v. State*, 121 Ind. 15, 22 N. E. 781. See also *State v. Patterson*, 116 Ind. 45, 10 N. E. 289, 18 N. E. 270; *State v. McDonald*, 106 Ind. 233, 6 N. E. 607; *State v. Sammons*, 95 Ind. 22. La.—Rev. St., 1904, §1063; *State v. Conega*, 121 La. 523, 46 So. 614. Md.—Pub. Gen. Laws, art. 27, §438. N. J.—Comp. St., 1910, p. 1831. N. C.—State v. Long, 143 N. C. 670, 57 S. E. 349. Vt.—Pub. St., 1906, §2272. Va.—Pollard's Code, 1904, §3999. W. Va.—Code, 1913, §5559. Wyo.

the offense to have been committed on a day subsequent to the finding of the indictment, or on an impossible day;¹⁶ omitting a statement of the value or price of any matter or thing or the amount of damages or injury in any case where the value or price or the amount of damages or injury is not of the essence of the offense;¹⁷ an omission or misstatement of the occupation and residence,¹⁸ title, estate or degree,¹⁹ or the misnomer²⁰ or designation by a name of office or other descriptive appellation instead of the proper name²¹ of the accused; any surplusage or repugnant allegation, when there is sufficient matter alleged to indicate the crime and person charged;²² any other defect or imperfection which does not tend to the prejudice of the substantial rights of the defendant upon the merits;²³ any matter or cause which might have been a subject of demurrer;²⁴ the want or addition of the

Comp. St., 1910, §6165; McGinnis v. State, 16 Wyo. 72, 91 Pac. 936.

[a] **When Indictment Must Show That Prosecution Is Within Statutory Period.**—While an indictment will not be quashed for a failure to allege any particular date or day in cases where time is not of the essence of the offense, yet it is indispensable that the indictment should disclose on its face that the offense was committed within the statutory limitation, when the offense is one which the statute declares shall not be prosecuted after a prescribed limitation. *State v. Bruce*, 26 W. Va. 153.

16. **La.**—Rev. Laws, 1904, §1063. **Md.**—Pub. Gen. Laws, art. 27, §438. **N. J.** Comp. St., 1910, p. 1831. **Vt.**—Pub. St., 1906, §2272.

17. **Ind.**—Burns' St., 1914, §2063; *Dorrell v. State*, 80 Ind. 566. **La.**—Rev. Laws, 1904, §1063. **N. J.**—Comp. St., 1910, p. 1831. **Va.**—Pollard's Code, 1904, §3999. **W. Va.**—Code, 1913, §5559. **Wyo.**—Comp. St., 1910, §6165; McGinnis v. State, 16 Wyo. 72, 91 Pac. 936.

18. **Ill.**—St., ch. 38, §9. **Me.**—Rev. St., 1903, ch. 132, §13. **Md.**—Pub. Gen. Laws, art. 27, §438. **Mich.**—Comp. Laws, 1897, §11,908. **Va.**—Pollard's Code, 1904, §3999. **W. Va.**—Code, 1913, §5559. **Wis.**—St., 1898, §4659.

19. **Me.**—Rev. St., 1903, ch. 132, §13. **Md.**—Pub. Gen. Laws, art. 27, §438. **Mich.**—Comp. Laws, 1897, §11,908. **Tex.**—See *Edmanson v. State*, 64 Tex. Crim. 413, 142 S. W. 887. **Va.**—Pollard's Code, 1904, §3999. **W. Va.**—Code, 1913, §5559. **Wis.**—St., 1898, §4659.

20. **N. J.** Comp. St., 1910, p. 1831;

Hubbard v. State, 62 N. J. L. 628, 43 Atl. 699.

21. **N. J.** Comp. St., 1910, p. 1831.

22. **Ind.**—Burns' St., 1914, §2063; *State v. White*, 129 Ind. 153, 28 N. E. 425; *Trout v. State*, 111 Ind. 499, 12 N. E. 1005; *State v. Boss*, 74 Ind. 80; *Kennedy v. State*, 62 Ind. 136; *Wall v. State*, 23 Ind. 150; *Hampton v. State*, 8 Ind. 336. **Kan.**—Gen. St., 1909, §6686; *State v. Cooper*, 31 Kan. 505, 3 Pac. 429; *Madden v. State*, 1 Kan. 321. **La.**—Rev. Laws, 1904, §1063. **Ohio.**—Rev. St., §7215; *Jones v. State*, 7 Ohio C. D. 305. **Tex.**—*Figueroa v. State* (Tex. Crim.), 159 S. W. 1188. **Wyo.**—Comp. St., 1910, §6165; McGinnis v. State, 16 Wyo. 72, 91 Pac. 936; *Curran v. State*, 12 Wyo. 553, 575, 76 Pac. 577; *Santolini v. State*, 6 Wyo. 110, 42 Pac. 746, 71 Am. St. Rep. 906.

23. **Ind.**—Burns' St., 1914, §2063. **Kan.**—Gen. St., 1909, §6686. **N. Y.** Code Crim. Proc., §285; *People v. Clements*, 107 N. Y. 205, 13 N. E. 782; *People v. Williams*, 2 N. Y. Supp. 382, 18 N. Y. St. 403; *People v. Peek*, 2 N. Y. Crim. 314, 317. **N. C.**—Rev., 1905, §3254. **Ohio.**—Rev. St., §7215; *Jones v. State*, 7 Ohio C. D. 305. **Porto Rico.** Code Crim. Proc., 1902, §83. **Tex.** *Stephens v. State* (Tex. Crim.), 151 S. W. 996, grammatical errors which do not render indictment uncertain, not ground for quashing. **Wash.**—Rem. & Ball. Code Proc., 1910, §2066. **Wis.** St., 1910, §4659. **Wyo.**—Comp. St., 1910, §6165; McGinnis v. State, 16 Wyo. 72, 91 Pac. 936; *Santolini v. State*, 6 Wyo. 110, 42 Pac. 746, 71 Am. St. Rep. 906.

24. **Md.** Pub. Gen. Laws, art. 27,

avermment of any matter unnecessary to be proved;²⁵ an omission of any of the following allegations, viz.: "with force and arms,"²⁶ "feloniously,"²⁷ "contrary to the form of the statute,"²⁸ "against the peace and dignity of the state,"²⁹ "as appears by the record,"³⁰ providing that such misstatements or omissions do not tend to the prejudice of the accused.³¹

(II.) **Effect.**—Where the legislature has set forth the grounds³² for the motion it must be based on one of the grounds enumerated,³²

§438; *State v. Wade*, 55 Md. 39.

[a] Mr. Justice Alvey in *Maquire v. State*, 47 Md. 491, says: "The manifest object of this statute was to preclude all objections to the indictment that might or could be raised by demurrer, from being raised in any other manner. Motions to quash, and motions in arrest for defects in the indictment that could have been taken advantage of by demurrer, are no longer available modes of attacking the indictment; and if the opportunity of demurring is not availed of at the proper time, the party is to be taken as having waived all such defects. Here a demurrer was interposed, and overruled; and the motion to quash, being founded upon supposed defects in the indictment, was therefore properly refused to be entertained." See also *State v. Ellavitch*, 77 Md. 144, 26 Atl. 406.

25. *La.*—Rev. Laws, 1904, §1063; *State v. Coleman*, 111 La. 303, 35 So. 500. *Md.*—Pub. Gen. Laws, art. 27, §438. *N. C.*—Rev., §2255; *State v. Outerbridge*, 82 N. C. 617. *Ohio*—Rev. St., §7215; *Jones v. State*, 7 Ohio C. D. 245. *Va.*—Pollard's Code, 1904, §3998. *Wyo.*—Comp. St., 1910, §6165; *Patrick v. State*, 17 Wyo. 260, 98 Pac. 588; *Santolli v. State*, 6 Wyo. 110, 42 Pac. 749, 71 Am. St. Rep. 906.

[a] An indictment for selling intoxicating liquors on Sunday will not be subject to a motion to quash because it did not contain "the allegation of averment that the traverser was licensed to sell or was a trader." *State v. Ellavitch*, 77 Md. 144, 26 Atl. 406.

26. *Ark.*—*State v. Cadle*, 19 Ark. 613. *Ill.*—St., ch. 38, §9. *Ind.*—Burns' St., 1914, §2063. *Kan.*—Gen. St., 1909, §6686. *La.*—Rev. Laws, 1904, §1063. *Me.*—Rev. St., 1903, ch. 132, §13. *Md.*—Pub. Gen. Laws, art. 27, §438. *Mich.*—Comp. Laws, 1897, §11,908. *N. J.*—Comp. St., 1910, p. 1831. *Vt.*—Pub. St.,

1906, §2272. *Va.*—Pollard's Code, 1904, §3999. *Wash.*—Rem. & Ball. Code Proc., 1910, §2066. *W. Va.*—Code, 1913, §5559. *Wis.*—St., 1898, §4659. *Wyo.*—Comp. St., 1910, §6165; *McGinnis v. State*, 16 Wyo. 72, 91 Pac. 936.

27. *Me.*—Rev. St., 1903, ch. 132, §13; *Mich.*—Comp. Laws, 1897, §11,908.

28. *Ark.*—*State v. Cadle*, 19 Ark. 613-621. *Ind.*—Burns' St., 1914, §2063. *Kan.*—Gen. St., 1909, §6686. *La.*—Rev. Laws, 1904, §1063. *Me.*—Rev. St., 1903, ch. 132, §13. *Md.*—See Pub. Gen. Laws, art. 27, §438. *Mich.*—Comp. Laws, 1897, §11,908. *N. J.*—See Comp. St., 1910, p. 1831. *Vt.*—Pub. St., 1906, §2272. *Va.*—Pollard's Code, 1904, §3999. *Wash.*—Rem. & Ball. Code Proc., 1910, §2066. *W. Va.*—Code, 1913, §5559. *Wis.*—St., 1898, §4659. *Wyo.*—Comp. St., 1910, §6165; *McGinnis v. State*, 16 Wyo. 72, 91 Pac. 936.

29. *Ark.*—*State v. Cadle*, 19 Ark. 613. *Ind.*—Burns' St., 1914, §2063. *Kan.*—Gen. St., 1909, §6686. *Me.*—Rev. St., 1903, ch. 132, §13. *N. J.*—Comp. St., 1910, p. 1831. *Wash.*—Rem. & Ball. Code Proc., 1910, §2066.

[a] Under the statutes 14 and 15 Victoria, the omission of the words "against the form of the statute and against the peace and dignity of the Queen" is not ground for a motion to quash. *Castro v. The Queen*, L. R., 6 App. Cas. 229.

[b] May be quashed for omission of words "in the name and behalf of the citizens of" the state. *Horne v. State*, 37 Ga. 80, 92 Am. Dec. 49.

30. *Ind.*—Burns' St., 1914, §2063. *La.*—Rev. Laws, 1904, §1063. *Md.*—Pub. Gen. Laws, art. 27, §438. *N. J.*—Comp. St., 1910, p. 1831. *Vt.*—Pub. St., 1906, §2272. *Wyo.*—Comp. St., 1910, §6165; *McGinnis v. State*, 16 Wyo. 72, 91 Pac. 936.

31. See *supra*, XIV, A, 1, b.

32. *Cal.*—*Ex parte Ruef*, 150 Cal. 665, 89 Pac. 605; *People v. Colby*, 54

unless the statute declares that as to matters not specifically provided for, the procedure shall be in accordance with the common law;³² or unless the indictment has been found in violation of the accused's constitutional rights.³⁴

Cal. 37; *People v. Hunter*, 54 Cal. 65; *People v. Southwell*, 46 Cal. 141; *People v. Colmere*, 23 Cal. 631; *People v. Arnold*, 17 Cal. App. 68, 118 Pac. 729; *People v. Sacramento Butcher's Assn.*, 12 Cal. App. 471, 107 Pac. 712. **Idaho.** *People v. Butler*, 1 Idaho 231. **Ind.** *Blaker v. State*, 130 Ind. 203, 29 N. E. 1077. **Ia.**—*State v. O'Malley*, 132 Iowa 696, 109 N. W. 491; *State v. McKay*, 122 Iowa 658, 98 N. W. 510; *State v. Phillips*, 119 Iowa 652, 94 N. W. 229, 67 L. R. A. 292; *State v. Easton*, 113 Iowa 516, 85 N. W. 795; *State v. Baughman*, 111 Ia. 71, 82 N. W. 452. **Kan.** *State v. Knadler*, 40 Kan. 359, 19 Pac. 923. **Ky.**—Crim. Code, 1906, §158; *Moore v. Com.*, 18 Ky. L. Rep. 129, 35 S. W. 283. **N. Y.**—Code Crim. Proc., §313; *People v. Scannell*, 37 Misc. 345, 75 N. Y. Supp. 500. **N. D.**—*State v. Longstreth*, 19 N. D. 268, 121 N. W. 1114; *State v. Foster*, 14 N. D. 561, 105 N. W. 938; *State v. Tough*, 12 N. D. 425, 96 N. W. 1025. **Okla.**—*Robinson v. Ter.*, 16 Okla. 241, 85 Pac. 451. **Ore.**—*State v. Kelliher*, 49 Ore. 77, 88 Pac. 867; *State v. Boek*, 49 Ore. 25, 88 Pac. 318; *State v. Whitney*, 7 Ore. 386. **S. D.**—*State v. Carlisle*, 30 S. D. 475, 139 N. W. 127; *State v. Security Bank*, 2 S. D. 538, 51 N. W. 337. **Tex.**—Code Crim. Proc., 1906, art. 564; *Day v. State*, 62 Tex. Crim. 527, 138 S. W. 123; *Spearman v. State*, 34 Tex. Crim. 279, 30 S. W. 229; *Johnson v. State*, 22 Tex. App. 206, 2 S. W. 609; *Goode v. State*, 2 Tex. App. 520. **Utah.** *United States v. Cutler*, 5 Utah 608, 19 Pac. 145.

[a] In New York the cases have been somewhat conflicting but are reviewed by Werner, J., as follows in the opinion of *People v. Glenn*, 173 N. Y. 395, 66 N. E. 112: "The words 'but in no other' were added to the first paragraph of section 313 in 1897, and were evidently intended to remove all doubts which had been raised as to the meaning of said section by the conflicting decisions of the courts upon that subject. In many cases it had been held that this code provision, as it stood prior to 1897, could not limit

or interfere with the inherent power of the courts to dismiss indictments upon other substantial grounds than those enumerated in the section referred to. (*People v. Molinex*, 27 Misc. Rep. 79; *People v. Vaughn*, 19 id. 298; *People v. Thomas*, 32 id. 179; *People v. Clark*, 8 N. Y. Crim. Rep. 169; *People v. Brickner*, id. 217; *People v. Moore*, 65 How. Pr. 177.) In other cases it had been held that this section of the code was exclusive, and distinctly negated the rights of courts to dismiss indictments upon any other grounds than those therein enumerated. (*People v. Rutherford*, 47 App. Div. 209; *People v. Willis*, 23 Misc. Rep. 568; *People v. Winant*, 24 id. 361; *People v. O'Connor*, 31 id. 668; *People v. Montgomery*, 36 id. 328; *People v. Scannell*, 37 id. 345.)" See *People v. Edwards*, 25 N. Y. Supp. 480; *People v. Price*, 2 N. Y. Supp. 414. See also *People v. Sexton*, 187 N. Y. 495, 80 N. E. 396, 116 Am. St. Rep. 621; *People v. Borgstrom*, 178 N. Y. 254, 70 N. E. 780; *People v. O'Connor*, 31 Misc. 668, 66 N. Y. Supp. 126; *People v. Vaughan*, 19 Misc. 298, 42 N. Y. Supp. 959; *People v. Metropolitan Traction Co.*, 50 N. Y. Supp. 1117; *People v. Brickner*, 8 N. Y. Crim. 217, 15 N. Y. Supp. 528; *People v. Clark*, 8 N. Y. Crim. 169, 179, 14 N. Y. Supp. 642.

33. Okla. Rev. Laws, 1910, §5543; *Hayes v. State*, 3 Okla. Crim. 1, 103 Pac. 1061, holding that such a statute extends the grounds for setting aside indictments.

34. *People v. Sexton*, 187 N. Y. 495, 80 N. E. 396; *People v. Borgstrom*, 178 N. Y. 254, 70 N. E. 780; *People v. Glen*, 173 N. Y. 395, 66 N. E. 112; *People v. Petrea*, 92 N. Y. 128; *People ex rel. Hummel v. Davy*, 105 App. Div. 598, 94 N. Y. Supp. 1937; *People v. Willis*, 23 Misc. 568, 52 N. Y. Supp. 508, 5 Ann. Cas. 181. See *infra*, XIV, A, 2, i, (V), and (VI).

[a] It must appear that the wrong done to him was in some way connected with the finding of the indictment. *People v. Katzenbach*, 70 Misc.

d. *Defects Subject to Demurrer.*—According to some authorities an indictment will not be quashed for defects which constitute ground for demurrer.³⁵

2. **Particular Grounds.**—a. *Want or Insufficiency of Preliminary Affidavit or Complaint.*—Where an information is based wholly upon a preliminary affidavit or complaint, the total absence of such an affidavit,³⁶ or a radical defect in it,³⁷ is a sufficient ground for a motion to quash the information. But the rule is otherwise where the information is based upon a preliminary hearing and commitment and the affidavit was merely to secure issuance of a warrant of arrest.³⁸

b. *Errors in or Want of Preliminary Examination or Commitment.* (I.) **Indictments.**—Where not required to be based upon a preliminary hearing it is no ground for quashal that the indictment was found before or during the progress of such a hearing,³⁹ or that there was no sufficient preliminary complaint or information.⁴⁰

But in some jurisdictions the fact that the accused had not been given a preliminary hearing and held to answer, before the finding of the indictment, gives him the right to attack it by motion to quash, upon grounds which otherwise would have been available only as a basis of challenge.⁴¹

(II.) **Informations.**—Except in cases where a preliminary commitment is not required by law, it is ground for quashing or setting aside an information that before the filing thereof the defendant has not been legally committed by a magistrate.⁴² Every informality or ir-

185. 25 N. Y. Crim. 276; 128 N. Y. Supp. 473.

35. *United States v. Kilpatrick*, 16 Fed. 765. See also *State v. Sweeten*, 83 N. J. L. 364; 85 Atl. 309; *Ex parte Bushnell*, 8 Ohio St. 599.

36. *Mo.*—*State v. Runzi*, 105 Mo. App. 319, 80 S. W. 36; *Weisbrodt v. State*, 50 Ohio St. 192, 33 N. E. 603.

37. *Davis v. State*, 69 Ind. 130; *State v. Cuppy*, 50 Ind. 291; *State v. Carpenter*, 20 Ind. 219; *State v. Gartrell*, 14 Ind. 280; *State v. Downs*, 7 Ind. 237; *Paragon Paper Co. v. State*, 19 Ind. App. 314, 49 N. E. 600. See also *State v. Whitaker*, 75 Mo. App. 184; and *supra*, V, G, 2, h. But see *People v. Viskniskki*, 255 Ill. 384, 99 N. E. 621, holding that the affidavit is no part of the information and a defect in it is not ground for motion to quash.

38. *People v. Velarde*, 59 Cal. 457. See *fullv supra*, XIV, A, 2, b, (II). See also *supra*, V, G, 2, h.

39. See *United States v. Fuers*, 12 Int. Rev. Rec. 43, 25 Fed. Cas. No. 15,174; and *supra*, V, G, 2, h.

[a] **Finding During Pendency of Preliminary Examination.**—*State v. Gieseke*, 209 Mo. 331, 108 S. W. 525.

40. *Com. v. Brennan*, 193 Pa. 567, 44 Atl. 498. See also *Com. v. Dingman*, 26 Pa. Super. 615.

41. See *infra*, XIV, A, 2, h, (I).

42. *Ariz.*—Penal Code, 1913, §972. *Cal.*—Penal Code, §995; *People v. Tarbox*, 115 Cal. 57, 46 Pac. 896; *People v. Parker*, 91 Cal. 91, 27 Pac. 537; *Ex parte Baker*, 88 Cal. 84, 25 Pac. 966; *Ex parte McConnell*, 83 Cal. 558, 23 Pac. 1119; *People v. McConnell*, 82 Cal. 620, 23 Pac. 40; *Western Meat Co. v. Superior Court*, 9 Cal. App. 538, 99 Pac. 976. *Mich.*—*Washburn v. People*, 10 Mich. 372. *Mont.*—Rev. Codes, 1907, §9193. *Neb.*—*Coffield v. State*, 44 Neb. 417, 62 N. W. 875. But see *Cowan v. State*, 22 Neb. 519, 35 N. W. 405. *N. D.*—Rev. Codes, 1905, §9891; *State v. Winbauer*, 21 N. D. 161, 129 N. W. 97; *State v. Weltner*, 7 N. D. 522, 75 N. W. 779. *Okla.*—*Blair v. State*, 4 Okla. Cr. 359, 111 Pac. 1003; *Heacock v. State*, 4 Okla. Cr. 606, 112 Pac. 949; *Davis v. State*, 4 Okla. Cr. 508, 113

regularity before the magistrate, however, does not require a quashal, but only those which affect the substantial rights of the accused.⁴³

An information will not be quashed or set aside because of the insufficiency of the affidavit or complaint lodged with the committing magistrate and upon which the warrant of arrest was issued, and the preliminary examination held,⁴⁴ or because of the insufficiency of testimony before the magistrate on the examination,⁴⁵ or because the war-

Pac. 220; *Canard v. State*, 2 Okla. Cr. 505, 103 Pac. 737, 881. **S. D.**—Code Crim. Proc., 1910, §263. **Utah.**—Comp. Laws, 1907, §4771; *State v. Springer*, 40 Utah 471, 121 Pac. 976.

Contra, *State v. Sunnafrank*, 64 Kan. 886, 67 Pac. 1103; *State v. Finley*, 6 Kan. 222.

[a] **If it appears upon the face of the information** that the defendant had not been given a preliminary examination, the objection should be raised by a motion to quash. *McGinnis v. State*, 16 Wyo. 72, 91 Pac. 936.

[b] **Presumption as to Examination.** When an information is filed charging a defendant with the commission of a felony, the law presumes that the defendant has had a preliminary examination or has waived the same, and the information need not allege that fact. If the defendant contends that no preliminary examination has been had or waived, and he desires to raise the question, he must do so by motion to set aside the information on that ground, and the burden of proof is on him. *Hughes v. State*, 7 Okla. Cr. 117, 122 Pac. 554.

[c] **The phrase "legally committed"** refers to the examination of the case and the holding of the defendant to answer before a committing magistrate. *Ex parte Baker*, 88 Cal. 84, 25 Pac. 966. See also *People v. Beach*, 122 Cal. 37, 54 Pac. 369.

[d] **The failure of the commitment to designate the crime for which the accused is held to answer, except by the general term "felony,"** is ground for a motion to quash. *Fertig v. State*, 14 Ariz. 540, 133 Pac. 99.

43. *People v. Rodrigo*, 69 Cal. 601, 11 Pac. 481.

[a] **Erroneous Endorsement of Commitment.**—Since public officers must be presumed to have performed their duty as required by law, until the contrary appears, where it does not appear that the justice did not hold the examina-

tion required by law and there was no deposition filed, the information will not be set aside because the order of commitment was endorsed on the complaint although the statute requires the order to be endorsed on the deposition. *People v. Smith*, 59 Cal. 365. But see now Penal Code, §872.

[b] **Commitment Under Erroneous Name.**—The fact that the defendant was charged and committed under a fictitious or erroneous name would be no reason for quashing or setting aside an information which states his true name. *State v. Yturaspe*, 22 Idaho 360, 125 Pac. 802.

[c] **The refusal of a witness to answer questions on cross-examination at the preliminary examination on the ground of privilege is not sufficient basis for setting aside the information.** *State v. Bond*, 12 Idaho 424, 86 Pac. 43. See also *State v. McGann*, 2 Idaho 40, 66 Pac. 823.

[d] **Objections to Stenographer.**—It is not ground for setting aside an information that the court required no affirmative showing as to the qualifications of the stenographer on preliminary examination, or that the stenographer was an employe of the district attorney or that the stenographer was not sworn to correctly take down and transcribe the testimony. *People v. Nunley*, 142 Cal. 441, 76 Pac. 45.

44. **Cal.**—*People v. Lee Look*, 143 Cal. 216, 76 Pac. 1028, *overruling* *People v. Christian*, 101 Cal. 471, 35 Pac. 1043; *People v. Howard*, 111 Cal. 655, 44 Pac. 342. And see *People v. Cole*, 127 Cal. 545, 59 Pac. 984; *People v. Sehorn*, 116 Cal. 503, 48 Pac. 495; *People v. Velarde*, 59 Cal. 457; *People v. Gregory*, 8 Cal. App. 738, 97 Pac. 912. **Neb.**—*Alderman v. State*, 24 Neb. 97, 38 N. W. 36. **N. D.**—*State v. Longstreth*, 19 N. D. 268, 121 N. W. 1114.

45. *People v. Beach*, 122 Cal. 37, 54 Pac. 369; *People v. Brott*, 163 Mich. 150, 128 N. W. 236.

rant on which the accused was arrested was not properly addressed.⁴⁶

c. *No Leave To File Information*.—An information filed without the necessary leave of court may be set aside on motion.⁴⁷

d. *Indictment Drawn by Unauthorized Attorney*.—It is ground for quashing an indictment that it was drawn by an attorney acting without authority.⁴⁸

e. *Objections as to the Grand Jury*.—(I.) *Irregularities in Selecting and Empanelling*. In the absence of statute to the contrary, objection to the competency and qualifications of the grand jurors, if not waived by failure to challenge,⁴⁹ or to the mode of selecting, summoning or empanelling them⁵⁰ may be made by a motion to quash or set aside.

46. *Wilson v. State*, 99 Ala. 194, 13 So. 427; *Martin v. State*, 3 Ala. App. 99, 58 So. 83.

47. *Mont. Rev. Codes*, 1907, §9193; *State v. Chevigny*, 48 Mont. 382, 138 Pac. 257; *State v. McCaffery*, 16 Mont. 33, 40 Pac. 63.

But the fact that an information failed to show on its face that such leave had been granted, is not ground for quashing it. *State v. Mansfield*, 19 Mont. 483, 48 Pac. 898.

48. *State v. Morris*, 1 Houst. Cr. (Del.) 124.

[a] Where the attorney is a de facto deputy state's attorney it is no ground for quashing the indictment that he was not a de jure officer. *State v. Phelps*, 5 S. D. 480, 59 N. W. 471.

49. **U. S.**—*Carter v. State*, 177 U. S. 442, 20 Sup. Ct. 687, 44 L. ed. 839; *Agnew v. United States*, 165 U. S. 36, 17 Sup. Ct. 235, 41 L. ed. 624; *United States v. Gale*, 109 U. S. 65, 3 Sup. Ct. 1, 27 L. ed. 857; *United States v. Swift*, 186 Fed. 1002; *Ex parte Harlan*, 180 Fed. 119. **Cal.**—*People v. Hanstead*, 135 Cal. 149, 67 Pac. 763. **Ky.**—*Ragantall v. Com.*, 14 Bush 457. But see *Com. v. May*, 8 Ky. Opin. 573. **La.**—*State v. Rowland*, 36 La. Ann. 193. **Md.**—*Pontier v. State*, 107 Md. 384, 68 Atl. 1059; *Clare v. State*, 30 Md. 164. **N. J.**—*State v. Lang*, 75 N. J. L. 1, 66 Atl. 942; *Gibbs v. State*, 45 N. J. L. 379, 46 Am. Rep. 782. **N. C.**—*State v. Ordine*, 74 N. C. 316. **Okla.**—*Snyder's Comp. Laws*, §6738; *Cowart v. State*, 4 Okla. Crim. 122, 111 Pac. 672. **Tex.**—*Thomas v. State*, 49 Tex. Crim. 20, 8 S. W. 1909. See *Streight v. State*, 62 Tex. Crim. 153, 138 S. W. 742.

See *supra*, XIV, A, 1, c. But see

State v. Ames, 90 Minn. 183, 96 N. W. 330; *People v. Scannell*, 37 Misc. 345, 75 N. Y. Supp. 500.

As to waiver, see *infra*, XV.

As to statutes providing what defects are not grounds for quashing, see *supra*, XIV, A, 1, c, (I).

[a] When the statutes specifies the grounds of the motion, it cannot be based on matters not specified though they indicate bias or prejudice. *State v. Baughman*, 111 Iowa 71, 82 N. W. 452; *State v. Russell*, 90 Iowa 569, 58 N. W. 915, 28 L. R. A. 195. See *supra*, XIV, A, 1, c.

[b] Where the lack of qualifications does not prejudice the accused but the disqualification is in the nature of a privilege or is not intended for the protection of the accused, as where a civil officer is disqualified, it is not ground for a motion to quash, especially where no challenge on this ground was interposed. **Ky.**—*Com. v. Pritchett*, 11 Bush 277; *Com. v. Rudd*, 3 Ky. L. Rep. 328. **Me.**—*State v. Wright*, 53 Me. 328; *State v. Quimby*, 51 Me. 395. **Tex.**—*Edgar v. State*, 59 Tex. Crim. 252, 127 S. W. 1053.

See *Spigener v. State*, 62 Ala. 383.

[c] *Publication of facts or advice to grand jurors* (1) before the indictment was found and before the defendant was arraigned (*State v. Slocum*, 111 Minn. 328, 126 N. W. 1096), (2) or the distribution of circulars containing advice to persons on the grand jury list (*People v. Shea*, 147 N. Y. 78, 41 N. E. 505, 69 Am. St. Rep. 320), have been held to furnish no ground for a motion to quash or set aside.

50. **U. S.**—*United States v. Gale*, 109 U. S. 65, 3 Sup. Ct. 1, 27 L. ed. 857; *United States v. Tallman*, 10 Blatch. 21,

And the same is true as to objection for failure to swear the grand

28 Fed. Cas. No. 16,429. **Ala.**—*Nixon v. State*, 68 Ala. 535. **Ark.**—Dig. of St., 1904, §2279; *Dixon v. State*, 29 Ark. 165. **Ill.**—*Marsh v. People*, 226 Ill. 464, 80 N. E. 1006; *Stone v. People*, 3 Ill. 326. **Ia.**—Code, 1897, §5319; *State v. Russell*, 90 Iowa 569, 58 N. W. 915, 28 L. R. A. 195; *State v. Beckey*, 79 Iowa 368, 44 N. W. 679; *State v. Bowman*, 73 Iowa 110, 34 N. W. 767; *Dutell v. State*, 4 Greene 125. See *State v. Miller*, 53 Iowa 154, 4 N. W. 900. But see *State v. Wheeler*, 129 Iowa 100, 105 N. W. 374. **Ky.**—Crim. Code, 1906, §158 (provision limited to substantial errors); *Ragantall v. Com.*, 14 Bush 457. **La.**—*State v. Bain*, 135 La. 776, 66 So. 196, jury selected by person who had ceased to be a jury commissioner. **Me.**—*State v. Doherty*, 60 Me. 504; *State v. Lightbody*, 38 Me. 200. But see now Rev. St., 1903, ch. 132, §13. **N. J.**—*State v. McCarthy*, 76 N. J. L. 295, 69 Atl. 1075. **N. Y.** *People v. Duff*, 65 How. Pr. 365, impaneling of jurors under unconstitutional law. But see *People v. Farmer*, 194 N. Y. 251, 87 N. E. 457. **Ohio.**—*Young v. State*, 23 Ohio St. 578. But see *State v. Thomas*, 61 Ohio St. 444, 56 N. E. 276, 48 L. R. A. 459; *Blaney v. State*, 9 Ohio C. D. 616, holding that challenge to array taken before the jury is impaneled and sworn is proper method of taking advantage of technical irregularities in selecting and summoning jury. **Okla.**—Rev. Laws, 1910, §5780. **Pa.**—*Com. v. Bartilson*, 85 Pa. 482; *Com. v. Robertson*, 47 Pa. Super. 472. **S. D.**—*State v. Forgraves*, 32 S. D. 21, 141 N. W. 990.

But see *State v. Bolt*, 7 Blackf. (Ind.) 19; *State v. Freeman*, 6 Blackf. (Ind.) 218; *State v. Cooley*, 72 Minn. 476, 75 N. W. 729, 71 Am. St. Rep. 502; *State v. Russell*, 69 Minn. 502, 72 N. W. 822; and *supra*, XIV, A, 1, c.

[a] In *O'Byrne v. State*, 51 Ala. 28, it was held that if a trial court drew and organized a grand jury in any other manner than that prescribed by law, indictments found by such grand jury would be quashed on proper and timely application. This case was quoted in *Fryer v. State*, 146 Ala. 4, 41 So. 172, and cited with approval in *Spivey v. State*, 172 Ala. 391, 56 So. 232.

[b] **Irregularity Not Amounting to Corruption.**—In Kansas it is proper to overrule a motion to quash for irregularity in selecting the grand jury where such irregularity, in the opinion of the court, does not amount to corruption. *State v. Johnson*, 6 Kan. App. 119, 50 Pac. 907; *State v. Lowe*, 6 Kan. App. 110, 50 Pac. 912.

[c] **Substantial Rights Unaffected.** An indictment will be set aside for irregularities in the selection of the grand jury, only when there has been a departure from the requirements of the statute, affecting the substantial rights of the defendant. *State v. Brandt*, 41 Iowa 593; *State v. Taylor*, 43 La. Ann. 1131, 10 So. 203. And see also *supra*, XIV, A, 1, b.

[d] **Exclusion of Negroes From Grand Jury.**—A negro indicted by the grand jury from which other negroes have been excluded because of their race or color may have such indictment quashed; but the mere absence of negroes from the juries for some years, without proof of the prejudice of the judge who selected the jury commissioners, or of the commissioners does not afford sufficient ground to quash the indictment. *Binyon v. United States*, 4 Ind. Ter. 642, 76 S. W. 265. See also *Carter v. State*, 177 U. S. 442, 20 Sup. Ct. 687, 44 L. ed. 839; *Thomas v. State*, 49 Tex. Crim. 633, 95 S. W. 1069.

[e] **Failure To Accompany Lists With Certificate.**—That the lists of jurors selected in the various townships of the county are not authenticated by a formal certificate, is insufficient as a ground for setting aside an indictment in the absence of fraud. *State v. Ausaleme*, 15 Iowa 44.

[f] **Grand Jury Composed of Persons Summoned as Trial Jurors.**—If the order be to summon twenty-four persons to act as trial jurors, an indictment found by these persons, subsequently impaneled as a grand jury will be set aside. *People v. Earnest*, 45 Cal. 29.

[g] **Jury Commissioner Father of Deceased.**—An indictment will be quashed where one of the jury commissioners was the father of the person killed and was an active prosecutor during the progress of the case and

jurors.⁵¹ But in some jurisdictions objections of this nature can also be taken by plea in abatement, and in others only by plea in abatement.⁵²

Defect in Venire Facias or Execution Thereof.—Informality or defect in the venire facias, or in the manner of executing the same, will not vitiate an indictment on motion to quash,⁵³ nor is it ground for quashing the indictment that it does not affirmatively appear from the record that a venire facias had been issued to summon the grand jury by which the indictment had been found.⁵⁴

(II.) **No Opportunity To Challenge.**—In the absence of a provision in a statute enumerating the grounds for setting aside an indictment a motion to set aside on the ground that the defendant was not given an opportunity to challenge the grand jurors,⁵⁵ or was not permitted to be present during an exercise of a challenge on his behalf⁵⁶ will not be sustained.

When the defendant has not been held to answer before the finding of the

endeavored to bring about the conviction of the defendant. *State v. Malloy*, 91 S. C. 429, 74 S. E. 988. See *State v. Perry*, 73 S. C. 199, 53 S. E. 169.

51. *Hardy v. State*, 96 Miss. 844, 51 So. 460. *Compare Chevarro v. State*, 17 Tex. App. 390, holding that such objection may not be presented by exception to the indictment.

52. See *infra*, XIV, C, 1, a, (IV), (V), (VI).

53. *Ala.*—*State v. Phillips*, 2 Ala. 297; *Maher v. State*, 1 Port. 265, 26 Am. Dec. 379, absence of seal on writ. *Miss.*—*Nichols v. State*, 46 Miss. 284. *N. H.*—*State v. Bradford*, 57 N. H. 188, absence of seal on writ. *Pa.*—See *Com. v. Salter*, 2 Pears. 461. *Tenn.*—*State v. Ahlsson*, 10 Yerg. 523; *Bennett v. State*, Mart. & Y. 133. *Tex.*—*Pierce v. State*, 12 Tex. 210; *West v. State*, 6 Tex. App. 485. *Va.*—Code, 1904, §3985.

[a] **Defective Order for Grand Jury.** The fact that the court in directing the sheriff to summon additional grand jurors neglected to include in his order the statutory requirement that such jurors should not be persons who had served as jurors upon the regular list within the last twelve months, is not ground for setting aside the indictment. *Troome v. Ter.*, 11 Ariz. 181, 59 Pac. 591.

[b] But the absence of the seal upon the venire facias is ground for quashing the indictment in Maine. *State v. Flemming*, 66 Me. 142, 22 Am.

Rep. 552; *State v. Lightbody*, 38 Me. 200.

[b] **Grand Jury Summoned Without Process.**—(1) An indictment found by a grand jury summoned by a sheriff without process will be quashed on motion. *Nicholls v. State*, 5 N. J. L. 621. (2) But an appearance by the grand jurors without service of summons will not vitiate the indictment. *Sylvester v. State*, 72 Ala. 201; *State v. Mellor*, 13 R. I. 666.

54. *Curtis v. Com.*, 87 Va. 589, 13 S. E. 73.

55. *State v. Phillips*, 119 Iowa 652, 94 N. W. 229, 67 L. R. A. 292. But see *Territory v. Ingersoll*, 3 Mont. 454.

[a] A defendant is not entitled to have an indictment against him set aside on the ground that he was not brought before the court and given an opportunity to challenge the grand jury, where it appears that he was under arrest at the time upon process issued by a justice of the peace, and that the district court had no jurisdiction over him to bring him before it upon the impaneling of the grand jury. *State v. Fitzgerald*, 63 Iowa 268, 19 N. W. 202.

[b] **Defendant in Jail When Grand Jury Impaneled.**—It is no ground for quashing an indictment that when the grand jury were impaneled and sworn the defendant was in jail. *State v. Hoyt*, 13 Minn. 125; *People v. Borgstrom*, 178 N. Y. 254, 70 N. E. 780. See also *Sullins v. State*, 79 Ark. 127, 95 S. W. 159.

56. *State v. Felter*, 25 Iowa 67.

indictment, a motion to quash or set aside will lie in some states on any ground which would have been good ground for challenge, either to the panel or to any individual grand juror,⁵⁷ provided of course the juror assailed took part in the consideration of the charge against defendant or the deliberations of the grand jury.⁵⁸

(III.) **Matters Not Subject to Challenge.**—Irregularities or defects in the selection and organization of the grand jury which are not grounds for challenge are not sufficient grounds for quashing or setting aside an indictment.⁵⁹

(IV.) **Want of Authority in Grand Jury.**—The defendant may move to quash the indictment when it appears from the face thereof that the grand jury had no legal authority to inquire into the offense charged,⁶⁰ but the fact that the body which found the indictment was not a de jure but only a de facto grand jury is not a ground for motion to quash, since the authority of such body cannot be collaterally at-

57. **Ariz.**—Penal Code, §972; *De Leon v. Ter.*, 9 Ariz. 161, 80 Pac. 348; *Parker v. Ter.*, 5 Ariz. 283-288, 52 Pac. 361. **Cal.**—*People v. Bright*, 157 Cal. 663, 109 Pac. 33; *Matter of Ruef*, 150 Cal. 665, 89 Pac. 605; *People v. Landis*, 139 Cal. 426, 430, 73 Pac. 153; *People v. Simmons*, 119 Cal. 1, 50 Pac. 844; *People v. Southwell*, 46 Cal. 141-154. But see Penal Code, §995, as amended in 1911, omitting this ground. **Idaho.**—Rev. Codes, §7730; *State v. Hardy*, 4 Idaho 478, 42 Pac. 507. **Mont.**—See Rev. Codes, 1907, §9193. **Nev.**—Rev. Laws, 1912, §7090. **N. D.**—Rev. Codes, 1905, §9891. **S. D.**—Code Crim. Proc., 1910, §263; *State v. Forgraves*, 32 S. D. 21, 141 N. W. 990. **Utah.**—Comp. Laws, 1907, §472. **Wash.**—But see *State v. Melvern*, 32 Wash. 7, 72 Pac. 489.

[a] But where the defendant has been given an opportunity to challenge and has failed to take advantage of such opportunity, he cannot use a ground of challenge as a basis for a motion to quash. *Borello v. Superior Court*, 8 Cal. App. 215, 96 Pac. 404. See also *De Leon v. Ter.*, 9 Ariz. 161, 80 Pac. 348; *Parker v. Ter.*, 5 Ariz. 283, 52 Pac. 361; and 10 STANDARD PROC. 634.

[b] In Iowa this ground for motion to set aside is not allowed to a defendant held to answer before indictment. Code, 1897, §5321; *State v. Johnson*, 136 Iowa 601, 111 N. W. 827; *State v. Hart*, 29 Iowa 268; *State v. Howard*, 19 Iowa 191.

[c] Any statutory incompetency of the grand jurors which is not made a

basis for challenge is regarded as a mere direction to the court in impaneling the jury and is not available as a ground for setting aside the indictment. *Matter of Ruef*, 150 Cal. 665, 89 Pac. 605. See also *State v. Simas*, 25 Nev. 432, 62 Pac. 242.

[d] **How Ground of Challenge Is Established.**—In *People v. Travers*, 88 Cal. 233, 26 Pac. 88, it was said: "But the fact which would have been good ground for challenge must be proven in the ordinary way in which other facts are proven, by the introduction of evidence, either by the examination of the jurors, or by other competent evidence. For this purpose, of course, defendant is entitled to the process of subpoena to compel the attendance of his witnesses; but there is no process by which discharged grand jurors can be reassembled in their official character and subjected to the original process of challenging."

58. *People v. Bright*, 157 Cal. 663, 109 Pac. 33; *People v. Simmons*, 119 Cal. 1, 50 Pac. 844.

[a] The word "consideration" means investigation of the charge. Under this provision the disqualified juror has no right as such to be present at or to take any part in the investigation of the charge. *People v. Bright*, 157 Cal. 663, 109 Pac. 33.

59. *People v. Morgan*, 133 Mich. 550, 95 N. W. 542.

60. **Ind.**—Burns' St., 1914, §2665. **Kan.**—Gen. St., 1909, §6804. **Nev.**—*State v. Rodriguez*, 7 Nev. 273. **Ore.**—*State v. Lawrence*, 12 Ore. 297, 7 Pac. 116.

tacked.⁶¹ Neither should a finding be set aside because found by the grand jury without a charge having been made before them.⁶²

f. *Objections to Proceedings Before and by the Grand Jury.* (I.) **Matters Pertaining to Court's Charge.**—Error in the general charge of the judge to the grand jury is not recognized as ground for quashing indictments found by them.⁶³ Neither will the indictment be set aside on the ground that one of the grand jurors who participated in finding the indictment was not present when the grand jury was charged.⁶⁴

(II.) **Errors in Statement by Prosecuting Attorney.**—An inadvertent error in a statement by the prosecuting attorney to the grand jury is not ground for quashing.⁶⁵

(III.) **Unauthorized Person Before Grand Jury.**—The presence of an unauthorized person at a session of the grand jury during its deliberations is ground for quashing or setting aside the indictment,⁶⁶ and

61. *People v. Morgan*, 133 Mich. 550, 95 N. W. 542. See also *People v. Petrea*, 92 N. Y. 128.

[a] **Improper Discharge of Previous Grand Jury.**—That a new grand jury was drawn after an improper discharge of a prior jury is not ground for setting aside an indictment returned by the new grand jury. *State v. Pitkin*, 137 Iowa 22, 114 N. W. 550; *State v. Hart*, 67 Iowa 142, 25 N. W. 99; *State v. Hughes*, 58 Iowa 165, 11 N. W. 706.

62. *People v. Strong*, 1 Abb. Pr. N. S. (N. Y.) 244.

63. *State v. White*, 37 La. Ann. 172.

64. *State v. Froiseth*, 16 Minn. 277.

65. *United States v. Haskell*, 169 Fed. 449.

66. **U. S.**—*United States v. Heinze*, 177 Fed. 770; *United States v. Edger-ton*, 30 Fed. 374. **Ariz.**—Penal Code, 1913, §972. **Ark.**—Dig. St., 1904, §2279. **Cal.**—Penal Code, §995; *People v. Bright*, 157 Cal. 663, 109 Pac. 33. **Idaho.**—Rev. Codes, §7730. **Ia.**—Code, 1897, §5319; *State v. Fertig*, 98 Iowa 139, 67 N. W. 87; *State v. Will*, 97 Iowa 58, 65 N. W. 1010. **Ky.**—Crim. Code, 1906, §158. **Minn.**—Rev. Laws, 1905, §5338; *State v. Slocum*, 111 Minn. 328, 126 N. W. 1096. **Miss.**—*State v. Barnett*, 98 Miss. 812, 54 So. 313. **Mont.**—Rev. Codes, 1907, §9193. **Nev.**—Rev. Laws, 1912, §7990. **N. Y.**—Code Crim. Proc., §313; *People v. Borgstrom*, 178 N. Y. 254, 70 N. E. 780; *People v. Glasser*, 60 Misc. 407, 112 N. Y. Supp. 321; *People v. Winner*, 80 Hun 130, 30 N. Y. Supp. 54. **N. D.**—Rev. Codes, 1905, §9891. **Okla.**—Rev.

Laws, 1910, §5780; *Patswald v. United States*, 5 Okla. 351, 49 Pac. 57; *Stan-ley v. United States*, 1 Okla. 336, 33 Pac. 1025. **S. D.**—Code Crim. Proc., 1910, §263. **Tex.**—Code Crim. Proc., 1906, art. 559; *Stuart v. State*, 35 Tex. Crim. 440, 34 S. W. 118. **Utah.**—Comp. Laws, 1907, §4772. **Wash.**—Rem. & Ball. Code Proc., 1910, §2099.

See 10 STANDARD PROC. 648, et seq. But see *State v. Whitney*, 7 Ore. 386.

[a] **Presence of Witness.**—In *People v. Arnold*, 248 Ill. 169, 93 N. E. 786, it was held the fact that a father was in the grand jury room at a time when some clothes were identified, for the alleged reason that his daughter was timid and unable to appear alone in respect to a matter of the kind under investigation, was not ground for quashing the indictment.

[b] **Presence of Unauthorized Grand Juror.**—A statutory provision of this nature held inapplicable to a case where the unauthorized person was a grand juror to whom a challenge had been allowed. *Territory v. Staples*, 3 Idaho 35, 26 Pac. 166.

[c] **Presence of bailiff in the grand jury room is not ground for a motion to quash, when the proof clearly shows that the bailiff exerted no influence on the grand jury.** *State v. Bacon*, 77 Miss. 366, 27 So. 563.

[d] **Stranger Present But Not Participating.**—In Maine it has been held that the motion to quash will be sustained if it is shown that the unauthorized person participates in the proceedings, but not otherwise. *State v. Clough*, 49 Me. 573. But see *State*

especially is this true where private counsel is permitted to harangue the jurors,⁶⁷ or it can be shown that any other improper influence has been brought to bear on them,⁶⁸ as for example where the presiding judge was in the grand jury room with the grand jury during their deliberations and urged and directed them to find the indictment.⁶⁹

Examination of Witnesses by Unauthorized Person.—But it has been held that it is not ground for quashing an indictment that the clerk of the grand jury examined witnesses,⁷⁰ or that an attorney acting for the prosecuting attorney examined witnesses before the grand jury if he was not present while the grand jury was deliberating or voting.⁷¹

(IV.) Improper Conduct of Grand Jury.—Improper conduct on the part of the grand jury may sometimes be taken advantage of by motion

v. Bowman, 90 Me. 363, 38 Atl. 331, 60 Am. St. Rep. 266.

[e] **Presence of Stenographer.**—In *State v. Bowman*, 90 Me. 363, 38 Atl. 331, 60 Am. St. Rep. 266, a motion to quash was sustained on the ground that a stenographer was present by order of court and took notes of the testimony before the grand jury. See 10 STANDARD PROC. 649, note. But see 10 STANDARD PROC. 653.

[f] **Attorney Acting as Stenographer.**—Where by statute two attorneys may be in the grand jury room the fact that one acts as stenographer is not ground for quashing an indictment. *United States v. Haskell*, 169 Fed. 449.

Presence of Prosecuting Attorney. See 10 STANDARD PROC. 651.

Presence of Special Counsel or Prosecutor.—See 10 STANDARD PROC. 651, 652.

[g] A county attorney, who through the relation of attorney and client in a civil action, has gained a confidential knowledge of facts subsequently made the basis of a criminal prosecution against his client, is disqualified to act as prosecutor of the charge, and his appearance before the grand jury in the matter of finding and returning the indictment is ground for setting the same aside. *State v. Rucker*, 130 Iowa 239, 106 N. W. 645.

Presence of Witnesses.—See 10 STANDARD PROC. 652.

Presence of Interpreter.—See 10 STANDARD PROC. 654.

[h] **Showing of Unlawful Presence.** It is incumbent on the defendant, moving to set aside the indictment on the ground that an unauthorized person was with the grand jury during their de-

liberations, to show that such person was present unlawfully and that he was present when the vote was taken on the finding of the indictment. *State v. Fertig*, 98 Iowa 139, 67 N. W. 87.

67. *United States v. Swift*, 186 Fed. 1002.

68. *United States v. Kilpatrick*, 16 Fed. 765.

69. *State v. Will*, 97 Iowa 58, 65 N. W. 1010.

Presence of Judge.—See 10 STANDARD PROC. 653.

70. In *State v. Miller*, 95 Iowa 368, 64 N. W. 288, the clerk who was not a member of the grand jury and was a practicing attorney asked the witnesses some questions, but they were asked at the request of the foreman and were followed by questions asked by different members of the grand jury. The court refused to set aside the indictment notwithstanding the fact that the statute provided that the clerk should "take no part in the proceedings aside from his clerical duties."

71. *Coon v. State*, 109 Ark. 346, 160 S. W. 226; *Tiner v. State*, 109 Ark. 138, 158 S. W. 1087; *Bennett v. State*, 62 Ark. 516, 36 S. W. 947.

[a] In *Jones v. State*, 150 Ala. 54, 43 So. 179, it was held that the fact that an attorney not a member of the grand jury nor the regular solicitor was present and examined witnesses before the grand jury is not good grounds for quashing the indictment where it appears that he was there at the request of the court and the regular solicitor who was ill, and that he did not counsel the grand jury or express any opinion unfavorable to defendant, though he may have administered the

to quash or to set aside.⁷² Thus if the grand jury should disregard its duty and prefer an indictment without any authority or foundation, the court should sustain a motion to quash,⁷³ but the misconduct must be substantially prejudicial to the accused.⁷⁴

(V.) **Illegal or Insufficient Evidence.** — Generally an indictment will not be quashed because of the illegality or insufficiency of the evidence upon which it was based, since the court will not inquire into the character or sufficiency of such evidence.⁷⁵ But it has been held that in extreme cases when the court can see that the finding of a grand jury is based upon such utterly insufficient evidence or such palpably

oath to a witness, it appearing that other witnesses were examined.

72. *United States v. Kilpatrick*, 16 Fed. 765; *People v. Goldenson*, 76 Cal. 328, 345, 19 Pac. 161. But see Cal. Penal Code, §995.

[a] Proof that the grand jury left their regular jury room and went to a nearby sanitarium to take the testimony of a witness, without any showing as to who the witness was, whether or not his testimony was in fact taken, why he could not attend before the grand jury, or to what case the testimony of the witness pertained, the act of the grand jury standing in the record as an isolated fact unconnected with the case at bar by any evidence direct or circumstantial, constitutes no ground for setting aside an indictment. *Fooshee v. State*, 3 Okla. Cr. 666, 108 Pac. 554.

[b] The fact that other indictments were found against the same defendant by the same grand jury for a similar offense will not justify a quashal upon the theory that it indicates bias and prejudice and improper conduct. *State v. Pennsylvania R. Co.*, 84 N. J. L. 550, 87 Atl. 86.

73. Under a statute declaring the punishment for the wanton injury to stock and providing that "no bill of indictment shall be found, or prosecution maintained, except upon the complaint of the owner of the stock" an indictment will be quashed on motion if preferred without the necessary complaint, though it should not be struck from the files merely because the name of the owner is not endorsed as prosecutor. *Ashworth v. State*, 53 Ala. 190.

74. The exclusion of the prosecuting attorney from the grand jury room has been held to be insufficient in itself

as a ground for setting aside an indictment in the absence of a showing that the substantial rights of the accused were violated. *State v. Slocum*, 111 Minn. 328, 126 N. W. 1096.

75. **U. S.**—*McKinney v. United States*, 199 Fed. 25; *United States v. Haskell*, 169 Fed. 449; *United States v. Thomas*, 145 Fed. 74; *United States v. Cobban*, 127 Fed. 713; *United States v. Jones*, 69 Fed. 973; *United States v. Terry*, 39 Fed. 355. See *Holt v. United States*, 218 U. S. 245, 31 Sup. Ct. 2, 54 L. ed. 1021, 20 Ann. Cas. 1138. **Ala.**—*Allen v. State*, 162 Ala. 74, 50 So. 279; *Agee v. State*, 117 Ala. 169, 23 So. 486; *Jones v. State*, 81 Ala. 79, 1 So. 32; *Washington v. State*, 63 Ala. 189; *Sparrenbirger v. State*, 53 Ala. 481, 25 Am. Rep. 643. **Cal.**—*Borello v. Superior Court*, 8 Cal. App. 215, 96 Pac. 404. **Ga.**—*Reese v. State*, 3 Ga. App. 610, 60 S. E. 284. **Ia.**—*State v. Smith*, 74 Iowa 580, 38 N. W. 492; *State v. Tucker*, 20 Iowa 508. **Ky.** *Com. v. Minor*, 89 Ky. 555, 13 S. W. 5. **La.**—*State v. Britton*, 131 La. 877, 60 So. 379; *State v. Chandler*, 45 La. Ann. 49, 12 So. 315. **Mich.**—*People v. Launder*, 82 Mich. 109, 116, 46 N. W. 956; *People v. Smith*, 25 Mich. 497. **Miss.**—*Hammond v. State*, 74 Miss. 214, 21 So. 149; *Welch v. State*, 68 Miss. 341, 8 So. 673. **Nev.**—*State v. Logan*, 1 Nev. 509. **N. J.**—*State v. Dayton*, 23 N. J. L. 49, 53 Am. Dec. 270. **N. M.** *Territory v. Torres*, 16 N. M. 615, 121 Pac. 27, secondary evidence. **N. C.** *State v. Lanier*, 90 N. C. 714; *State v. Cain*, 8 N. C. 352. **Okla.**—*Royce v. Ter.*, 5 Okla. 61, 47 Pac. 1083 (hearsay); *Robinson v. Ter.*, 16 Okla. 241, 85 Pac. 451. **Tenn.**—*Bloomer v. State*, 3 Sneed 66, 69. **Tex.**—*Kingsbury v. State*, 37 Tex. Crim. 259, 39 S. W. 365; *Dockery v. State*, 35 Tex. Crim.

incompetent evidence as to indicate that the indictment resulted from prejudice, or was found in wilful disregard of the rights of the accused, the indictment will be quashed;⁷⁶ and this is also the rule where

487, 34 S. W. 281. **Va.**—Wadley v. Terry, 39 Fed. 355; United States v. Com., 98 Va. 803, 35 S. E. 452. **W. Va.** Farrington, 5 Fed. 343. **Ala.**—Perkins Noll v. Dailey, 72 W. Va. 520, 79 v. State, 66 Ala. 457; Sparrenberger v. S. E. 668, 47 L. R. A. (N. S.) 1207; State, 53 Ala. 481. **N. Y.**—People v. State v. Woodrow, 58 W. Va. 527, 52 Edwards, 25 N. Y. Supp. 480. **Okla.** S. E. 545, 112 Am. St. Rep. 1001, 6 Royce v. Ter., 5 Okla. 61, 47 Pac. 1083, Ann. Cas. 180, 2 L. R. A. (N. S.) 862. hearsay.

See 6 ENCY. OF EV. 252, 257.

As to motions to quash because of objection to evidence on preliminary examination see *supra*, XIV, A, 2, b.

[a] **Reasons.**—In United States v. Swift, 186 Fed. 1002, the court said: "The cases are uniform to the effect that, except in those states in which, by statute, indictments are required to be returned on 'legal' or 'competent' evidence, the courts will not review the evidence received by a grand jury for the purpose of passing upon its competency. In the first place no official record of the evidence introduced before the grand jury ordinarily is kept. In the second place, if, on a motion to quash, the competency of the evidence presented could be inquired into, the trial courts would be obliged to sit as courts of review, to examine into the correctness of every ruling made upon the evidence by the grand jurors. The obstructions to justice and the unnecessary and uncalled-for waste of time, and consequent expense to the state as well as to defendants, which would result from such a course, are too obvious to need comment." See also Noll v. Dailey, 72 W. Va. 520, 79 S. E. 668, 47 L. R. A. (N. S.) 1207.

[b] **Where no constitutional right of defendant is violated**, an indictment will not be set aside because some incompetent evidence was admitted. Hope v. People, 83 N. Y. 418, 38 Am. Rep. 460; People v. Booth, 52 Misc. 340, 102 N. Y. Supp. 62; People v. Willis, 23 Misc. 568, 52 N. Y. Supp. 808.

[c] **That the minutes of the evidence do not show sufficient facts** to justify the finding of the indictment, constitutes no ground for quashing or setting aside the same. State v. Morris, 36 Iowa 272.

76. **U. S.**—McKinney v. United States, 199 Fed. 25; United States v. Jones, 69 Fed. 973; United States v.

[a] "This qualification, however, is far from a recognition of the right of a defendant to compel a review of the evidence upon which he was indicted." McKinney v. United States, 199 Fed. 25.

[b] **One Incompetent Witness.**—If it should appear from the indorsement on the back of the indictment that only one witness was examined, and it should be shown that he was a convicted felon and, therefore, incompetent to be a witness in any case, it would seem that the indictment should be quashed. United States v. Terry, 39 Fed. 355.

[c] **Must Be Total Absence of Competent Evidence.**—In State v. Coates, 130 N. C. 701, 41 S. E. 706, the court laid down the following rule: "When an indictment is found upon testimony, all of which is incompetent, or of witnesses, all of whom were disqualified, the bill will be quashed; but when some of the testimony, or some of the witnesses before the grand jury, were incompetent, the court will not go into the barren inquiry how far such testimony or such witnesses contributed to finding the bill, which is merely a charge, but will admit the competent witnesses or testimony on the trial."

[d] **In New York** "whenever it clearly appears, therefore, that the legal evidence received by the grand jury is insufficient to support an indictment; or that illegal evidence is the sole basis for an indictment, the person indicted has a constitutional right to make a motion to dismiss, notwithstanding the provisions of the code to the contrary." People v. Sexton, 187 N. Y. 495, 80 N. E. 396; People v. Evans, 81 Misc. 606, 143 N. Y. Supp. 49; People v. Restenblatt, 1 Abb. Pr. 268; People v. Brickner, 8 N. Y. Cr. 217, 15 N. Y. Supp. 528; People v. Price, 6 N. Y. Cr. 141, 2 N. Y. Supp. 414; People v. Metropolitan Traction

there was no evidence whatever upon which to base the indictment.⁷⁷

(VI.) **Incompetency of Witnesses.**—Since it cannot be shown what weight, if any, the testimony of a single witness had with the grand jury, it is a general rule that the incompetency of one of several witnesses will not sustain a motion to quash.⁷⁸ But this general rule should not be confused with the right of the accused to have the indictment quashed where he has been brought before the grand jury

Co., 50 N. Y. Supp. 1117; *People v. Vaughan*, 19 Misc. 298, 42 N. Y. Supp. 959, 76 N. Y. St. 959.

[c] In *People v. Glen*, 173 N. Y. 395, 66 N. E. 112, the court said: "But our courts have also always asserted and exercised the power to set aside indictments whenever it has been made to appear that they have been found without evidence, or upon illegal and incompetent testimony. (*United States v. Coolidge*, 2 Gall. 361; *People v. Restorff*, 1 Abb. Pr. 268; *People v. Briggs*, 60 How. Pr. 17.) This power is based upon the inherent right and duty of the courts to protect the citizen in his constitutional prerogatives and to prevent oppression or persecution. It is a power which the legislature can neither curtail nor abolish, and, to the extent that legislative enactments are designed to effect either of those ends, they are unconstitutional." See also *People v. Molineux*, 27 Misc. 79, 38 N. Y. Supp. 155; *People v. Archibald*, 57 Misc. 574, 110 N. Y. Supp. 469; *People v. Grosser*, 124 N. Y. Supp. 781. But see *People v. Strong*, 1 Abb. Pr. N. S. (N. Y.) 244. (1) An indictment should not be quashed on the ground that incompetent, immaterial or illegal evidence was given before the grand jury, where there is sufficient competent evidence to support it, unless it clearly appears that the illegal evidence improperly influenced the minds of the grand jurors. *People v. Farrell*, 39 Misc. 213, 45 N. Y. Supp. 911. See also *People v. Winant*, 24 Misc. 261, 32 N. Y. Supp. 695.

(2) U. S.—*United States v. Shepard*, 1 Abb. 165, 37 Fed. Cas. No. 16273; *United States v. Coolidge*, 2 Gall. 361, 23 Fed. Cas. No. 11463. Ala.—*Sparrowhawk v. State*, 22 Ala. 441, quoted in *McIntosh v. United States*, 199 Fed. 29, 212 C. C. A. 403. Mo.—*State v. Cole*, 146 Mo. 672, 47 S. W. 895; *State v. Grady*, 34 Ala. 220, *affirming* 39 Mo. App. 501; *State v. Randolph*,

139 Mo. App. 314, 123 S. W. 61. N. Y. *People v. Thomas*, 32 Misc. 170, 66 N. Y. Supp. 191, 8 Ann. Cas. 36. See *People v. Clark*, 8 N. Y. Crim. 169, 179, 14 N. Y. Supp. 642. N. C.—*State v. Ivey*, 100 N. C. 539, 541, 5 S. E. 407; *State v. Lanier*, 90 N. C. 714. Pa. *Com. v. McComb*, 157 Pa. 611, 27 Atl. 794; *Com. v. Green*, 126 Pa. 531, 17 Atl. 878, 12 Am. St. Rep. 894.

See also preceding note.

Contra.—Cal.—*Brobeck v. Superior Court*, 152 Cal. 289, 92 Pac. 646. Ga. *Scott v. State*, 6 Ga. App. 567, 65 S. E. 359. Tex.—*Lee v. State* (Tex. Crim.), 148 S. W. 567; *Kingsbury v. State*, 37 Tex. Crim. 259, 39 S. W. 365; *Dockery v. State*, 35 Tex. Crim. 487, 34 S. W. 281; *Terry v. State*, 15 Tex. App. 66.

[a] **Evidence in Another Case.**—

Where an indictment is preferred by a district attorney with leave of court and the bill is not made on the personal knowledge of the grand jury but from testimony given by a witness in another case against a different person, such an indictment will be quashed on motion, and a member of the grand jury is a competent witness to testify as to how the indictment was found. *Com. v. McComb*, 157 Pa. 611, 27 Atl. 794; *Com. v. Green*, 126 Pa. 531, 17 Atl. 878, 12 Am. St. Rep. 894.

78. Ill.—*People v. Bladek*, 259 Ill. 69, 102 N. E. 243. Ia.—*State v. Shepherd*, 129 Iowa 705, 106 N. W. 190; *State v. De Groate*, 122 Iowa 661, 98 N. W. 495. Mo.—*State v. Shreve*, 137 Mo. 1, 38 S. W. 548. N. C.—See *State v. Coates*, 130 N. C. 701, 41 S. E. 706.

[a] **Wife of Defendant a Witness**

(1) An indictment should not be set aside simply because the wife of defendant was a witness before the grand jury. Ill.—*People v. Bladek*, 259 Ill. 69, 102 N. E. 243. Ia.—*State v. De Groate*, 122 Iowa 661, 98 N. W. 495. Miss.—*Hammond v. State*, 74 Miss. 214, 21 So. 149. Tex.—*Dockery v. State*,

and there examined;⁷⁹ though if he testifies voluntarily⁸⁰ he cannot

35 Tex. Crim. 487, 34 S. W. 281. **Utah.** United States v. Catler, 5 Utah 608, 19 Pac. 145. **W. Va.**—State v. Woodrow, 58 W. Va. 527, 52 S. E. 545, 112 Am. St. Rep. 1001, 2 L. R. A. (N. S.) 862, 6 Am. Cas. 180. But see United States v. Jones, 69 Fed. 973. (2) But if it appear by affidavit that the testimony of the wife was given against the will of the husband and was vitally material, the indictment should be set aside. *People v. Moore*, 65 How. Pr. (N. Y.) 177.

79. **U. S.**—United States v. Edgerton, 80 Fed. 374; United States v. Jones, 69 Fed. 973. **Ala.**—Sandwich v. State, 137 Ala. 85, 34 So. 620. **Minn.** State v. Gardner, 88 Minn. 130, 92 N. W. 529; State v. Hawks, 56 Minn. 129, 57 N. W. 455 (the accused had been called as a witness in an investigation of another charge than on which he was indicted); State v. Froiseth, 16 Minn. 269. **Miss.**—State v. Bramlett, 47 So. 433. **N. Y.**—People v. Singer, 18 Abb. N. C. 96, 5 N. Y. Cr. 1; *People ex rel. Hummel v. Davy*, 105 App. Div. 598, 94 N. Y. Supp. 1037; *People v. Steinhardt*, 47 Misc. 252, 93 N. Y. Supp. 1026; *People v. Haines*, 1 N. Y. Supp. 55. See *People v. Sexton*, 187 N. Y. 495, 80 N. E. 396, 116 Am. St. Rep. 621; *People v. Glen*, 173 N. Y. 395, 66 N. E. 112.

See also 6 ENCY. OF EV. 254; 14 ENCY. OF EV. 679.

Contra, State v. Shepherd, 129 Iowa 705, 106 N. W. 190.

[a] In *United States v. Swift*, 186 Fed. 1002, the court in passing on this point said: "The two propositions are radically different. It is one thing to quash an indictment because the accused, in violation of his constitutional right, is brought before the grand jury and browbeaten or maltreated . . . and it is quite another thing to quash an indictment because a witness is asked concerning facts which mayhap do not tend to prove the charge which the grand jury is to inquire into. The one reaches to the organization or fundamental power of the grand jury to act; the other, granting that the grand jury was properly impaneled and had the power to proceed, involves the proposition that it acted upon incom-

petent evidence, and therefore reached an irrational conclusion."

[b] In *Boone v. People*, 148 Ill. 440, 36 N. E. 99, the court said: "We do not hold that where one is before the grand jury as a witness, and at that time is not charged with crime, and may incidently be interrogated about a matter to which he makes answer, and an indictment is afterwards found against him, that would require the indictment to be quashed; nor do we hold that every case where one is before the grand jury as a witness, and interrogated about a matter for which he afterwards may be indicted, would be of itself sufficient cause to quash the indictment. But in this case it does not appear that the grand jury examined any other witnesses, nor does it appear the indictment was not found on the evidence of the defendant alone. No affidavits are filed by the state's attorney on that question; and where, as here, the defendant charged with crime is taken from the jail before the grand jury, and interrogated about the matter with which he is charged with crime, such an error must be held fatal to the indictment. It was error to overrule the motion to quash the indictment."

[c] Where this is not one of the statutory grounds for quashing it will not support a motion to quash. *Spearman v. State*, 34 Tex. Crim. 279, 30 S. W. 229. See *Mencheea v. State* (Tex. Crim.), 28 S. W. 203; and *supra*, XIV, A, 1, c, (II).

80. See 6 ENCY. OF EV. 256; 14 ENCY. OF EV. 679.

[a] In *People v. Page*, 116 Cal. 386, 48 Pac. 326, the court said, "nor do we know of any rule of law which makes the voluntary testimony of the defendant before the grand jury a ground for setting aside the indictment," and this was so held although the accused was not informed of his right to consult counsel before testifying. See also: **Cal.**—*People v. King*, 28 Cal. 265. **La.**—*State v. Donelon*, 45 La. Ann. 744, 12 So. 922. **N. Y.**—*People v. Burke*, 72 Misc. 336, 26 N. Y. Cr. 235, 131 N. Y. Supp. 122. **Ore.** *State v. Anderson*, 10 Ore. 448.

Or where the defendant refuses to

complain, especially if he gave no incriminating testimony.⁸¹ The indictment may be quashed where the witnesses before the grand jury were not properly sworn.⁸²

(VII.) **Failure To Preserve Evidence.**—Some statutes have made it a ground for setting aside the indictment when the minutes of the evidence of the witnesses examined before the grand jury are not returned with the indictment,⁸³ but it has not been considered a sufficient ground for quashing that the defendant has not received a copy of the evidence or that the grand jury did not cause the stenographer to transcribe the testimony,⁸⁴ or that exhibits before the grand jury were not returned and filed with the indictment,⁸⁵ or that a witness before the grand jury did not sign the minutes of his testimony.⁸⁶

g. **Not Properly Found Endorsed, Presented and Filed.**—A motion to set aside or quash an indictment as the case may be where it is not found, endorsed and presented as prescribed by statute,⁸⁷ as for example where the finding was by an incomplete grand jury,⁸⁸

answer the questions put to him. *People v. Katzenstein*, 70 Misc. 185, 25 N. Y. Cr. 276, 128 N. Y. Supp. 473.

81. *State v. Firmatura*, 121 La. 676, 46 So. 691.

82. *United States v. Coolidge*, 2 Gall. 364, 25 Fed. Cas. No. 14,858; *Com. v. Price*, 3 Pa. Co. Ct. 175, 4 Kulp 289.

[a] **Oath Administered by Unauthorized Person.**—An indictment will be quashed, on motion, when it is shown that the witness before the grand jury, on whose testimony it was found, was sworn by a person who was acting as special solicitor and whose appointment was void. *Joyner v. State*, 78 Ala. 448.

[b] Where the grounds for such a motion are enumerated in the statute and failure to swear the witness is not included it is not ground for quashal. *State v. Easton*, 113 Iowa 516, 85 N. W. 795, 86 Am. St. Rep. 389. See *supra*, XIV, A, 1, c. (II).

83. Ia. Code, 1897, §5319; *State v. O'Malley*, 132 Iowa 696, 109 N. W. 491.

84. *People v. Delhantie*, 163 Cal. 461, 125 Pac. 1066.

85. *State v. O'Malley*, 132 Iowa 696, 109 N. W. 491; *State v. Easton*, 113 Iowa 516, 85 N. W. 795, 86 Am. St. Rep. 389.

86. *State v. O'Malley*, 132 Iowa 696, 109 N. W. 491.

87. *Ariz.*—Penal Code, 1913, §972. *Ark.*—Dig. 1904, §2279. *Cal.*—Penal Code, 1905; *In Matter of Burleigh*,

145 Cal. 35, 78 Pac. 242; *People v. Goldenson*, 76 Cal. 323-345, 19 Pac. 161; *People v. Crowley*, 56 Cal. 36; *People v. Colby*, 54 Cal. 37; *People v. Southwell*, 46 Cal. 141. **Idaho.**—Rev. Codes, §7730. **Ky.**—Crim. Code, 1906, §158. **La.**—*State v. Sibley*, 114 La. 416, 38 So. 403. **Minn.**—Rev. Laws, 1905, §5338. **Mo.**—*State v. Joiner*, 19 Mo. 224. **Mont.**—Rev. Codes, 1907, §9193; *State v. McCaffery*, 16 Mont. 33, 40 Pac. 63. **Nev.**—Rev. Laws, 1912, §7090; *State v. Harris*, 12 Nev. 414. **N. Y.**—Code Crim. Proc., §313; *People v. Borgstrom*, 178 N. Y. 254, 70 N. E. 780; *People v. Shattuck*, 6 Abb. N. C. 33; *People v. Winner*, 80 Hun 130, 30 N. Y. Supp. 54; *People v. Glasser*, 60 Misc. 407, 112 N. Y. Supp. 321. **N. D.**—Rev. Codes, 1905, §9891. **Okla.**—Rev. Laws, 1910, §5780; *Shivers v. Territory*, 13 Okla. 466, 74 Pac. 899; *Hayes v. State*, 3 Okla. Cr. 1, 103 Pac. 1061; *Stanley v. United States*, 1 Okla. 336, 33 Pac. 1025. **Ore.**—Lord's Laws, §1483; *State v. Reinhart*, 26 Ore. 466, 38 Pac. 822. **S. D.**—Code Crim. Proc., 1910, §263. **Utah.**—Comp. Laws, 1907, §4772. **Wash.**—Rem. & Ball. Code Proc., 1910, §2099.

[a] "Not found" as prescribed by statute is not intended to cover objections to evidence received by grand jury. *Robinson v. Ter.*, 16 Okla. 241, 85 Pac. 451.

88. **Finding by Incomplete Grand Jury.**—**Ala.**—*State v. Savage*, 89 Ala. 1, 7 So. 7, 7 L. R. A. 426; *Sparrenberger v. State*, 53 Ala. 481, 25 Am. Rep. 643. **Okla.**—*Robinson v. Ter.*, 16

or where the name of the prosecutor,⁸⁰ or prosecuting witness⁸⁰ was not indorsed on the indictment or information, or where the names of the witnesses examined before the grand jury or whose depositions may have been read before them are not inserted at the foot of the indictment or endorsed thereon,⁸¹ or where the names of all the wit-

Okla. 241, 85 Pac. 451. **Tex.**—Code Crim. Proc., 1906, art. 559.

But see *United States v. Terry*, 39 Fed. 355; *United States v. Reed*, 2 Blatchf. (U. S.) 449.

89. **Ill.**—*Vezain v. People*, 40 Ill. 397. **Mo.**—*State v. Joiner*, 19 Mo. 224. **Utah.**—Comp. Laws, 1907, §4771. **Wash.** Rem. & Ball. Code, Proc., 1910, §2101, ground to quash information only.

[a] **Title or Profession of Prosecutor.**—In *Com. v. Dever*, 10 Leigh (Va.) 685, the court held the statute requiring "the title or profession of the prosecutor to be written at the foot of an information or indictment" to be directory only.

[b] **In Missouri** no indictment shall be quashed for the want of such indorsement if the same shall be made before the motion to quash is disposed of. *Rev. St.*, 1909, §5096.

90. *Picket v. State*, 22 Ohio St. 405.

91. **Ariz.**—Penal Code, 1913, §972; *Thomas v. Ter.*, 11 Ariz. 184, 89 Pac. 591. **Cal.**—Penal Code, §995; *People v. Crowey*, 56 Cal. 36; *People v. Symonds*, 22 Cal. 348; *People v. Freeland*, 6 Cal. 96. **Idaho.**—Rev. Codes, §7730. **Ill.**—*McKinney v. People*, 7 Ill. 540, 43 Am. Dec. 65. **Ia.**—Code, 1897, §5319; *State v. Hasty*, 121 Iowa 507, 96 N. W. 1115; *State v. Beal*, 94 Iowa 39, 62 N. W. 657; *State v. Story*, 76 Iowa 262, 41 N. W. 12. **Ky.**—*Com. v. Brewer*, 113 Ky. 217, 67 S. W. 994. **Minn.**—Rev. Laws, 1905, §5338. **Mo.** *State v. Griffin*, 87 Mo. 608; *State v. Roy*, 83 Mo. 268. **Mont.**—Rev. Codes, 1907, §9193. **Nev.**—Rev. Laws, 1912, §7090. **N. D.**—Rev. Codes, 1905, §9891. **Okla.**—Rev. Laws, 1910, §5780; *Stanley v. United States*, 1 Okla. 336, 33 Pac. 1025. **Ore.**—*Lord's Laws*, §1483; *State v. Andrews*, 35 Ore. 388, 390, 58 Pac. 765. **S. D.**—Code Crim. Proc., 1910, §263; *State v. Stevens*, 1 S. D. 480, 17 N. W. 546. **Utah.**—Comp. Laws, 1907, §4771. **Wash.**—Rem. & Ball. Code Proc., 1910, §§2099, 2101.

Contra, *State v. Johnson*, 33 Ark. 171; *Com. v. Edwards*, 4 Gray (Mass.) 1. See *infra*, XIV, A, 7, c.

[a] Such a statute held to be directory only, and the omission of such indorsement will not vitiate the indictment. **Ky.**—*Doty v. Com.*, 9 Ky. Opin. 539. **Va.**—*Williams' Case*, 5 Gratt. 702. **W. Va.**—*State v. Shores*, 31 W. Va. 491, 7 S. E. 413, 13 Am. St. Rep. 875; *State v. Enoch*, 26 W. Va. 253.

[b] In *State v. Barrington*, 198 Mo. 23, 70, 95 S. W. 235, the court said the correct rules as to the application of this statute may thus be stated: "First—If there are no witnesses indorsed upon the indictment, then, upon motion, it should be quashed, unless the prosecuting attorney offers to supply such omission, then the defendant should have a reasonable time after such omission has been supplied to prepare his defense. Secondly—If the state should indorse some of the witnesses on the back of the indictment and then purposely refrain from indorsing the names of material witnesses on the back of the indictment, with the view of taking an undue advantage of the defendant, then the court would be warranted in promptly quashing the indictment or requiring the prosecuting attorney to supply such omission, and give the defendant a reasonable time in which to meet the testimony of such material witnesses."

[c] **Evidence Should Be Material.** In *State v. Hasty*, 121 Iowa 507, 96 N. W. 1115, the supreme court of Iowa held that this rule relative to setting aside the indictment for omission of the indorsement of the names of the witnesses is applicable only when the testimony of such witnesses is shown to be material. See also *State v. Little*, 42 Iowa 51; *Com. v. Glass*, 107 Ky. 160, 53 S. W. 18.

[d] **Where Omission To Endorse Is a Mere Oversight.**—It is not ground for quashing if the omission to endorse was the result of oversight. *Com. v. Glass*, 107 Ky. 160, 53 S. W. 18.

[e] **Omission to endorse the name of the accused** (1) who had testified before the grand jury not ground for motion to set aside indictment. *People*

nesses for the state are not endorsed thereon,⁹² or the certificate or indorsement of the foreman has been omitted.⁹³

Failure to file information within the statutory period is questioned by a motion to set aside.⁹⁴

Return of Indictment. — Where the indictment has not been properly returned and filed it may be quashed or set aside.⁹⁵

r. Page, 116 Cal. 386, 48 Pac. 326. (2) Nor is the endorsing of the name of the accused, who had voluntarily appeared as witness, ground for a motion to quash. *State v. Rader*, 62 Ore. 37, 124 Pac. 195.

[f] **Omission to indorse name of interpreter** before the grand jury not within the meaning of the rule stated in the text. *People v. Gee Gong*, 15 Cal. App. 28, 114 Pac. 78, 81.

[g] **Omission To Designate Whether Witnesses Had Been Sworn and Examined.**—The failure of the foreman of the grand jury to mark on the back of the bill that the witnesses designated had been sworn and examined is no ground for quashing the indictment, unless it is shown that the witnesses had not been sworn and examined. *State v. Long*, 143 N. C. 670, 57 S. E. 349; *State v. Sultan*, 142 N. C. 569, 54 S. E. 841, *overruling State v. McBroom*, 127 N. C. 528, 37 S. E. 193; *State v. Hollingsworth*, 100 N. C. 535, 6 S. E. 417; *State v. Sheppard*, 97 N. C. 491, 1 S. E. 879; *State v. Hines*, 84 N. C. 811.

92. Mont. Rev. Codes, 1907, §9193.

93. **Ala.**—*Coburn v. State*, 151 Ala. 109, 44 So. 58. **Ind.**—*Denton v. State*, 155 Ind. 307, 58 N. E. 74; *Strange v. State*, 110 Ind. 351, 11 N. E. 357; *State v. Bowman*, 103 Ind. 69, 2 N. E. 249; *Cooper v. State*, 79 Ind. 206; *Johnson v. State*, 23 Ind. 32. **Ia.**—Code, 1897, §5319. **Ky.**—*Com. v. McGuire*, 9 Ky. Opin. 236. **Mo.**—*State v. Murphy*, 47 Mo. 274; *State v. Burgess*, 24 Mo. 381, 49 Am. Dec. 433. **Wash.**—*Rem. & Ball. Code Proc.*, 1910, §2099.

[a] **Signature of Foreman But No Endorsement.** The absence of the endorsement "A true bill" upon the back of an indictment, although the name of the foreman is endorsed thereon may be taken advantage of by motion to quash. *State v. Boutin*, 123 Ind. 124, 23 N. E. 1140.

[b] **Signature Before Endorsement.** But a motion to quash should not be

sustained for the reason that the foreman signed his name above the words "a true bill," and not on a line with the word "foreman." *State v. Bowman*, 103 Ind. 69, 2 N. E. 289.

[c] **Failure of foreman to sign his full name** not ground for quashing. *State v. Henry*, 9 Ohio N. P. (N. S.) 254.

94. *State v. Logani*, 30 Mont. 472, 76 Pac. 1044; *State v. Smith*, 12 Mont. 378, 30 Pac. 679.

95. **Ala.**—*Jackson v. State*, 74 Ala. 26. **Ark.**—*Shinn v. State*, 93 Ark. 290, 124 S. W. 263; *Felker v. State*, 54 Ark. 489, 16 S. W. 663. **Cal.**—In *Matter of Burleigh*, 145 Cal. 35, 78 Pac. 242. **Ind.**—*Hoover v. State*, 110 Ind. 349, 11 N. E. 434; *State v. Dixon*, 97 Ind. 125; *Heacock v. State*, 42 Ind. 393. See *Clark v. State*, 1 Ind. 253. **Ia.**—Code, 1897, §5319; *State v. Glover*, 3 Greene 249. **Ky.**—*Patterson v. Com.*, 86 Ky. 313, 5 S. W. 387. **Mo.**—*State v. Sharpe*, 119 Mo. App. 386, 95 S. W. 298. **Nev.** *State v. Harris*, 12 Nev. 414-419. **N. C.** *State v. Bordeaux*, 93 N. C. 560. **Ohio.** See *Kerr v. State*, 36 Ohio St. 614-623. **Tex.**—*Strong v. State*, 18 Tex. App. 19; *Jinks v. State*, 5 Tex. App. 68. **Vt.** *State v. Butler*, 17 Vt. 145, defect may be raised "by motion." **Wash.**—*Rem. & Ball. Code Proc.*, 1910, §2099, 2101, not marked "filed."

[a] In Texas, the fact that the presentation of the indictment was not entered upon the minutes of the court is not ground for quashal of the indictment. *Johnson v. State*, 60 Tex. Crim. 305, 131 S. W. 1085; *Boren v. State*, 32 Tex. Crim. 637-644, 25 S. W. 775.

[b] Although the code may require that an indictment must be filed with the clerk, it will not be dismissed on motion because the name of the clerk was not endorsed on the back thereof, where the record shows that the indictment was returned into court and was ordered to be filed. *Com. v. Stegala*, 10 Ky. Opin. 428.

h. Defects in Form and in Manner of Charging.—General Rule. A motion to quash may be made where there is a defect apparent upon the face of the record, including defects in the form of the indictment or information or in the manner in which an offense is charged.⁹⁶

Misnomer or Insufficient Description.—A misnomer or insufficient description of the defendant has been successfully attacked by a motion to quash,⁹⁷ though such a defect has generally been taken advantage

[c] It is not good ground for quashing an indictment that it does not affirmatively appear that it was presented to the court by the foreman of the grand jury in the presence of eleven members of the grand jury as required by statute. *Williams v. State*, 150 Ala. 84, 43 So. 182.

96. **Fla.**—*Mills v. State*, 58 Fla. 74, 51 So. 278. **Ill.**—*People v. Krueger*, 237 Ill. 357, 86 N. E. 617, *affirming* 141 Ill. App. 510. See also *Fixmer v. People*, 153 Ill. 123, 38 N. E. 667; *Soby v. People*, 31 Ill. App. 242. **Ind.**—*Woodsmall v. State*, 179 Ind. 697, 102 N. E. 130. **Kan.**—*State v. Ashe*, 44 Kan. 84, 24 Pac. 72; *Rice v. State*, 3 Kan. 135. **La.**—*State v. Crenshaw*, 45 La. Ann. 496, 12 So. 628; *State v. Robacker*, 31 La. Ann. 651. **Mass.**—Rev. Laws, 1902, ch. 219, §21. **Mich.**—*People v. Smith*, 94 Mich. 644, 54 N. W. 487. **Neb.**—Rev. St., 1913, §9084. **N. H.**—*State v. Robinson*, 29 N. H. 274. **Ohio.**—Gen. Code, 1910, §13,621; *Lindsey v. State*, 69 Ohio St. 215, 69 N. E. 126; *Whiting v. State*, 48 Ohio St. 231, 27 N. E. 96; *Kerr v. State*, 36 Ohio St. 614; *Davis v. State*, 32 Ohio St. 24 (information); *Carper v. State*, 27 Ohio St. 572; *Rifle-maker v. State*, 25 Ohio St. 395; *State v. Henry*, 9 Ohio N. P. (N. S.) 254. **Wyo.**—Comp. St., 1910, §6186; *Wilbur v. Territory*, 3 Wyo. 268, 21 Pac. 698.

[a] "The doctrine of the English books is, that by the common law the court may in discretion, quash an indictment for such insufficiency, as will make any judgment whatsoever, given upon any part of it against the defendants, erroneous. Hawk. P. C., bk. 2, c. 25, §146; 1 Chit. Cr. Law; Archb. Cr. Pl., p. 64, §8; Bac. Abr. Indict K; Com. Dig. (Day's Ed.) Indict. H and notes. The American authorities recognize the principle fully." *United States v. O'Sullivan*, 27 Fed. Cas. No. 15,974. See also *State v. Wishon*, 15 Mo. 504; *State v. Robinson*, 29 N. H. 274.

[b] **Charge in Alternative.**—An indictment or presentment for cohabitation of a white person with a negro, charging in the alternative, that "J. R. was a negro, mulatto, or person of mixed blood," is bad and a motion to quash it, should be sustained. *Roberson v. State*, 3 Heisk. (Tenn.) 266.

[c] But a charge that petit larceny was "feloniously" committed does not make the indictment subject to a motion to quash. *State v. Joiner*, 19 Mo. 224.

[d] An objection that a certain fact appears by way of recital, and not by positive averment, goes to the manner of pleading the fact, and not to the fact itself, and therefore should be taken advantage of upon a motion to quash the indictment, before trial. *Townsend v. People*, 4 Ill. 326.

[e] That a count in the indictment did not conclude "against the peace and dignity of the State of Arkansas," is sufficient ground upon which to quash that count. This defect in the count is not cured by the fact that the last count has the proper conclusion. *State v. Cadle*, 19 Ark. 613-622.

[f] **Omission of Residence.**—Although the form of the indictment prescribed in the statute, contains an averment of residence of the defendant, the omission of such averment in an indictment will not be ground for quashing the indictment, where it conforms in all other particulars with the prescribed form, and the offense is plainly described in the language of the statute. *Tarver v. State*, 123 Ga. 494, 51 S. E. 501.

97. *State v. McGregor*, 41 N. H. 407.

[a] An indictment which did not set out the Christian name of the defendant, but only the initials has been held properly subject to a motion to quash. *Gardner v. State*, 4 Ind. 632. *Quaere.*—*State v. Seely*, 30 Ark. 162. And see *Gabe v. State*, 6 Ark. 519.

[b] **Misnomer which may be ex-**

of by a plea in abatement,⁶⁸ which is elsewhere treated in this work.

Impossible Date. — An indictment charging that the defendant committed the offense on an impossible date may be attacked in some jurisdictions by a motion to quash.⁶⁹

No Offense Stated. — In some states the defendant may move to quash the indictment, information or affidavit when the facts stated therein do not constitute a public offense.¹

Uncertainty. — A motion to quash is under some statutes and rules of procedure the proper method of raising the objection that the indictment or information does not state the offense with sufficient certainty.²

plained by doctrine of *idem sonas* is not ground for motion to quash. *O'Donnell v. People*, 224 Ill. 218, 79 N. E. 639.

98. See 1 STANDARD PROC. 33.

99. *Boos v. State*, 181 Ind. 562, 105 N. E. 117 (committed in 19012); *Terrill v. State*, 165 Ind. 443, 75 N. E. 884, 112 Am. St. Rep. 244, 6 Ann. Cas. 551, 2 L. R. A. (N. S.) 251 (charging that the offense was committed in the year 1893); *Murphy v. State*, 166 Ind. 96, 5 N. E. 767, 55 Am. Rep. 722; *State v. Weaver*, 74 S. C. 417, 54 S. E. 615, date of commission of offense laid at day subsequent to finding of bill.

1. Ind.—*Burns' St.*, 1914, §2065; *State v. Barnett*, 159 Ind. 432, 65 N. E. 515; *State v. Wright*, 159 Ind. 394, 65 N. E. 190; *State v. Beach*, 147 Ind. 74, 43 N. E. 949, 16 N. E. 145, 36 L. R. A. 179; *Paragon Paper Co. v. State*, 19 Ind. App. 311, 49 N. E. 660. Kan.—*Gen. St.*, 1909, §6891; *State v. Lewis*, 26 Kan. 123. Ky.—*McKinley v. Com.*, 10 Ky. Opin. 13. Mo.—*State v. Balch*, 178 Mo. 392, 77 S. W. 547; *State v. Jackson*, 89 Mo. 561, 1 S. W. 760. N. H.—*State v. Robinson*, 29 N. H. 274. Ohio.—*Com. v. State*, 3 Ohio C. D. 29; *State v. Pohl*, 12 Ohio Dec. (N. P.) 286. Va.—*Ball v. Com.*, 8 Gratt. 600; *Com. v. Clark*, 6 Gratt. 675.

Contra, *People v. Kahn*, 155 App. Div. 811, 110 N. Y. Supp. 618. See *Opio*, XIV, C.

[c] In *Com. v. Eastman*, 1 Cush. (Mass.) 111, 214, the court said that a motion to quash because the indictment sets forth no sufficient charge of any criminal offense "should not be allowed to prevail in a doubtful case, but only when the insufficiency of the indictment is as palpable as clearly to admit the presiding judge that a ver-

diet thereon would not authorize a judgment against the defendant." Quoted with approval in *People v. Nash*, 1 Idaho 206.

2. Ill.—*Keer v. People*, 42 Ill. 307; *Conolly v. People*, 4 Ill. 474; *Stone v. People*, 3 Ill. 326. Ind.—*Burns' St.*, 1914, §2065; *Sherriek v. State*, 167 Ind. 345, 79 N. E. 193; *Nichols v. State*, 127 Ind. 406, 26 N. E. 839; *Stewart v. State*, 113 Ind. 505, 16 N. E. 186; *Paragon Paper Co. v. State*, 19 Ind. App. 314, 49 N. E. 600; *State v. Williams*, 4 Ind. 234, 58 Am. Dec. 627. See also *State v. Jacks*, 54 Ind. 412. Ky.—*Com. v. Griffon*, 9 Ky. Opin. 240. La.—*State v. Johns*, 32 La. Ann. 812; *State v. Thomas*, 30 La. Ann. 600. Mo.—*State v. McCracken*, 20 Mo. 411. Ohio.—*State v. Messenger*, 63 Ohio St. 398, 59 N. E. 105; *Arnsman v. State*, 11 Ohio C. C. (N. S.) 113, 20-30 Ohio C. D. 445; *Searles v. State*, 6 Ohio C. C. 331, 3 Ohio C. D. 478.

[a] An indictment which fails to give the name of the person injured will be quashed. *State v. Cadle*, 19 Ark. 613.

[b] And in *Shafer v. State*, 74 Ind. 90, it was held that a motion to quash is not the proper method of objecting that in an indictment for larceny the property charged to have been stolen is inaccurately described, where the objection is not applicable to all the property named, the court holding further that "the proper way to have saved the question was to have objected to the admission of any evidence" concerning the property improperly described.

[c] It is not a ground for quashing the indictment that the description of the money taken was included with the description of many pieces of

Duplicity. — The rule in criminal cases is that duplicity in an indictment or information is ground for quashal;³ but it has been held that the motion to quash should not be sustained where the prosecuting attorney has elected to try the defendant on a single charge,⁴ nor when the several counts are merely statements of the same transaction varied to meet the different phases of proof.⁵

money of other kinds, so that it was uncertain what money defendant was charged with taking. *McKevitt v. People*, 208 Ill. 460, 70 N. E. 693.

3. **U. S.**—*Lemon v. United States*, 164 Fed. 953. **Colo.**—*White v. People*, 8 Colo. App. 289, 45 Pac. 539. **Fla.**—*Irvin v. State*, 52 Fla. 51, 41 So. 785. **Ill.**—*Kotter v. People*, 150 Ill. 441, 37 N. E. 932. **Kan.**—*State v. Fisher*, 37 Kan. 404, 15 Pac. 606; *State v. Goodwin*, 33 Kan. 538, 6 Pac. 899. **La.**—*State v. Johns*, 32 La. Ann. 812. **Me.**—*State v. Palmer*, 35 Me. 9. **Md.**—*Curry v. State*, 117 Md. 587, 83 Atl. 1030; *State v. McNally*, 55 Md. 559. **Mo.**—*State v. Blakely*, 184 Mo. 187, 83 S. W. 980; *State v. Klein*, 78 Mo. 627; *State v. Harrison*, 62 Mo. App. 112. **Neb.**—*State v. Freiburghouse*, 94 Neb. 603, 143 N. W. 933; *Smith v. State*, 32 Neb. 105, 48 N. W. 823. **N. C.**—*State v. Wilson*, 121 N. C. 650, 28 S. E. 416; *State v. Simons*, 70 N. C. 336. **Ohio.**—*Jones v. State*, 14 Ohio C. C. 363, 7 Ohio C. D. 305; *Arnsman v. State*, 11 Ohio C. C. (N. S.) 113, 20-30 Ohio C. D. 445; *State v. Granville*, 17 Wkly. L. Bul. 253, 9 Ohio Dec. (Reprint) 798. **Pa.**—*Kilrow v. Com.*, 89 Pa. 480; *Com. v. Koons*, 1 Kulp 134. **Tenn.**—*Seruggs v. State*, 7 Baxt. 38; *State v. Williams*, 10 Humph. 101; *Forrest v. State*, 13 Lea 103. **Tex.**—*Thweatt v. State*, 49 Tex. Crim. 617, 95 S. W. 517. **Va.**—*Lazier v. Com.*, 10 Gratt. 708. **Wis.**—*Cornell v. State*, 104 Wis. 527, 80 N. W. 745. *Contra*, *Moore v. Com.*, 18 Ky. L. Rep. 129, 35 S. W. 283.

[a] "If the indictment contains different counts which are in fact for separate and distinct offenses, and this fact appears on the opening of the cause, or at any time before the jury are sworn for the trial thereof, the court may quash the same, lest it may confound the prisoner in his defense, or prejudice his challenges of the jury; and in such case, if the defect is discovered after the jury is sworn and before the verdict is found, the court may require the prosecutor to make

his election on which charge he will proceed." *State v. Smith*, 24 W. Va. 814; *State v. Shores*, 31 W. Va. 491, 7 S. E. 413, 13 Am. St. Rep. 875.

[b] In Indiana the general rule (1) as stated in the text prevails. *McCullough v. State*, 132 Ind. 427, 31 N. E. 1116; *Joslyn v. State*, 128 Ind. 160, 27 N. E. 492, 25 Am. St. Rep. 425; *Kiley v. State*, 120 Ind. 65, 22 N. E. 99; *Gallaher v. State*, 101 Ind. 411; *State v. Weil*, 89 Ind. 286; *Knopf v. State*, 84 Ind. 316; *Lohman v. State*, 81 Ind. 15; *State v. Smith*, 8 Ind. 485. (2) In *State v. Wickey*, 54 Ind. 438, the court said that this rule did not apply to indictments for misdemeanors and the court in *State v. Cummins*, 78 Ind. 251, which was a misdemeanor case, made the statement that "Duplicity does not afford cause for quashing an affidavit or indictment," and cited the *Wickey* case as authority for the statement. *Shafer v. State*, 26 Ind. 191, also held the rule inapplicable to misdemeanors. (3) But in *Knopf v. State*, 84 Ind. 316, the cases were reviewed and these statements in both the *Wickey* and *Cummins* cases were declared to be mere dicta.

[c] In Ohio.—A motion to quash is not the proper remedy of defendant where the indictment charged separate and distinct offenses. He should make a motion to require the state to elect upon which count it would proceed. *Myers v. State*, 4 Ohio C. C. 570, 2 Ohio C. D. 712.

4. *State v. Spence*, 87 Mo. App. 577.

5. *State v. Burnett*, 142 N. C. 577, 55 S. E. 72; *State v. Morrison*, 85 N. C. 561; *State v. Eason*, 70 N. C. 88.

[a] "If the different counts in an indictment for murder purporting to be for separate and distinct offenses, are inserted in good faith for the purpose of meeting a single charge, the court will neither quash the indictment nor compel the prosecutor to elect upon which count he will proceed to trial." *State v. Smith*, 24 W. Va. 814; *State*

Variance Between Indictment and Complaint.—A motion to quash is not the proper mode of objecting on the ground that the offense charged in the indictment or information differs from that named in the complaint upon which the accused was held to answer.⁶

Variance between the information and the affidavit upon which it is based is ground for quashal.⁷

Misjoinder.—According to some authorities a motion to quash is not the proper method of objecting to a joinder of counts which may embarrass the defendant in his defense;⁸ but the general rule is that a motion to quash on this ground is permissible,⁹ as it is also upon the ground of misjoinder of defendants.¹⁰

Signature and Verification of Information.—An information may be set aside on motion when it is not subscribed by an authorized person, or when it is not verified.¹¹

r. Shores, 31 W. Va. 491, 7 S. E. 413, 13 Am. St. Rep. 875.

[b] Motion to quash is not the proper method of objecting to an indictment charging as separate offenses matters which are alleged by the defendant to constitute but one offense. *United States v. Harman*, 38 Fed. 827; *St. Louis L. M. & S. Ry. Co. v. State*, 99 Ark. 1, 19, 136 S. W. 938; *State v. Whitmore*, 5 Ark. 247; *State v. Michel*, 113 La. 434-436, 35 So. 629.

6. *Whitner v. State*, 46 Neb. 144, 64 N. W. 704.

7. *Frazier v. State*, 11 Ga. App. 261, 75 S. E. 10; *Dyer v. State*, 85 Ind. 525.

8. *United States v. Jones*, 69 Fed. 973 (holding the proper procedure to be to compel an election). See *United States v. Harman*, 38 Fed. 827.

[a] The proper method of objecting is by motion at trial to compel the prosecuting attorney to elect upon which count he will proceed; or to ask the court to give proper instructions to the jury. *People v. General Sessions*, 13 Hun (N. Y.) 395.

9. Ill.—*Kutler v. People*, 150 Ill. 441, 37 N. E. 922, defendant may either move to quash or to compel an election. Mich.—*Hamilton v. People*, 20 Mich. 173. Miss.—*Brantley v. State*, 15 South. & M. 408. Eng.—*King v. Kingston*, 8 East 41.

[a] But a motion to quash is addressed to the discretion of the court and its refusal would not be error. *People v. General Sessions*, 13 Hun (N. Y.) 395.

[b] “Although the joinder of distinct offenses in the same indictment constitutes no legal ground for quashing the indictment, if objection, on that ground, be made before plea, the court, at its discretion, may order the indictment to be quashed, lest it should embarrass the prisoner in his defense or prejudice him in his challenge to the jury.” *Strawhern v. State*, 37 Miss. 422.

10. *State v. Lancaster*, 36 Ark. 55; *State v. Nail*, 19 Ark. 563.

11. **Ariz.**—Penal Code, 1913, §972. **Cal.**—Penal Code, §995; *Ex parte Baker*, 88 Cal. 84, 25 Pac. 966; *People v. Le Roy*, 65 Cal. 613, 4 Pac. 649; *People v. Shem Ah Fook*, 64 Cal. 380, 1 Pac. 347. **Mont.**—Rev. Codes, 1907, §9193. **N. D.**—Rev. Codes, 1905, §9891. **Wash.** Rem. & Ball. Code Proc., 1910, §2101.

See *Porto Rico Code Crim. Proc.*, 1902, §145.

[a] Omission of oath on affidavit upon which the prosecution is based will properly lie where it does not appear that such affidavit was sworn to. *Swiney v. State*, 119 Ind. 478, 21 N. E. 1102.

[b] **Signature Under Erroneous Title.** A motion to quash an information in a criminal case, on the ground that the “prosecuting attorney” signed it as “county attorney,” is properly denied. *State v. McGann*, 8 Idaho 40, 66 Pac. 823.

[c] **Verification before notary instead of judicial officer.** *Davis v. State*, 31 Neb. 247, 47 N. W. 854.

[d] **Verification upon information**

An unauthorized alteration in an indictment is ground for quashal.¹²

i. *Defects in List of Grand Jurors.*—The misspelling of the name of one of the grand jurors in the list served on the defendant will not support a motion to quash.¹³

j. *Another Accusation Pending.*—It has been held that in the absence of statute so declaring it is not a ground for setting aside an indictment or information that there is another accusation pending in the same court against the same defendant for the same offense,¹⁴ but the rule in some jurisdictions is for the court to quash the prior accusation in such a case.¹⁵

k. *Erroneous Mode of Procedure.*—Where an indictment is not a lawful method of proceeding in the case it may be quashed.¹⁶

l. *Defendant Deprived of a Constitutional Right.*—The defendant may move to quash an indictment, by the finding of which he has been deprived of a constitutional right.¹⁷

and belief ground for quashal. *State v. Barr*, 54 Kan. 230, 38 Pac. 289 (warrant quashed); *Muldrow v. State*, 4 Okla. Crim. 324, 111 Pac. 656, information.

[e] *Want of Knowledge in Affiant.* A motion to set aside an information on the ground that the person verifying it did not have positive knowledge of the acts set forth in the information is properly overruled, where the verification is positive and regular. *Munn v. State*, 5 Okla. Crim. 245, 114 Pac. 272.

[f] *Where the signature is by initials* and the body of the verification contains a Christian name the question as to whether the persons are the one and the same may be raised by motion to quash. *Munn v. State*, 5 Okla. Crim. 245, 114 Pac. 272.

[g] *That a complainant swears positively* to a sale of liquor instead of on information and belief presents no ground for quashing a complaint and information. *Eason v. State* (Tex. Crim.), 154 S. W. 1196.

12. *Shurley v. State*, 90 Miss. 415, 43 So. 299.

13. *State v. Black* (N. J. L.), 20 Atl. 255.

14. **U. S.**—*Thompson v. United States*, 202 Fed. 401, 120 C. C. A. 575. **Ark.**—*Hudspeth v. State*, 50 Ark. 534, 9 S. W. 1. **Minn.**—*State v. Gut*, 13 Minn. 315. **N. Y.**—See *People v. Monroe Over & Terminer*, 20 Wood. 108. **S. D.**—*State v. Security Bank*, 2 S. D. 538, 51 N. W. 337. **Tex.**—*Robinson v. State*, 53 Tex. Crim. 567, 110 S. W. 905.

15. **Mo.**—Rev. St., 1909, §5102. **Wyo.** See Comp. St., 1910, §6164. **Eng.** *Withipole's Case*, Cro. Car. 147, 79 Eng. Reprint 731. **Can.**—*The Queen v. Marshall*, 31 N. Bruns. 390.

[a] In *United States v. Maloney*, 26 Fed. Cas. No. 15,713a, the court said: "I find that where a prisoner has been already arraigned and has pleaded, and a second indictment is found for the same offense, the court will adopt some measure to get rid of the first indictment by quashing it or requiring a nolle pros. to be entered before requiring a plea to the second. There is a good reason for this course. If the prisoner should be tried on the indictment secondly found, and acquitted or convicted, and the public prosecutor should then proceed to put him upon his trial upon the indictment first found, the prisoner, having already put in his plea of not guilty, might have some difficulty in availing himself of the former acquittal or conviction as a bar to the further prosecution of the indictment first found." But this rule is not applicable where the prisoner has not been arraigned and has not pleaded to the first indictment.

16. In *United States v. Taylor*, 4 Cranch C. C. 731, 28 Fed. Cas. No. 16,438, an indictment for playing cards at a public place was quashed on the ground that the only mode of recovery of the penalty prescribed by the statute was by a conviction before a justice of the peace.

17. *People ex rel. Hummel v. Davy*, 165 App. Div. 598, 94 N. Y. Supp.

m. *Where Law Repealed or Is Unconstitutional.*—Where the law under which the accused has been indicted is repealed and the repealing statute contains no exception of pending cases,¹⁸ or the statute upon which the accusation was founded is unconstitutional,¹⁹ a motion to quash an indictment founded on such a statute should be sustained.

n. *Where Charge Shows Justification or Bar.*—(I.) *Generally.* Under some statutes a motion to quash will properly lie where the indictment or affidavit contains any matter, which, if true, would constitute a legal justification of the offense charged, or other legal bar to the prosecution.²⁰

(II.) *Bar by Statute of Limitations.*—Under some authorities, an indictment which shows that the statute of limitations has run against the offense charged, is subject to a motion to quash,²¹ though a contrary rule has been held.²²

o. *Defects in the record* are ground for quashal in some states,²³ but not in others.²⁴

1037. See *supra*, XIV, A, 2, i, (V), (VI).

18. *Smith v. State*, 45 Md. 49.

19. *Cohen v. State*, 7 Ga. App. 5, 65 S. E. 1096.

[a] But in *State v. Rich*, 20 Mo. 293, it was held that the constitutionality of a law establishing a new county cannot be inquired into upon a motion to quash an indictment found in a court of such county.

20. *Burns' St. (Ind.)*, 1914, §2065; *Kan. Gen. St.*, 1909, §6804.

21. *Ill.*—*People v. Hallberg*, 259 Ill. 502, 102 N. E. 1005; *Lamkin v. People*, 94 Ill. 501; *Garrison v. People*, 87 Ill. 96. *La.*—*State v. Davis*, 44 La. Ann. 972, 11 So. 580. *Minn.*—*State v. Dlugi*, 123 Minn. 392, 143 N. W. 971. *N. H.*—*State v. Hunkins*, 43 N. H. 557, 82 Am. Dec. 175; *State v. Robinson*, 29 N. H. 274. *Pa.*—*Com. v. Owens*, 3 Kulp 270.

22. The court will not quash an indictment because it appears upon the record that the indictment was not found within two years after the offense committed, for that would deprive the prosecution of the right to reply that the defendant was a person fleeing from justice. The defendant may avail himself of the limitation either by special plea or by evidence upon the general issue. *United States v. White*, 5 Cranch C. C. 38, 28 Fed. Cas. No. 16,075.

23. *Failure of Record To Show That Grand Jury Was Impaneled.*—*Young v. State*, 23 Ohio St. 578.

[a] But in *State v. Thomas*, 61 Ohio St. 444, 56 N. E. 276, 47 L. R. A. 156, the indictment was objected to on the ground that the record failed to show that the grand jury was selected and drawn as required by law and the court said: "Properly speaking, the record of a criminal case, where the offense is an indictable one, except when the accused is bound over to await the action of the grand jury, commences with the return of the indictment. While the preliminary steps in the formation of the grand jury are proper matters of record, they concern the public rather than the accused, if the body that returns the indictment is composed of men possessing the necessary qualifications; and defects in the record of those steps are not those contemplated by section 7249 of the Revised Statutes, for which a motion to quash an indictment may be made."

[b] *Failure To Show Swearing of Grand Jury.*—*Hardy v. State*, 96 Miss. 844, 51 So. 460.

24. A failure of the order book or record to show that the indictment on which defendant was convicted was endorsed "a true bill," cannot be questioned on a motion to quash an indictment. *Hoffman v. State*, 176 Ind. 284, 95 N. E. 1002; *Beard v. State*, 57 Ind. 8.

[a] *Neglect of Clerk Will Not Nullify Act of Grand Jury.*—An indictment will not be quashed because of an omission by the clerk to place on the minutes of the court, an entry showing

3. Motion.—*a. Necessity for.*—When the trial court is of the opinion that it has no jurisdiction of the offense charged,²⁵ or where there has been a misjoinder of counts and a failure or refusal to elect on which count a conviction would be claimed,²⁶ the court may of its own motion quash the indictment. And the failure of the accusation to state an offense may be questioned on appeal though no objection on such ground was made below.²⁷

b. To What Court Addressed.—The motion to quash and strike from the files must be addressed to the court upon whose records or into whose files the paper has been introduced without warrant of law.²⁸

c. Form and Requisites, Written or Oral.—Generally the rule is that a motion to quash or set aside should be in writing,²⁹ subscribed by the defendant or his attorney;³⁰ but it has been held that if the indictment or accusation is so defective that a judgment upon it would be arrested it may be quashed on oral motion.³¹

Particularity Required.—The motion should specially and particularly state the grounds³² upon which the indictment or information should

that the indictment was presented when a quorum of the grand jury was present. *Serrato v. State* (Tex. Crim.), 171 S. W. 1133.

[*b*] **Failure To Certify Foreman's Appointment.**—*State v. Thompson*, Wright (Ohio) 618.

Right To Question Defects Not Apparent on Face of Indictment.—See *supra*, XIV, A, 1, a.

25. *State v. Kirkpatrick*, 32 Ark. 117; *State v. Benthall*, 82 N. C. 664.

26. *Wooster v. State*, 55 Ala. 217.

27. *Minn.*—*State v. Tracy*, 82 Minn. 317, 84 N. W. 1015. *Nev.*—*State v. Trolson*, 21 Nev. 419, 32 Pac. 930. *Ore.*—*State v. Mack*, 20 Ore. 234, 25 Pac. 639.

28. *State v. Savage*, 89 Ala. 1, 7 So. 7, 183, 7 L. R. A. 426; *Sparrenberger v. State*, 53 Ala. 481, 25 Am. Rep. 643.

29. *Ga.*—*Thomasson v. State*, 22 Ga. 499. *Mo.*—*State v. Duncan*, 116 Mo. 288, 22 S. W. 699. *Mont.*—Rev. Codes, 1907, §9194; *State v. Chevigny*, 48 Mont. 382, 138 Pac. 257. *N. D.*—Rev. Codes, 1905, §9892. *Tex.*—Code Crim. Proc., 1906, art. 566. *Utah.*—Comp. Laws, 1907, §473.

[*a*] **And Verified.**—*Reed v. Territory*, 1 Okla. Crim. 481, 98 Pac. 583, 129 Am. St. Rep. 861.

30. *Mont.*—Rev. Codes, 1907, §9194; *State v. Chevigny*, 48 Mont. 382, 138 Pac. 257. *N. D.*—Rev. Codes, 1905, §9892. *Utah.*—Comp. Laws, 1907, §473.

31. *Gilmore v. State*, 118 Ga. 299, 45 S. E. 226, 246.

[*a*] **Omission of Statutory Words.**

The omission of the words "tending to debauch the morals" in an accusation based upon a statute relating to notorious acts of public indecency is not such a defect as can be reached by an oral motion to quash. *Gilmore v. State*, 118 Ga. 299, 45 S. E. 226, 246.

32. *Ark.*—*Warner v. State*, 54 Ark. 660, 17 S. W. 6. *Colo.*—*Mills' St.*, 1912, §2104. *Ill.*—*Thomas v. People*, 113 Ill. 531. *Ind.*—*Gilmore v. State*, 177 Ind. 148, 97 N. E. 422; *Leach v. State*, 177 Ind. 234, 97 N. E. 792. *Mass.*—*Com. v. Langley*, 169 Mass. 89, 47 N. E. 511; *Com. v. Lane*, 157 Mass. 462, 32 N. E. 655; *Com. v. Schaffner*, 146 Mass. 512, 16 N. E. 280; *Com. v. Intoxicating Liquors*, 105 Mass. 176. *Mich.*—*Hamilton v. People*, 29 Mich. 173. *Mo.*—*Rev. St.*, 1909, §5112; *State v. Berry*, 62 Mo. 595; *State v. Murphy*, 47 Mo. 274; *State v. Marshall*, 47 Mo. 378; *State v. Webb*, 37 Mo. 366; *State v. Spence*, 87 Mo. App. 577. *Mont.*—Rev. Codes, 1907, §9194; *State v. Chevigny*, 48 Mont. 382, 138 Pac. 257. *N. Y.*—See *People v. Welz*, 112 N. Y. Supp. 326. *N. D.*—Rev. Codes, 1905, §9892. *Okla.*—*Reed v. Territory*, 1 Okla. Crim. 481, 98 Pac. 583, 129 Am. St. Rep. 861; *Stanley v. United States*, 1 Okla. 330, 33 Pac. 1025. *Pa.*—*Com. v. Murphy*, 12 Pa. Co. Ct. 131. *Tenn.*—*Edgar v. State*, 96 Tenn. 690, 36 S. W. 379; *Robbison v. State*, 3 Heisk. 266. *Utah.*—Comp. Laws, 1907, §4773.

be quashed or set aside, and should be addressed to the defective count only.³³

d. *Time for Motion*.—The court will not hear a motion to quash before the indictment is found,³⁴ nor until the defendant has been taken into custody.³⁵ The particular time at which the motion should be made is not the same in all jurisdictions, being either before arraignment or plea to the merits,³⁶ or at time of arraignment unless for good

[a] If the defendant does no more than "move to quash the indictment herein," without at the same time stating, at least generally, one of the legal grounds for quashing or setting aside the indictment, the action of the court in overruling the motion cannot be successfully questioned. *Scott v. State*, 176 Ind. 382, 96 N. E. 125.

[b] The reason for this general rule is that the prosecuting attorney, being apprised of the particular defect may remedy it by having a new bill found. *State v. Risley*, 72 Mo. 609.

[c] In the absence of a statute requiring the motion to point out the specific grounds of objection, it need not be done. *Dyer v. State*, 85 Ind. 525; *Davis v. State*, 69 Ind. 130.

[d] The following statements have been held insufficient: "that no offense is fully, plainly and formally set up in said indictment;" "that no statute of offense is set forth herein;" and "that all the facts which constitute the offense intended to be punished are not properly alleged and set forth." *Com. v. Murray*, 135 Mass. 530.

[e] A motion to quash "because said indictment is wholly insufficient, in law, to require this defendant to plead thereto" is not sufficient as an objection that the indictment was found by a grand jury not legally assembled. *Englenfield v. People*, 191 Ill. 272, 61 N. E. 93.

[f] "Because there is no offense charged in the indictment," held sufficient. *State v. Belew*, 79 Mo. 581; *State v. Woods*, 77 Mo. 496, overruling *State v. Poston*, 63 Mo. 521; *State v. Barry*, 62 Mo. 335; *State v. Van Houten*, 37 Mo. 357.

[g] A motion to quash on the ground that the information was "not verified and indorsed as required" by a certain section of the statutes is sufficiently distinct. *State v. Brown*, 163 Mo. App. 30, 115 S. W. 1180.

[h] A motion on the ground that

the indictment is "an absurdity on its face" is frivolous and should be disregarded. *State v. Belew*, 79 Mo. 584.

33. *Cal.*—*People v. Danford*, 14 Cal. App. 442, 112 Pac. 474. *Ind.*—*Greer v. State*, 50 Ind. 287, 19 Am. Rep. 709. *Mo.*—*State v. Wishon*, 15 Mo. 504.

34. *People v. Fitzpatrick*, 1 N. Y. Crim. 425, 66 How. Pr. 14, 30 Hun 493.

35. *United States v. Taylor*, 4 Cranch C. C. 731, 28 Fed. Cas. No. 16,438.

36. *U. S.*—*United States v. Gale*, 109 U. S. 65, 3 Sup. Ct. 1, 27 L. ed. 857; *Burchett v. United States*, 194 Fed. 821, 114 C. C. A. 525. See *United States v. Lewis*, 192 Fed. 633. *Ala.*—*Knox v. State*, 167 Ala. 92, 52 So. 526; *Rogers v. State*, 166 Ala. 10, 52 So. 33; *Allen v. State*, 162 Ala. 74, 50 So. 279. *Cal.*—*People v. Turner*, 39 Cal. 370-376; *People v. Stacey*, 34 Cal. 483, 43 N. W. 711. *Ga.*—*Penal Code*, 1911, §980; *Gilmore v. State*, 118 Ga. 209, 45 S. E. 226, 246; *Davis v. State*, 93 Ga. 45, 18 S. E. 993; *Wilder v. State*, 47 Ga. 522; *Hill v. State*, 41 Ga. 484; *Long v. State*, 38 Ga. 491; *Thomasson v. State*, 22 Ga. 499; *Jordan v. State*, 22 Ga. 545. *Idaho.*—*State v. Collins*, 4 Idaho 184, 38 Pac. 38; *State v. Clark*, 4 Idaho 7, 35 Pac. 710; *People v. Butler*, 1 Idaho 231. *Ill.*—*St.*, ch. 38, §9; *People v. Miller*, 264 Ill. 148, 106 N. E. 191, 1915B, Ann. Cas. 1240; *Marsh v. People*, 226 Ill. 464, 80 N. E. 1066; *Winship v. People*, 51 Ill. 296; *Guykowski v. People*, 2 Ill. 476; *Curtis v. People*, 1 Ill. 256. *Ind.*—*West v. State*, 48 Ind. 483. *Ia.*—*Code*, 1897, §5319. *Kan.*—*State v. Pryor*, 53 Kan. 657, 37 Pac. 169. *Ky.*—*Smith v. Com.*, 28 Ky. L. Rep. 1254, 91 S. W. 742. *Minn.*—*State v. Thomas*, 19 Minn. 484. *Miss.*—*Josephine v. State*, 39 Miss. 613; *George v. State*, 39 Miss. 570. *Mo.*—*State v. Sartino*, 216 Mo. 408, 115 S. W. 1015; *State v. Klein*, 78 Mo. 627. *Mont.*—*Rev. Codes*, 1907, §9194; *State v. Chev-*

cause the court allows it to be made subsequently;³⁷ or before the jury is sworn,³⁸ or at the time of the call of the indictment for trial,³⁹ or before any evidence is introduced.⁴⁰

igny, 48 Mont. 382, 138 Pac. 257; State v. Peterson, 24 Mont. 81, 60 Pac. 809; State v. Schnepel, 23 Mont. 523, 59 Pac. 929; State v. Smith, 12 Mont. 378, 30 Pac. 679. Nev.—State v. Collyer, 17 Nev. 275, 30 Pac. 891. N. Y.—People v. Upton, 38 Hun 107; People v. Equitable Gas Light Co., 6 N. Y. Crim. 189, 5 N. Y. Supp. 19. N. D.—Rev. Codes, 1905, §9892; State v. Kelly, 25 N. D. 1, 140 N. W. 714; State v. Pancoast, 5 N. D. 516, 67 N. W. 1052, 35 L. R. A. 518. Okla.—Gourley v. State, 8 Okla. Crim. 598, 129 Pac. 684. Utah.—Comp. Laws, 1907, §4773. Va.—Richards v. Com., 81 Va. 110. Can.—32 Viet., ch. 29; Reg. v. Mason, 22 U. C. P. 246.

See *infra*, XV, A, 1.

[a] **Necessity for Motion on First Day of Term.**—See State v. Taylor, 43 La. Ann. 1131, 10 So. 203; State v. Strickland, 41 La. Ann. 513, 6 So. 471. See also State v. Hinson, 42 La. Ann. 941, 8 So. 471.

[b] **Objection to the verification of an information should be taken advantage of by motion to quash the warrant before a recognizance for appearance is given or other steps taken which would operate as a waiver of the defect.** State v. Barr, 54 Kan. 230, 38 Pac. 289.

[c] **In North Carolina.**—A motion to quash a bill of indictment for the disqualification of a grand juror, if made before plea, will be granted as a matter of right, but if made after plea it may be granted or not, in the sound discretion of the trial judge. State v. DeGraff, 113 N. C. 688, 18 S. E. 507; State v. Gardner, 104 N. C. 739, 10 S. E. 146.

37. Minn.—State v. Schumm, 47 Minn. 373, 50 N. W. 362; State v. Dick, 47 Minn. 375, 50 N. W. 362. N. Y. Code Crim. Proc., §315. N. D.—Rev. Codes, 1905, §9890. Ore.—Lord's Laws, §1484; State v. Walton, 53 Ore. 557, 99 Pac. 431, 101 Pac. 389; State v. Melvain, 35 Ore. 365, 58 Pac. 525; State v. Smith, 33 Ore. 483, 55 Pac. 534; State v. Witt, 33 Ore. 594, 55 Pac. 1053.

[a] But in People v. Phifer, 59 Misc. 339, 22 N. Y. Crim. 363, 112 N. Y. Supp. 285, it is held that the provision of §315 of the Code of Criminal Pro-

cedure, requiring a motion to set aside an indictment to be heard at the time of the arraignment, has reference to a motion made under §313 upon the grounds mentioned in the latter section, and does not apply to a motion to set aside an indictment based upon an alleged violation of defendant's constitutional rights, predicated upon grounds not mentioned in §313.

[b] If accused is given a day to plead or answer, he may enter his motion to set aside on such succeeding day. State v. Pool, 20 Ore. 150, 25 Pac. 375.

38. La.—Rev. Laws, 1904, §1064; State v. Lewis, 133 La. 1095, 63 So.

597; State v. Stelly, 48 La. Ann. 1478, 21 So. 89; State v. Jim, 48 La. Ann. 267, 19 So. 145; State v. Thomas, 30 La. Ann. 600; State v. Durbin, 22 La. Ann. 162; State v. Bondreaux, 14 La. Ann. 88. See State v. Bush, 117 La. 463, 41 So. 793. Mass.—Com. v. Schaffner, 146 Mass. 512, 16 N. E. 280; Com. v. Kennedy, 131 Mass. 584; Com. v. Walton, 11 Allen 238. Mich.—Comp. Laws, 1897, §11920; People v. Schultz, 85 Mich. 114, 48 N. W. 293. N. J. Comp. St., 1910, p. 1834. Pa.—1 Purdon's Dig. (13th ed.), p. 1032; Com. v. Frey, 50 Pa. 245; Com. v. Newcomer, 49 Pa. 478; Com. v. Paxton, 14 Phila. 665. S. C.—Crim. Code, 1902, §57. Vt. St., 1906, §2263. Wash.—State v. Bo-deckar, 11 Wash. 417, 39 Pac. 645.

[a] **In Mississippi** motion must be filed before issuance of venire facias in capital cases, otherwise before jury is sworn. Miss. Code, 1906, §1426; Jefferson v. State, 46 Miss. 270.

[b] **Where Verdict Set Aside.**—If a jury has once been impaneled, it is too late to move to quash the indictment for formal defects apparent on its face, although the motion is made before the impaneling of the jury for a new trial of the case, the former verdict having been set aside. Com. v. Fitchburg R. Co., 126 Mass. 472.

39. Ky. Crim. Code, §137; Moore v. Com., 18 Ky. L. Rep. 129, 35 S. W. 283.

40. See N. J. Comp. St., 1910, p. 1830.

Waiver of defects and objections is treated in a subsequent section.⁴¹

Ignorance of the facts relied on in such motion, is no excuse for delay without a showing that reasonable diligence was exercised to sooner ascertain the facts.⁴²

Formal Defects in Complaint.—Objections to formal defects in a complaint must be taken before judgment by the magistrate to whom the complaint was made.⁴³

Withdrawal of Plea.—Where the defendant is permitted to withdraw his plea he may move to quash or strike out without such motion being subject to the objection that it is made too late.⁴⁴

Discretion of Court.—Notwithstanding the general rule, the court may in its discretion entertain a motion to quash though not filed in time, for the purpose of economizing time and settling questions which might later be raised by motion in arrest.⁴⁵

e. Necessity for Answer.—It is not necessary that the state's counsel make a written answer to a motion to quash the indictment, either admitting or denying the allegations thereof.⁴⁶

41. See *infra*, XV.

42. *Moorer v. State*, 115 Ala. 119, 22 So. 592.

43. *Com. v. Emmons*, 98 Mass. 6; *Com. v. Norton*, 13 Allen (Mass.) 550.

44. *McKevitt v. People*, 208 Ill. 460, 76 N. E. 693; *Nicholls v. State*, 5 N. J. L. 621.

[a] Where a motion to quash was not filed till after the defendant had entered a plea of not guilty and no objection appears to have been made, the motion will be regarded as having been properly filed by leave of court. *Com. v. Bailey*, 199 Mass. 583, 85 N. E. 857.

[b] It is within the discretion of the court to permit the defendant to withdraw his plea for the purpose of allowing him to introduce a motion to quash. *State v. Arbes*, 70 Minn. 462, 73 N. W. 403; *Territory v. Barrett*, 8 N. M. 70, 42 Pac. 66. See *People v. Strong*, 1 Abb. Pr. N. S. (N. Y.) 244; *State v. Denker*, 10 Wkly. L. J. 328, 1 Ohio Dec. (Reprint) 527.

[c] **Filing Motion Does Not Withdraw Plea.**—See *State v. Reeves*, 97 Mo. 688, 10 S. W. 841, 10 Am. St. Rep. 349, holding that a motion to quash the indictment, though filed with the consent of the court, and after a plea of not guilty entered, did not have the effect of withdrawing that plea. See also *State v. Gleske*, 269 Mo. 331, 108 S. W. 525.

45. *People v. Judson*, 11 Daly (N. Y.) 1. See also *State v. Williams*, 5 Md. 82.

[a] The time when a court will entertain a motion to quash an indictment rests in some degree in the exercise of a sound discretion, but it appears to be conceded in the books that it must be made before the case is submitted to the jury; ordinarily it must be made before plea pleaded, or any evidence given in the case. *People v. Monroe Oyer & Terminer*, 20 Wend. (N. Y.) 108.

[b] Where a motion is sought to be filed under such circumstances it should not be granted except upon clear and plain grounds. *State v. Rester*, 116 La. 985, 41 So. 231.

[c] A motion to quash after plea of not guilty is allowable only in the discretion of the court. *State v. Burnett*, 142 N. C. 577, 55 S. E. 72; *State v. DeGraff*, 113 N. C. 688, 18 S. E. 507; *State v. Gardner*, 104 N. C. 739, 10 S. E. 146; *State v. Jones*, 88 N. C. 671.

[d] If the indictment or accusation is so defective that a judgment upon it would be arrested, attention may be called to it at any time during the trial. *Gilmore v. State*, 118 Ga. 299, 45 S. E. 226, 246; *State v. Miller*, 100 N. C. 543, 5 S. E. 925.

[e] Where the objection goes to the merits of the prosecution the motion to set aside may be made at any time before or after judgment. *People v. Williams*, 1 Idaho 85.

46. *State v. Joseph*, 45 La. Ann. 903, 12 So. 934.

f. *Hearing and Determination.*—(I.) *Time for.*—The motion is heard at the time it is made, unless for cause the court postpones the hearing to another time,⁴⁷ and it should be disposed of before requiring the defendant to plead to the merits.⁴⁸

(II.) *Presence of Defendant.*—The presence of the defendant is unnecessary in court during argument upon a motion to quash.⁴⁹

(III.) *Appointment of Stenographer.*—The refusal of the court to appoint a stenographic reporter to take down the evidence, objections and rulings at the hearing of a motion to set aside an information is not prejudicial to the defendant.⁵⁰

(IV.) *Evidence.*—Motions to set aside indictments or informations must be based upon some facts appearing from the record or otherwise produced before the court,⁵¹ or an offer to prove the facts alleged in

47. *Ariz.*—Penal Code, §974. *Cal.*—Penal Code, 997. *Idaho.*—Rev. Codes, §7732. *Iowa.*—Code, 1897, §5322. *Minn.*—Rev. Laws, 1905, §5338, "at the time of the arraignment." *Mont.*—Rev. Codes, 1907, §9195. *Nev.*—Rev. Laws, 1912, §7092. *N. D.*—Rev. Codes, 1905, §9893. *Okla.*—Rev. Laws, 1910, §5784. *Ore.*—Lord's Laws, §1484. *Porto Rico.*—Code Crim. Proc., 1902, §147. *S. D.*—Code Crim. Proc., 1910, §265. *Utah.*—Comp. Laws, 1907, §4774.

[a] *Error to refuse to fix time for hearing of motion.* *Mahaffey v. Territory*, 11 *Okla.* 213, 66 *Pac.* 342.

48. *Allen v. State*, 162 *Ala.* 74, 50 *So.* 279; *Crawford v. State*, 112 *Ala.* 1, 21 *So.* 214.

[a] A motion to quash an indictment is directed against defects on the face of the indictment, and the court should not deal with it as a plea of prescription and postpone consideration of it until after a hearing of the case on its merits. *State v. Conega*, 121 *La.* 522, 46 *So.* 614.

49. *People v. Vail*, 57 *How. Pr.* (N. Y.) 81.

50. *People v. Nunley*, 142 *Cal.* 441, 76 *Pac.* 45.

51. *U. S.*—*Martin v. Texas*, 200 *U. S.* 316, 26 *Sup. Ct.* 338, 50 *L. ed.* 497; *Brownfield v. South Carolina*, 189 *U. S.* 426, 23 *Sup. Ct.* 513, 47 *L. ed.* 882; *Tarrance v. Florida*, 188 *U. S.* 519, 23 *Sup. Ct.* 402, 47 *L. ed.* 572; *Carter v. Texas*, 177 *U. S.* 442, 20 *Sup. Ct.* 687, 44 *L. ed.* 829; *Williams v. Mississippi*, 170 *U. S.* 213, 18 *Sup. Ct.* 583, 42 *L. ed.* 1012; *Smith v. Mississippi*, 162 *U. S.* 592, 16 *Sup. Ct.* 900, 40 *L. ed.* 1082. *Ariz.*—*Parker v. Territory*, 5 *Ariz.* 283,

290, 52 *Pac.* 361. *Cal.*—*People v. Tre-schenko*, 159 *Cal.* 456, 114 *Pac.* 578; *People v. Travers*, 88 *Cal.* 233, 26 *Pac.* 88; *People v. Smith*, 79 *Cal.* 554, 21 *Pac.* 952. *Ga.*—*O'Shields v. State*, 92 *Ga.* 472, 17 *S. E.* 845. *Idaho.*—*State v. Hardy*, 4 *Idaho* 478, 42 *Pac.* 507. *Ill.*—*Stone v. People*, 3 *Ill.* 326. *Ia.*—*State v. Felter*, 25 *Iowa* 67. *La.*—*State v. West*, 116 *La.* 626, 40 *So.* 920; *State v. Brittin*, 50 *La. Ann.* 261, 23 *So.* 301. *Me.*—*State v. Nutting*, 39 *Me.* 359. *Mich.*—*Washburn v. People*, 10 *Mich.* 371. *Miss.*—*Husbands v. State*, 105 *Miss.* 548, 62 *So.* 418. *Mo.*—*State v. Keener*, 225 *Mo.* 488, 125 *S. W.* 747. *Mont.*—*State v. Mansfield*, 19 *Mont.* 483, 48 *Pac.* 898. *N. Y.*—*People v. Petrea*, 30 *Hun* 98, 64 *How. Pr.* 139, 1 *N. Y. Crim.* 198. *Tex.*—*Crescencio v. State* (Tex. Crim.), 165 *S. W.* 936.

[a] *Allegations in a motion to quash which set up facts de hors the record do not prove themselves*, and if the pleader desires the court to consider those questions he should offer proof of those allegations. In the absence of such proof they are not before the court for consideration. *State v. Ramsauer*, 140 *Mo. App.* 401, 124 *S. W.* 67.

[b] Where a motion to quash an indictment was made upon the ground that the indictment had been materially changed by alterations and interlineations, but the defendant refused to introduce any evidence or witnesses in support of his motion, the court properly overruled the motion. *Rahn v. State*, 30 *Tex. App.* 310, 17 *S. W.* 416.

the motions,⁵² for where there is no showing to the contrary it will be presumed that the statutory conditions precedent to the filing of an information have been complied with,⁵³ and that the charge was based upon legal and sufficient evidence.⁵⁴

Where the defendant offers to introduce testimony in support of his motion the court should not overrule the motion without hearing the evidence.⁵⁵ Proof may be made by means of affidavits,⁵⁶ but the affidavit of the accused on information and belief is not sufficient.⁵⁷ Additional time to procure evidence will not be granted except upon a proper showing.⁵⁸

Averments Taken as True. — For the purposes of the motion the court must take the facts as stated in the indictment to be true,⁵⁹ but since an indictment or information must allege every fact essential to the existence of the offense charged, no presumptions are indulged in their support when challenged by motion to quash.⁶⁰

[c] **Allegations of uncontroverted verified motion** stand as admitted. *McGinley v. Territory*, 1 Okla. Crim. 24, 94 Pac. 525, 20 Okla. 218, 94 Pac. 525.

[4] In Oklahoma special provision is made for proof of grounds for setting aside. See Rev. Laws, 1910, §§5781, 5782; *Hodge v. Territory*, 12 Okla. 108, 69 Pac. 1077; *Keith v. Territory*, 8 Okla. 307, 57 Pac. 834; *Royce v. Territory*, 5 Okla. 61, 47 Pac. 1083; *Hayes v. State*, 3 Okla. Crim. 1, 103 Pac. 1061. See also *Reed v. Territory*, 1 Okla. Crim. 481, 98 Pac. 583, 129 Am. St. Rep. 891.

52. *Franklin v. State*, 85 Ark. 534, 109 S. W. 298; *O'Shields v. State*, 92 Ga. 172, 17 S. E. 845.

53. *White v. People*, 8 Colo. App. 229, 45 Pac. 539; *People v. Glasser*, 60 Misc. 497, 112 N. Y. Supp. 321.

[a] On a motion by the defendant to set aside an information on the ground that the defendant has not been legally committed, it is certainly incumbent upon the moving party to establish his contention. The presumption is that judicial authority has been regularly and legally exercised until the contrary is shown. *People v. Beach*, 122 Cal. 37, 94 Pac. 389.

54. *People v. Olm*, 173 N. Y. 395, 66 N. E. 112.

55. *Franklin v. State*, 85 Ark. 534, 109 S. W. 298; *Swanberry v. State*, 69 Ark. 216, 63 S. W. 679, 86 Am. St. Rep. 107.

56. *United States v. Coolidge*, 2

Gall. 364, 25 Fed. Cas. No. 14,858. See *Neal v. Delaware*, 103 U. S. 370, 20 L. ed. 567; *Parker v. Territory*, 5 Ariz. 283, 52 Pac. 361.

[a] Where the moving affidavits are vague and unsatisfactory, and the court's attention is directed to no illegal evidence that was presented to the grand jury, and the general charge that the evidence was insufficient is supported by no direct or definite statements, a denial of the motion is proper. *People v. Sexton*, 187 N. Y. 495, 80 N. E. 396, 116 Am. St. Rep. 621.

57. *Tarrance v. Florida*, 188 U. S. 519, 23 Sup. Ct. 402, 47 L. ed. 572; *Smith v. State* (Miss.), 18 So. 116. See also *People v. Sebring*, 14 Misc. 31, 9 N. Y. Crim. 545, 35 N. Y. Supp. 237, 69 N. Y. St. 612.

[a] Unless admitted as evidence with the consent of the prosecuting attorney or by order of the trial court. *Smith v. Mississippi*, 162 U. S. 592, 16 Sup. Ct. 900, 40 L. ed. 1082.

58. *Franklin v. State*, 85 Ark. 534, 109 S. W. 298.

59. *People v. Williams*, 1 Idaho 85; *People v. Clews*, 57 How. Pr. (N. Y.) 245, contrary affidavits cannot be received.

60. *People v. Tait*, 261 Ill. 197, 103 N. E. 750.

[a] But where objection is first made on appeal the indictment will be construed more liberally than where objection is made before trial. *State v. Kruger*, 34 Nev. 302, 122 Pac. 483.

Proof That Indictment Found Without Legal Evidence.—Proof of the fact that the indictment was found by the grand jury without any evidence may according to some decisions be made by the testimony of the prosecuting attorney,⁶¹ but it seems that it cannot be made by a member of the grand jury,⁶² though there is authority to the contrary.⁶³

Indictments Not Concurred in by Requisite Number.—The return of an indictment endorsed a true bill by the grand jury gives rise to a presumption that the requisite number of jurors concurred in the finding.⁶⁴

According to the weight of authority it is not permissible to show by the testimony of some of the grand jurors that twelve of the grand jury did not concur in the finding.⁶⁵ But where it is a ground for motion to quash, the fact that the requisite number of jurors did not concur in the finding may be shown by other witnesses,⁶⁶ and in some states the grand jurors themselves are competent to prove this fact.⁶⁷

61. *State v. Cole*, 145 Mo. 672, 47 S. W. 895; *State v. Grady*, 84 Mo. 220. But see *State v. Britton*, 131 La. 877, 60 So. 379.

62. **U. S.**—*United States v. Farrington*, 5 Fed. 343. **Conn.**—*State v. Fasset*, 16 Conn. 457. **La.**—*State v. Britton*, 131 La. 877, 60 So. 379. **Mo.**—*State v. Cole*, 145 Mo. 672, 47 S. W. 895. *Quære.*—*State v. Grady*, 84 Mo. 220, 224; *State v. Baker*, 20 Mo. 338. **Nev.**—*State v. Logan*, 1 Nev. 515. **Pa.** *Com. v. Twitchell*, 1 Brewst. 551, 557. **W. Va.**—*Noll v. Dailey*, 72 W. Va. 520, 79 S. E. 668, 47 L. R. A. (N. S.) 1207.

See 2 Bishop's New Crim. Proc., §874.

[a] Testimony concerning the grand jury, as to whether witnesses appeared before it to testify, must come from others than the members of the jury, the district attorney, and the officers of the court. *State v. Britton*, 131 La. 877, 60 So. 379.

63. Thus, where a motion to quash an indictment for seduction is made on the ground that there was no corroborative evidence before the grand jury as required to warrant an indictment, and issue is joined on the motion, the defendant is entitled to show by the grand jurors that there was no such evidence. *Allen v. State*, 162 Ala. 74, 50 So. 279.

64. **U. S.**—*Ex parte Harlan*, 180 Fed. 119, 130; *United States v. Wilson*, 6 McLean 604, 28 Fed. Cas. No. 16,737, twelve. **Ark.**—*Cook v. State*, 166 S. W. 223; *St. Louis, I. M. & S. R. Co. v. State*, 99 Ark. 1, 136 S. W. 938. **Fla.**—*English v. State*, 31 Fla. 356, 12 So.

689, twelve. **Ind.**—*Creek v. State*, 24 Ind. 151. **Okla.**—*Eubanks v. State*, 5 Okla. Crim. 325, 114 Pac. 748; *Hopkins v. State*, 4 Okla. Crim. 194, 108 Pac. 420.

[a] **Controverting presumption by plea in abatement** is not permissible. *Creek v. State*, 24 Ind. 151. See also *People v. Hulbut*, 4 Denio (N. Y.) 133.

65. **Ala.**—*Spigener v. State*, 62 Ala. 383. **Ark.**—*Patterson v. State*, 166 S. W. 225 (evidence of foreman that jury voted to indict just as the law directed inadmissible); *Nash v. State*, 73 Ark. 399, 84 S. W. 497. **Conn.**—*State v. Hamlin*, 47 Conn. 114. **Ill.**—*Gitchell v. People*, 146 Ill. 175, 33 N. E. 757. **Ia.**—*State v. Mewherter*, 46 Iowa 88; *State v. Gibbs*, 39 Iowa 318. **Mo.**—*State v. Baker*, 20 Mo. 338. **Tex.**—*State v. Oxford*, 30 Tex. 428.

[a] **This rule applies to all persons authorized to be present in the grand jury room.** *Gitchell v. People*, 146 Ill. 175, 187, 33 N. E. 757.

[b] **To testify that the jurors did not vote at all** is not permissible within the rule. *State v. Baker*, 20 Mo. 338.

66. *State v. Oxford*, 30 Tex. 428. But see *Spigener v. State*, 62 Ala. 383, holding it is not permissible to show by a grand juror or any other person how any grand juror voted. And see *Gitchell v. People*, 146 Ill. 175, 187, 33 N. E. 757.

67. *Low's Case*, 4 Mo. 429. See *State v. Symonds*, 36 Mo. 128; *People v. Shattuck*, 6 Abb. N. C. (N. Y.) 33; *People v. Hulbut*, 4 Denio (N. Y.) 133.

Failure To Indorse Complete List of Witnesses.—On a motion to set aside an indictment because of the omission of the names of witnesses, the materiality of the testimony of the omitted witnesses must be shown.⁶⁸

(V.) Determination and Effect.—Discretion of Court.—Ordinarily a motion to quash the indictment or information⁶⁹ is addressed to the

[a] Although a grand juror is not permitted to testify how many members of the jury voted, or the opinion expressed by any of them upon any question before them, he may be required by the court to testify in support of a motion to set aside the indictment, whether or not a vote or ballot was taken showing the concurrence of the necessary number of grand jurors to find a true bill. *Eubanks v. State*, 5 Okla. Crim. 325, 114 Pac. 748.

68. *State v. Hasty*, 121 Iowa 507, 96 N. W. 1115; *State v. Little*, 42 Iowa 51.

[a] **How Omissions Shown.**—The names of the witnesses testifying before the grand jury are not secrets forbidden to be disclosed and on the hearing of the motion upon the ground that the names of all the witnesses before the grand jury are not inserted at the foot of the indictment, the members of the grand jury may be examined and compelled to disclose the names of the witnesses. *Ex parte Schmidt*, 71 Cal. 212, 12 Pac. 55.

69. **U. S.**—*Durland v. United States*, 161 U. S. 306, 16 Sup. Ct. 508, 40 L. ed. 709; *Logan v. United States*, 144 U. S. 263, 12 Sup. Ct. 617, 36 L. ed. 429; *United States v. Hamilton*, 109 U. S. 63, 3 Sup. Ct. 9, 27 L. ed. 857; *United States v. Rosenberg*, 7 Wall. 580, 19 L. ed. 203; *United States v. Gooding*, 12 Wheat. 460, 6 L. ed. 693; *United States v. Herbert*, 5 Cranch (C. C.) 87, 33, 26 Fed. Cas. No. 15,354. **Ala.**—*Daniel v. State*, 149 Ala. 44, 43 So. 22; *White v. State*, 74 Ala. 31; *Moore v. State*, 1 Ala. App. 198, 56 So. 85. **Ark.**—*State v. Lancaster*, 36 Ark. 53; *State v. Nail*, 19 Ark. 563; *State v. Mathis*, 3 Ark. 81. **La.**—*State v. Michel*, 111 La. 121, 35 So. 629. **Me.**—*State v. Harley*, 34 Me. 562; *State v. Mahan*, 40 Me. 309; *State v. Putnam*, 28 Me. 332; *State v. Thuermer*, 28 Me. 308; *State v. Burke*, 38 Me. 574; *State v. Haines*, 30 Me. 65; *State v. Barnes*, 29 Me. 301. **Mass.**—*Com. v. Ryan*, 9 Gray 137. **Mich.**—*Hamilton v. People*,

29 Mich. 173. **Miss.**—*George v. State*, 39 Miss. 570, 2 Mor. St. Cas. 1404. **Mo.**—*State v. Keener*, 225 Mo. 488, 125 S. W. 747; *State v. Patterson*, 159 Mo. 98, 59 S. W. 1104; *State v. Wishon*, 15 Mo. 504; *State v. Rector*, 11 Mo. 28. **N. H.**—*State v. Robinson*, 29 N. H. 274. **N. J.**—*State v. Potter*, 83 N. J. L. 428, 85 Atl. 216; *State v. Hoffman*, 71 N. J. L. 285, 58 Atl. 1012; *Proctor v. State*, 55 N. J. L. 472, 26 Atl. 804; *State v. Black* (N. J. L.), 20 Atl. 255; *State v. Beard*, 25 N. J. L. 384; *State v. Hageman*, 13 N. J. L. 314. **N. Y.** *People v. Davis*, 56 N. Y. 95; *People v. Monroe*, 20 Wend. 108, 110; *People v. Eckford*, 7 Cow. 535; *People v. Herbert*, 152 App. Div. 579, 137 N. Y. Supp. 409; *People v. General Sessions*, 13 Hun 395; *People v. Foody*, 39 Misc. 142, 79 N. Y. Supp. 240, 113 N. Y. St. 240; *People v. Spolascio*, 33 Misc. 530, 15 N. Y. Crim. 293, 68 N. Y. Supp. 924, 102 N. Y. St. 924. **N. C.**—*State v. Baldwin*, 18 N. C. 195. **Ohio.**—*Ex parte Bushnell*, 8 Ohio St. 599; *State v. Shumann*, 8 Ohio Dec. (Reprint) 373, 8 Wkly. L. Bul. 240; *State v. Carson*, 2 Ohio Dec. (Reprint) 81, 1 Wkly. L. M. 335. **Pa.**—*Withers v. Com.*, 5 Serg. & R. 59, 61; *Republica v. Cleaver*, 4 Yeates 69. **R. I.**—*State v. McCarty*, 4 R. I. 82. **S. C.**—*State v. Smith*, 89 S. C. 158, 71 S. E. 830; *State v. Shirer*, 20 S. C. 392. **Tex.**—*Click v. State*, 3 Tex. 282. **Vt.**—*State v. Louanis*, 79 Vt. 463, 65 Atl. 532; *State v. Stewart*, 59 Vt. 273, 9 Atl. 559, 59 Am. Rep. 710. **Va.**—*Bell v. Com.*, 8 Gratt. 600. **Eng.**—*Swan & Jeffries, Foster Crown Law* 101. **Can.**—*Abrahams v. Queen*, 6 Can. Super. 10; *Queen v. Marshall*, 31 N. Bruns. 390.

[a] **Discretion Not Arbitrary.**—In *State v. McNally*, 55 Md. 559, it was said that "its discretion is to be governed by rules, and where it acts in violation of those rules, its judgment may be reviewed and reversed." See also *Com. v. McGovern*, 10 Allen (Mass.) 193.

discretion of the court, and hence a refusal to quash it is not generally assignable as error.⁷⁰

A motion to quash should not be sustained except in the clearest cases and unless the indictment or information is bad beyond a reasonable doubt,⁷¹ but if the indictment or information is so palpably defective that no judgment could be rendered on it after conviction it is the duty of the court to sustain the motion.⁷²

If the motion is granted, the court must order that the defendant, if in custody, be discharged; or, if admitted to bail, that his bail be exonerated; or if he has deposited money instead of bail, that the same be refunded to him; unless it directs that the case be resubmitted to the same or another grand jury, or that an information be filed by the prosecuting attorney.⁷³

[b] Where an information is bad as charging two offenses in one count it is discretionary with the circuit court to quash it instead of compelling the prosecuting attorney to elect upon which of the offenses the trial should proceed. *Chase v. Van Buren* Circuit Judge, 148 Mich. 149, 111 N. W. 750, 14 Det. Leg. N. 73.

70. See *infra*, XIV, A, 3, j.

71. U. S.—*United States v. Rosenberg*, 7 Wall. 580, 19 L. ed. 263; *United States v. Dustin*, 2 Bond 332, 25 Fed. Cas. No. 15,011. Mass.—*Com. v. Eastman*, 1 Cosh. 189, 48 Am. Dec. 596. Mo.—*See State v. Rector*, 11 Mo. 28. N. J.—*State v. Sweeten*, 83 N. J. L. 364, 85 Atl. 309; *State v. Johnson*, 82 N. J. L. 330, 81 Atl. 657; *State v. Ham*, 65 N. J. L. 464, 47 Atl. 508; *Proctor v. State*, 55 N. J. L. 472, 26 Atl. 804. N. C.—*State v. Cline*, 146 N. C. 640, 61 S. E. 522; *State v. Flowers*, 109 N. C. 841, 13 S. E. 718; *State v. Skidmore*, 109 N. C. 795, 14 S. E. 63. Ohio.—*Ex parte Bushnell*, 8 Ohio St. 599. Pa.—*Com. v. Keenan*, 67 Pa. 203; *Republica v. Cleaver*, 4 Yeates 69. R. I.—*State v. McCarty*, 4 R. I. 82. S. C.—*State v. Howard*, 15 Rich. L. 274. Tex.—*Click v. State*, 3 Tex. 282. Va.—*Bell v. Com.*, 8 Gratt. 600.

See 1 Chitty Am. Law 246.

[a] Reason for the Rule.—“This rule has been adopted in view of the fact that nearly all questions involving the sufficiency of the indictment may be available to the defendant, if a conviction follows, on a motion in arrest of judgment.” *United States v. Dustin*, 2 Bond 332, 25 Fed. Cas. No. 15,011.

[b] In *State v. Skidmore*, 109 N. C.

795, 14 S. E. 63, the court says that the courts do not favor quashing indictments, and that indictments for treason, felony and the higher misdemeanors will not be quashed except where it appears that the court has not jurisdiction, or the matter charged is not indictable in any form. The reason is that to quash in such cases would release recognizances and cause delays, and that it would be trifling with public justice to quash for verbal defects in grave cases in which the public have an interest, when the irregularity or deficiency could be cured in a few moments and without postponing the trial to another term, by sending the witnesses before the grand jury with a more accurately drawn bill. See also *State v. Flowers*, 109 N. C. 841, 13 S. E. 718; *State v. Knight*, 84 N. C. 789; *State v. Colbert*, 75 N. C. 368; *Click v. State*, 3 Tex. 282; 1 Chitty Crim. Law 300.

[c] If the alleged grounds are insufficient to support a motion, it should be overruled. *Reed v. Territory*, 1 Okla. Crim. 481, 98 Pac. 583, 129 Am. St. Rep. 861.

72. *State v. Beard*, 25 N. J. L. 384; *People v. Eckford*, 7 Cow. (N. Y.) 535.

[a] In *The King v. Wheatley*, 1 W. Bl. (Eng.) 273, Lord Mansfield said that “the indictment must be very grossly bad to have the court quash it at once.” *Quoted in United States v. Wardell*, 49 Fed. 914.

73. Ariz.—*Penal Code*, §974. Cal.—*Penal Code*, §997. Idaho.—*Rev. Codes*, §7782. Ia.—*Code*, 1897, §5324. Ky.—*Crim. Code*, 1906, §§159, 160. Minn.—*Rev. Laws*, 1905, §5338. Mont.—*Rev. Codes*, 1907, §9195. Nev.—*Rev. Laws*,

Some statutes merely provide that when a motion to quash is adjudged in favor of the accused he may be committed or held to bail in such sum as the court requires for his appearance at the first day of the next term of such court.⁷⁴

One Good Count.—A general motion to quash an indictment containing several counts should be overruled if any one of the counts is good,⁷⁵ or if an offense is sufficiently alleged, though not the one intended to be charged;⁷⁶ but a motion to quash the bad count⁷⁷

1912, §7092. **N. D.**—Rev. Codes, 1905, §9895. **Okl.**—Rev. Laws, 1910, §5786. **Ore.**—Lord's Laws, §1485. **Porto Rico.** Code Crim. Proc., 1902, §117. **S. D.** Code Crim. Proc., 1910, §267. **Utah.** Comp. Laws, 1907, §474. **Wash.**—Rem. & Ball. Code Proc., 1910, §2103.

See *supra*, VI; and State *v.* Scott, 99 Iowa 36, 68 N. W. 451; People *v.* Vaughan, 19 Misc. 298, 42 N. Y. Supp. 959, 76 N. Y. St. 959.

[a] In case of a misdemeanor, the Texas statute provides that the defendant must be discharged from custody, but he may be again prosecuted within the time allowed by law. Turner *v.* State, 21 Tex. App. 198, 18 S. W. 96.

[b] Upon the quashing of an information there is no case pending against the defendant until the filing of a new information. People *v.* Thompson, 84 Cal. 598, 24 Pac. 384. See Mentor *v.* People, 30 Mich. 91.

[c] Effect on Recognizance.—A recognizance to appear in court from day to day to answer to a certain indictment and not to depart without leave of court is not discharged by the quashing of the indictment. United States *v.* White, 5 Cranch C. C. 368, 28 Fed. Cas. No. 16,678.

74. **Neb.**—Rev. St., 1913, §9087. **N. C.**—State *v.* Griffice, 74 N. C. 316. **Ohio.**—Gen. Code, 1910, §13,624. See State *v.* Messenger, 63 Ohio St. 398, 50 N. E. 195; Winnett *v.* State, 18 Ohio C. C. 515, 10 Ohio C. D. 259. **Wyo.**—Comp. St., 1910, §6189.

75. **Ala.**—State *v.* Coleman, 5 Port. 22, 40. **Ark.**—State *v.* Mathis, 3 Ark. 84. **Ill.**—People *v.* Jones, 242 Ill. 138, 89 N. E. 711; Thomas *v.* People, 113 Ill. 531; Chicago W. & V. Coal Co. *v.* People, 144 Ill. App. 75. **Ind.**—Bryant *v.* State, 195 Ind. 549, 7 N. E. 217; Dantz *v.* State, 87 Ind. 398; Good *v.* State, 61 Ind. 60; Jamell *v.* State, 58 Ind. 293; Gray *v.* State, 50 Ind. 267; McGhee *v.* State, 59 Ind. 284; Dukes

v. State, 11 Ind. 557, 71 Am. Dec. 370; State *v.* Staker, 3 Ind. 570. **La.**—State *v.* Laque, 37 La. Ann. 853. **Md.**—Watts *v.* State, 99 Md. 30, 57 Atl. 542. **Mass.** Com. *v.* Snell, 189 Mass. 12, 75 N. E. 75, 3 L. R. A. (N. S.) 1019; Com. *v.* Lapham, 156 Mass. 480, 31 N. E. 638; Com. *v.* Pratt, 137 Mass. 98; Com. *v.* Hawkins, 3 Gray 463. **Mo.**—State *v.* Woodward, 21 Mo. 265; State *v.* Wishon, 15 Mo. 504; State *v.* Reector, 11 Mo. 28. **N. J.**—State *v.* Startup, 39 N. J. L. 423; State *v.* Hickman, 8 N. J. L. 299. **N. C.**—State *v.* Mangum, 116 N. C. 998, 21 S. E. 189. **Tex.** State *v.* Rutherford, 13 Tex. 24; King *v.* State, 10 Tex. 281. **W. Va.**—State *v.* Cartright, 20 W. Va. 32.

76. Where an assault and battery (1) is sufficiently charged, a motion directed to the whole indictment should not be sustained although the indictment is based on an attempted rape (Zoborosky *v.* State, 180 Ind. 187, 102 N. E. 824), (2) or on assault with intent to murder. Stucker *v.* State, 171 Ind. 441, 84 N. E. 971.

77. **Ind.**—Good *v.* State, 61 Ind. 69. **Mo.**—State *v.* Woodward, 21 Mo. 265; State *v.* Wishon, 15 Mo. 504. **Pa.** Com. *v.* Gouger, 21 Pa. Super. 217. **Tenn.** Jones *v.* State, 6 Humph. 625. **Tex.** State *v.* Rutherford, 13 Tex. 24.

[a] In State *v.* Woodward, 21 Mo. 265, the court remarked: "We are aware of the old practice, and the old cases mentioned in the books, that an indictment is an entire thing, and that to quash or strike out one count, destroys the whole; but the practice has never prevailed in this state."

[b] **Retaining Explanatory Counts.** But where an indictment contained counts charging bribery, followed by a count charging extortion, and the latter count contained a reference to the preceding counts which, if permitted to be employed, rendered it sufficient, and upon the trial the

may be sustained unless a *nolle prosequi* is entered as to it.⁷⁸

Where the indictment contains a single count only, a material portion cannot be quashed, but the motion should be directed against the entire indictment.⁷⁹

Quashal as to one defendant does not necessarily result in quashal as to other joint defendants,⁸⁰ especially where the latter have waived the right to raise the objection;⁸¹ though the court may quash an indictment as to all the defendants on the motion of one of them where it is bad as to all of them.⁸²

If the motion is denied the defendant must immediately answer the indictment or information either by demurring or pleading thereto.⁸³

4. New Trial.—A refusal to quash an indictment has been held to be no ground for granting a new trial.⁸⁴

5. Prohibition.—Since the denial of a motion to quash may be reviewed on an appeal from the judgment, a writ of prohibition will not lie to prevent a trial under the indictment.⁸⁵

6. Mandamus.—It has been held that mandamus is an appropriate remedy to secure the reversal of an order quashing an information.⁸⁶

7. Certiorari.—An order of the lower court quashing an indictment being of a discretionary nature is not the subject of review by writ of certiorari in the appellate court where it is not apparent that such judicial discretion has been abused.⁸⁷

prosecution elected to go to the jury upon the extortion count alone, but, with the consent of the defendant, the other counts were retained for the purpose of reference, and the trial resulted in a disagreement of the jury—the court had power, on a subsequent trial of the indictment, to refuse to strike out the bribery counts, and to retain such portion thereof as is necessary, to explain the reference in the count for extortion. *People v. McLaughlin*, 150 N. Y. 365, 44 N. E. 1017.

78. *State v. Buchanan*, 23 N. C. 59.

79. *Duty v. State*, 54 Tex. Crim. 613, 114 S. W. 817, 22 L. R. A. (N. S.) 469.

80. Ark.—*State v. Webster*, 30 Ark. 166. Ky.—*Sutton v. Com.*, 97 Ky. 308, 30 S. W. 661. N. Y.—*Coats v. People*, 4 Park. Crim. 662.

81. *Sutton v. Com.*, 97 Ky. 308, 30 S. W. 661.

82. *People v. Eckford*, 7 Cow. (N. Y.) 535.

83. Ariz.—Penal Code, §974. Cal. Penal Code, §997. Idaho.—Rev. Codes, §7732. Ia.—Code, 1897, §5323. Ky. Crim. Code, 1906, §161. Minn.—Rev.

Laws, 1905, §5338. Mont.—Rev. Codes, 1907, §9195. Nev.—Rev. Laws, 1912, §7092. N. D.—Rev. Codes, 1905, §9894. Okla.—Rev. Laws, 1910, §5785; *Stanley v. United States*, 1 Okla. 336, 33 Pac. 1025. Porto Rico.—Code Crim. Proc., 1902, §147. S. D.—Code Crim. Proc., 1910, §266. Utah.—Comp. Laws, 1907, §4774. Wash.—Rem. & Ball. Code Proc., 1910, §2102.

84. *Jones v. State*, 92 Ga. 480, 17 S. E. 859; *O'Shields v. State*, 92 Ga. 472, 17 S. E. 845. See generally the title "New Trial."

85. *People ex rel. Hummel v. Davy*, 105 App. Div. 598, 94 N. Y. Supp. 1037, affirmed, 184 N. Y. 30, 76 N. E. 732. See generally the title "Prohibition."

86. *Hoffman v. Allegan Circuit Judge*, 150 Mich. 58, 113 N. W. 584; *People v. Swift*, 59 Mich. 529, 26 N. W. 694. But see generally the title "Mandamus."

87. *State v. Potter*, 83 N. J. L. 428, 85 Atl. 216.

[a] Certiorari will not lie to review the action of the court in refusing to quash an indictment. *People v. Thompson*, 108 Mich. 583, 66 N. W. 478. See

8. **Appeal and Error.**—As a general rule an appeal will not lie directly from an order on a motion to set aside or quash an indictment,⁸⁸ but the action of the court upon a motion to set aside an indictment in so far as it is reviewable, may be reviewed on appeal from the final judgment.⁸⁹ But in so far as the order involves the exercise of

also *People v. Lauder*, 82 Mich. 109, 120, 46 N. W. 956.

88. Ala.—*State v. Jones*, 5 Ala. 666. D. C.—*United States v. Huyck*, 6 D. C. 304. Ind.—*Farrel v. State*, 7 Ind. 345. Kan.—*State v. Freeland*, 16 Kan. 9. Ky.—*Franklin v. Com.*, 105 Ky. 237, 48 S. W. 986 (decision on motion not subject to exception); *Downard v. Com.*, 13 Ky. L. Rep. 472, 17 S. W. 439. Mass. *Com. v. Hanley*, 121 Mass. 377. *Compare Com. v. McCormack*, 126 Mass. 258, where the court said the fact that the defendant had been tried and was found guilty in the Hanley case was overruled. Mo.—*State v. Smith*, 42 Mo. 350. N. J.—*State v. Greenwald*, 66 N. J. L. 685, 56 Atl. 440. Ohio. *Ex parte Bushnell*, 8 Ohio St. 599, refused to grant motion is not a final decision. Pa.—*Petition of Quay*, 189 Pa. 517, 42 Atl. 199. S. C.—*State v. Mason*, 54 S. C. 240, 32 S. E. 357; *State v. Burbage*, 51 S. C. 284, 28 S. E. 937.

[a] Where the exceptions are important, the appellate court will sometimes consider them anyway, perhaps thereby rendering another appeal unnecessary. *State v. Burbage*, 51 S. C. 284, 28 S. E. 937.

89. Cal.—*People v. Siemsen*, 153 Cal. 347, 25 Pac. 805; *People v. Simmons*, 119 Cal. 1, 50 Pac. 844; *People v. Turner*, 32 Cal. 370; *Western Meat Co. v. Superior Court*, 9 Cal. App. 538, 99 Pac. 970; *People v. Izlar*, 8 Cal. App. 600, 97 Pac. 685. Ky.—See *Crim. Code*, §281; *Com. v. Jefferson*, 6 B. Mon. 313. Me.—*State v. Smith*, 54 Me. 33; *State v. Maher*, 49 Me. 569; *State v. Putnam*, 28 Me. 296; *State v. Barnes*, 29 Me. 301. Mass.—*Com. v. McGovern*, 10 Allen 103. Mich.—*Hamilton v. People*, 29 Mich. 173. Minn.—*State v. Abrisch*, 42 Minn. 302, 43 N. W. 1115. Mo. *State v. Keener*, 125 Mo. 488, 125 S. W. 747; *State v. Cherrill*, 21 Mo. 271. Mont. *State v. Johnson*, 33 Mont. 523, 59 Pac. 929. N. Y.—*People v. Sexton*, 187 N. Y. 495, 511, 80 N. E. 396, 116 Am. St. Rep. 621; *People v. Glen*, 173 N. Y.

395, 66 N. E. 112; *People v. Barry*, 4 Park. Cr. 657, 10 Abb. Pr. 225; *People ex rel. Moore v. Warden of City Prison*, 150 App. Div. 644, 135 N. Y. Supp. 883; *People ex rel. Hummel v. Davy*, 105 App. Div. 598, 94 N. Y. Supp. 1037; *People v. Spolaseo*, 33 Misc. 530, 15 N. Y. Cr. 293, 68 N. Y. Supp. 924, 102 N. Y. St. 924. N. C.—*State v. De Graff*, 113 N. C. 688, 18 S. E. 507; *State v. Gardner*, 104 N. C. 739, 10 S. E. 146. R. I.—*State v. Maloney*, 12 R. I. 251. S. C.—*State v. Shirer*, 20 S. C. 392. Tex.—*Chavis v. State*, 33 Tex. 446. Vt.—*State v. Louanis*, 79 Vt. 463, 65 Atl. 532; *State v. Stewart*, 59 Vt. 273, 9 Atl. 559, 59 Am. Rep. 710.

[a] In *People v. Kahn*, 155 App. Div. 821, 140 N. Y. Supp. 618, the court in passing on this point said: "The confusion with respect to the practice and the right of a defendant in a criminal action to have a review of intermediate orders made to his alleged prejudice arises from a misconception of the holdings of the Court of Appeals in *People v. Glen*, 173 N. Y. 395, 66 N. E. 112; *People v. Canepi*, 181 id. 398, 74 N. E. 473, and *People v. Sexton*, 187 id. 495, 80 N. E. 396, 116 Am. St. Rep. 621. In each of those cases there was an appeal by the defendant from a judgment of conviction, and all that was held was that certain intermediate orders and rulings, notwithstanding the apparent restriction of section 313 of the Code of Crim. Proc., formed a part of the judgment roll, and were reviewable where a defendant had been convicted and appealed from the judgment entered thereon. In none of those cases was it held that a direct appeal could be had from such intermediate orders, but the only holding was that they were reviewable on an appeal from the judgment itself. Nor is there anything to the contrary in *People ex rel. Hummel v. Trial Term*, 184 N. Y. 30, 76 N. E. 732."

[b] In *State ex rel. Marecaux v. De Baillon*, 51 La. Ann. 197, 25 So.

the court's discretion⁹⁰ it is not reviewable except to the extent that any discretionary order may be reviewed.⁹¹ A writ of error is only available to the person making the motion.⁹²

The state may appeal, in some jurisdictions, from an order sustaining a motion to quash an indictment or information,⁹³ but the appeal can-

104, the court said: "Motions to quash, and rulings of court thereon, come up for review in the supreme court on the appeal taken from the final judgment in the cases in which they are made. These motions, and the rulings thereon cannot be detached from the cases themselves, and made the subject-matter of review by the supreme court, in the exercise of its supervisory jurisdiction."

[c] On appeal by bill of exceptions, or on motion for a new trial or on motion for arrest of judgment the order is not reviewable. *People v. Ramirez*, 56 Cal. 533, 38 Am. Rep. 73.

90. See *supra*, XIV, A, 3, f, (V).

[a] But where the court does not exercise its discretion, but denies the motion for a supposed lack of power to grant it, its action will be reversed with directions to proceed with the motion according to its discretion. *State v. Brannen*, 53 N. C. 208.

91. U. S.—*Durland v. United States*, 161 U. S. 306, 16 Sup. Ct. 508, 40 L. ed. 709; *United States v. Hamilton*, 109 U. S. 63, 3 Sup. Ct. 9, 27 L. ed. 857; *United States v. Rosenburgh*, 7 Wall. 580, 19 L. ed. 263; *Endleman v. United States*, 86 Fed. 456. Ind.—See *Glover v. State*, 109 Ind. 391, 10 N. E. 282. Ky.—*Com. v. Simons*, 100 Ky. 164, 37 S. W. 949; *Marston v. Com.*, 18 B. Mon. 485, by statute. Me.—*State v. Hurley*, 54 Me. 562; *State v. Maher*, 49 Me. 569; *State v. Soule*, 20 Me. 19. Mass. *Com. v. Eastman*, 1 Cush. 189. Mich. *People v. Reigel*, 120 Mich. 78, 78 N. W. 1017. Mo.—*State v. Lucas*, 147 Mo. 70, 47 S. W. 1067; *State v. Fanning*, 38 Mo. 362; *State v. Burgess*, 24 Mo. 381; *State v. Conrad*, 21 Mo. 271. N. C. *State v. De Graff*, 113 N. C. 688, 18 S. E. 507; *State v. Barnes*, 52 N. C. 20. Pa.—*Com. v. Sheppard*, 20 Pa. Super. 417. S. C.—*State v. Shiner*, 20 S. C. 392.

Review of discretionary orders generally. See 2 STANDARD PROC. 149; and the title "Review."

[a] Rhode Island.—The effect of the court and practice act, §301, is to give

a defendant the right to take exception to the decision of the court in overruling pleas, motions, and demurrers, for matters not jurisdictional. So that an exception will lie to a denial of a motion to quash. *State v. Smith*, 29 R. I. 513, 72 Atl. 710.

[b] In Pennsylvania "it is well settled that for error of law fairly deducible from the record, the quashing of an indictment may be reviewed and reversed on appeal, but the decision ought not to be overruled except for clear error or plain abuse of discretion." *Com. v. Carlucci*, 48 Pa. Super. 72. See also *Com. v. Green*, 126 Pa. 531, 17 Atl. 878, 12 Am. St. Rep. 894; *Com. v. Bradney*, 126 Pa. 199, 17 Atl. 600; *Hutchison v. Com.*, 82 Pa. 472; *Com. v. Church*, 1 Pa. 105, 44 Am. Dec. 112; *Com. v. Robertson*, 47 Pa. Super. 472.

[c] Where the motion to quash is treated as a demurrer, as in Mississippi, the action of the court is reviewable. *Jefferson v. State*, 46 Miss. 279.

[d] The finding of the trial court upon the evidence produced at the hearing of the motion to set aside the information is conclusive upon the appellate court. *People v. Siemsen*, 153 Cal. 387, 95 Pac. 863.

92. *Jones v. State*, 14 Ohio C. C. 363, 7 Ohio C. D. 717.

93. Ind.—*Burns' St.*, 1914, §2211; *State v. Evansville & T. H. R. Co.*, 107 Ind. 581, 8 N. E. 619. Kan.—*Gen. St.*, 1909, §6857. Mo.—*Rev. St.*, 1909, §5305; *State v. McKay*, 225 Mo. 540, 125 S. W. 478; *State v. Burdgoerfer*, 197 Mo. 1, 17 S. W. 646, 14 L. R. A. 851; *State v. Ashcraft*, 95 Mo. 348, 8 S. W. 216; *State v. Stegman*, 90 Mo. 456, 2 S. W. 798; *State v. Dollinger*, 69 Mo. 577; *State v. Cunningham*, 51 Mo. 479. S. C.—*State v. Young*, 39 S. C. 399, 9 S. E. 355.

As to right of state to appeal in criminal cases generally see the titles "Review," "States and Territories."

[a] Bail Pending Appellate Review. It is within the sound discretion of the court, where a motion to quash has

not be allowed if after sustaining a motion to quash to one or more courts, one good count remains.⁹⁴

Record.—The record in the appellate court must be in such shape as to present a case entitling the appellant to a review of the order.⁹⁵ An exception to the ruling, where necessary, must appear in the record.⁹⁶ A bill of exceptions is necessary in some jurisdictions.⁹⁷ and therefore where the motion to quash is not a part of the record proper it must be embodied in the bill.⁹⁸ In some states, however, a bill of exceptions is unnecessary.⁹⁹

B. DEMURRER.—1. **Propriety and Grounds.**—a. *General Statement.*—A demurrer is used to object to an indictment or information as insufficient in law because defective in substance or form.¹ its

been sustained, either to hold the defendants to bail pending the certiorari or writ of error, to hold them in their own recognizance, or to discharge them without day, and such action is not reviewable except perhaps for a gross abuse of discretion. *Com. v. Bartilson*, 85 Pa. 482.

94. *State v. Evansville & T. H. R. Co.*, 107 Ind. 581, 8 N. E. 619; *State v. Stegman*, 90 Mo. 486, 2 S. W. 798; *State v. Woodward*, 21 Mo. 265.

95. See the titles “**Appeals;**” “**Bills of Exceptions;**” and *Blocher v. State*, 177 Ind. 356, 93 N. E. 118; *State v. Bazen*, 89 S. C. 260, 71 S. E. 779.

96. *Laycock v. State*, 136 Ind. 217, 36 N. E. 137. See 4 STANDARD PROC. 287.

97. *Binyon v. United States*, 4 Ind. Ter. 642, 76 S. W. 265; *State v. Cole*, 145 Mo. 672, 47 S. W. 895 (embodying the evidence on the motion); *State v. Fortune*, 10 Mo. 466.

[a] Where no bill of exception is taken to the overruling of a motion to quash an indictment, the appellate court cannot review evidence taken on the trial thereof, though found in the record. *State v. White*, 37 La. Ann. 172. See also *State v. Hobbs*, 33 La. Ann. 226.

98. *State v. Glascock*, 232 Mo. 278, 134 S. W. 549; *State v. McKay*, 225 Mo. 540, 125 S. W. 478; *State v. Finley*, 193 Mo. 202, 91 S. W. 942; *State v. Vincent*, 91 Mo. 662, 4 S. W. 430; *State v. Thruston*, 83 Mo. 271, 53 Am. Rep. 581; *State v. Gee*, 79 Mo. 313; *State v. Batchelor*, 15 Mo. 207; *State v. Wall*, 15 Mo. 208.

[a] Where an information was amended, the original information and

demurrer thereto are not properly a part of the record on appeal and if the defendant wishes to have the ruling reviewed he must incorporate such matter in his bill of exceptions. *State v. Stickney*, 29 Mont. 523, 75 Pac. 201.

[b] Though improperly incorporated in the transcript and certified by the clerk it cannot be considered. *State v. Fraker*, 137 Mo. 258, 38 S. W. 909. See also *State v. Tooker*, 188 Mo. 438, 444, 87 S. W. 487.

[c] “If, however, the information which is a part of the record proper, shows upon its face that it is invalid, that question may be raised for the first time in this court.” *State v. Finley*, 193 Mo. 202, 91 S. W. 942. See also *State v. Tooker*, 188 Mo. 438, 87 S. W. 487.

99. *Laycock v. State*, 136 Ind. 217, 36 N. E. 137; *State v. Judy*, 60 Ind. 138; *State v. Day*, 52 Ind. 483. See *Cooper v. State*, 79 Ind. 206.

[a] “There is no more necessity for excepting to the ruling of the court upon a motion to quash an indictment than there would be for excepting to the ruling of the court upon a demurrer to a plea or declaration.” *Baker v. People*, 105 Ill. 452.

1. **U. S.**—*United States v. Gooding*, 12 Wheat. 460, 6 L. ed. 693. **Ala.** *Daniel v. State*, 149 Ala. 44, 43 So. 22; *State v. Coleman*, 5 Port. 32, 39. **Cal.**—*People v. Matuszewski*, 138 Cal. 533, 71 Pac. 701; *People v. Prather*, 120 Cal. 660, 53 Pac. 259; *People v. Ellenwood*, 119 Cal. 166, 51 Pac. 553; *People v. Turner*, 39 Cal. 370; *People v. Apple*, 7 Cal. 289; *People v. Josephs*, 7 Cal. 129; *People v. Horvath*, 23 Cal. App. 306, 137 Pac. 1069. **Fla.**—*Barber v. State*, 52 Fla. 5, 42 So. 86. **Ga.**

use, however, being limited to such objections,² and to such grounds as are enumerated in the statutes,³ and appear upon the face of the indictment⁴ or elsewhere in the record.⁵ It is not an appropriate method of raising an objection which requires extrinsic evidence to support it.⁶

b. *Enumeration of Grounds.*—Among the grounds for demurrer recognized in some jurisdictions, are the following: that the grand jury by which the indictment was found had no authority to inquire into the offense charged by reason of its not being within the jurisdiction

Wood v. State, 46 Ga. 322. **La.**—State v. Stelly, 48 La. Ann. 1478, 21 So. 89; State v. Crenshaw, 45 La. Ann. 496, 12 So. 628; State v. Robacker, 31 La. Ann. 651. **Md.**—Avirett v. State, 76 Md. 510, 25 Atl. 676, 987. **Mass.**—Rev. Laws, 1902, ch. 219, §21. **Mich.**—People v. Smith, 94 Mich. 644, 54 N. W. 487. **Miss.**—Code, 1906, §1426, all formal defects to be attached by demurrer only. **Mo.**—State v. Lichtner, 95 Mo. 402, 8 S. W. 720. **N. Y.**—People v. Stockham, 1 Park. Crim. 424. **Ohio.** See Kennedy v. State, 34 Ohio St. 310; Smith v. State, 8 Ohio 295, 298, 32 Am. Dec. 718; Stahl v. State, 11 Ohio C. C. 23, 5 Ohio C. D. 29. But see Davis v. State, 32 Ohio St. 24, 26. **Eng.** Reg. v. Smith, 2 Moody & Rob. 109; Reg. v. Law, 2 Moody & Rob. 197.

[a] **Demurrer is proper mode of objecting to failure to aver the means employed in committing the crime.** Gaines v. State, 146 Ala. 16, 41 So. 865.

2. United States v. Kilpatrick, 16 Fed. 765.

3. People v. Schmidt, 64 Cal. 260, 30 Pac. 814. See also State v. Schwartz, 25 Tex. 764.

4. **Ark.**—Bass v. State, 29 Ark. 142. **Cal.**—People v. McConnell, 82 Cal. 620, 23 Pac. 40. **Ga.**—Jackson v. State, 64 Ga. 344; Gunn v. State, 10 Ga. App. 819, 74 S. E. 312. **Ia.**—Code, 1897, §5328. **Ky.**—Com. v. Hodges, 137 Ky. 233, 125 S. W. 689; Com. v. Beals, 119 S. W. 813; Com. v. Smith, 16 Ky. L. Rep. 276, 27 S. W. 810. **La.**—Rev. Laws, 1904, §1064; State v. Lewis, 133 La. 1095, 63 So. 597. **Miss.**—State v. Tingle, 103 Miss. 672, 60 So. 728; State v. Mitchell, 95 Miss. 130, 48 So. 693; Clue v. State, 78 Miss. 661, 29 So. 516, 84 Am. St. Rep. 643; Norton v. State, 72 Miss. 128, 16 So. 264, 18 So. 916, 48 Am. St. Rep. 538; Gates v. State, 71 Miss. 874, 16 So. 342. **Mo.**—State v.

Glascock, 232 Mo. 278, 134 S. W. 549. **Mont.**—Rev. Codes, 1907, §9200. **N. Y.** People v. Wiechers, 179 N. Y. 459, 72 N. E. 501, 1 Ann. Cas. 479. **Okla.** Rev. Laws, 1910, §§5791, 5799. **Ore.** Lord's Laws, §1499. **Pa.**—Purdon's Dig. (13th ed.) vol. 1, p. 1031. **Porto Rico.**—Code Crim. Proc., 1902, §153. **S. C.**—Crim. Code, 1902, §57; State v. Davis, 86 S. C. 208, 68 S. E. 532; State v. Rodman, 86 S. C. 154, 68 S. E. 343. See State v. Banks, 84 S. C. 543, 66 S. E. 999; State v. Ross, 83 S. C. 434, 65 S. E. 443; State v. Maddox, 80 S. C. 452, 61 S. E. 964; State v. Weaver, 74 S. C. 417, 54 S. E. 615. **S. D.**—Code Crim. Proc., 1910, §272. **Utah.**—Comp. Laws, 1907, §§4779, 4787. **Vt.**—St., 1906, §2263. **Wash.**—Rem. & Ball. Code Proc., 1910, §2105. **Can.**—Reg. v. Mason, 22 U. C. C. P. 246, 32 Vict., ch. 29.

[a] **Failure to file minutes of evidence on which the indictment was found, is not ground for demurrer.** State v. Briggs, 68 Iowa 416, 27 N. W. 358.

[b] **Exhibits attached to the indictment, and referred to in it as attached thereto, and marked and expressly made a part thereof, may be considered a part of the indictment, the same as if incorporated in the body of the pleading.** State v. Williams, 32 Minn. 537, 21 N. W. 746. Compare State v. Aenspacker, 130 La. 717, 58 So. 520.

5. Jackson v. State, 64 Ga. 344.

6. **La.**—State v. Aenspacker, 130 La. 717, 58 So. 520. **Mo.**—State v. Burch, 68 Mo. 78. **Vt.**—State v. Switzer, 63 Vt. 604, 22 Atl. 724.

See generally the title "Demurrer."

[a] Where an indictment purports to charge a separate and different scheme to defraud in each count, the question whether the scheme will prove to be one and the same for the different offenses, upon which more than

of the county;⁷ or by reason of the fact that the grand jury had been illegally constituted;⁸ or because of any other matter which would result in a loss or want of jurisdiction;⁹ that it contains any matter which if true would constitute a legal justification or excuse of the offense charged,¹⁰ or other legal bar to the prosecution;¹¹ that the facts stated do not constitute an offense¹² punishable by the laws of the

one of the counts are based, cannot be considered on demurrer. *United States v. Palmierie*, 169 Fed. 490.

[b] **Former Jeopardy.**—See *United States v. Moller*, 16 Blatchf. 65, 26 Fed. Cas. No. 15,794; and the title "**Jeopardy.**"

[c] "**Immateriality as a defense to a perjury indictment** would have to be raised upon testimony and not upon demurrer, unless the materiality is apparent." *United States v. Rosenstein*, 211 Fed. 738.

7. **Ariz.**—Penal Code, 1913, §980. **Ark.**—Dig. St., 1904, §2279. **Cal.** Penal Code, §1004; *People v. More*, 68 Cal. 500, 9 Pac. 461. **Idaho.**—Rev. Codes, §7742. **Ky.**—Crim. Code, 1906, §165. **Minn.**—Rev. Laws, 1905, §5343. **Mont.**—Rev. Codes, 1907, §9200. **Nev.** Rev. Laws, 1912, §7097. **N. Y.**—Code Crim. Proc., §323; *People v. Foster*, 60 Misc. 3, 112 N. Y. Supp. 706, not apparent on face of indictment that the crime was not within the jurisdiction of the county. **N. D.**—Rev. Codes, 1905, §9000. **Ore.**—Lord's Laws, §1491. **S. D.** Code Crim. Proc., 1910, §272. **Utah.** Comp. Laws, 1907, §4779.

[a] But in *People v. Fredericks*, 106 Cal. 554, 39 Pac. 944, it was held that the question whether the county court had jurisdiction over offenses committed within the county but upon territory occupied by the federal government, could not be raised by demurrer.

8. *State v. Vincent*, 91 Md. 718, 47 Atl. 1036.

9. *People v. Turner*, 39 Cal. 370. See *Ariz.* Penal Code, 1913, §980.

10. **Ariz.**—Penal Code, 1913, §980. **Ark.**—Dig. St., 1904, §2286. **Cal.** Penal Code, §1004; *People v. Ayhens*, 85 Cal. 89, 24 Pac. 635. **Idaho.**—Rev. Codes, §7742. **Ia.**—Code, 1897, §5328. **Minn.**—Rev. Laws, 1905, §5343. **Mont.** Rev. Codes, 1907, §9200. **Nev.**—Rev. Laws, 1912, §7097. **N. Y.**—Code Crim. Proc., §323. **N. D.**—Rev. Codes, 1905, §9000. **Okla.**—Rev. Laws, 1910, §5791. **Ore.**—Lord's Laws, §1491. **Porto Rico.**—

Code Crim. Proc., 1902, §153. **S. D.** Code Crim. Proc., 1910, §272. **Utah.** Comp. Laws, 1907, §4779. **Wash.**—Rem. & Ball. Code Proc., 1910, §2105.

11. **U. S.**—*United States v. White*, 5 Cranch C. C. 368, 28 Fed. Cas. No. 16,678; *United States v. Watkins*, 4 Cranch C. C. 271, 28 Fed. Cas. No. 16,650. **Idaho.**—Rev. Codes, §7742. **Ia.** Code, 1897, §5328. **Ky.**—Crim. Code, 1906, §165; *Com. v. Megibben Co.*, 101 Ky. 195, 40 S. W. 694; *Williams v. Com.*, 18 Ky. L. Rep. 667, 37 S. W. 839. **Minn.**—Rev. Laws, 1905, §5343. **Mont.**—Rev. Codes, 1907, §9200; *State v. Clemens*, 40 Mont. 567, 107 Pac. 896. **Nev.**—Rev. Laws, 1912, §7097. **N. Y.**—Code Crim. Proc., §323. But see *People v. Durrin*, 2 N. Y. Crim. 328. **N. D.**—Rev. Codes, 1905, §9900. **Okla.**—Rev. Laws, 1910, §5791. **Ore.** Lord's Laws, §1491. **Porto Rico.**—Code Crim. Proc., 1902, §153. **S. D.**—Code Crim. Proc., 1910, §272; *State v. Carlisle*, 30 S. D. 475, 139 N. W. 127. **Wash.**—Rem. & Ball. Code Proc., 1910, §2105.

12. **Ariz.**—Penal Code, 1913, §980. **Ark.**—Dig. St., 1904, §2286; *State v. Bailey*, 62 Ark. 489, 36 S. W. 690. **Cal.**—Penal Code, §1004; *People v. Swenson*, 49 Cal. 388. **Ga.**—Lockhart *v. State*, 116 Ga. 557, 42 S. E. 787; *Draper v. State*, 6 Ga. App. 12, 64 S. E. 117; *Lanier v. State*, 5 Ga. App. 472, 63 S. E. 536. **Idaho.**—Rev. Codes, §7742; *State v. Hincley*, 1 Idaho 490, 42 Pac. 510. **Ky.**—Crim. Code, 1906, §165; *Kinnaird v. Com.*, 134 Ky. 575, 121 S. W. 489; *Com. v. Bradley*, 132 Ky. 512, 116 S. W. 761; *Com. v. Bush*, 131 Ky. 384, 115 S. W. 249; *Com. v. Bray*, 123 Ky. 336, 96 S. W. 522. **Md.**—*Cowman v. State*, 12 Md. 250. **Minn.**—Rev. Laws, 1905, §5343. **Miss.**—*Newton v. State*, 72 Miss. 128, 16 So. 264, 18 So. 916, 48 Am. St. Rep. 538. **Neb.**—Rev. St., 1913, §9086. **Nev.**—Rev. Laws, 1912, §7097. **N. M.**—Territory *v. Abeyta*, 14 N. M. 56, 89 Pac. 254. **N. Y.**—Code Crim. Proc., §323; *People v. Corbalis*, 178 N. Y. 516, 71 N. E. 106; *People*

state: that the accusation was based on a defective affidavit;¹² that the indictment does not substantially conform to the statutes or code,¹⁴ or strictly follow a special statutory form;¹⁵ that it is fatally defective because based upon an unconstitutional statute,¹⁶ or on one which for any reason is not a valid and subsisting law;¹⁷ apparent defects in naming the accused;¹⁸ that the charge is in the alternative,¹⁹

- v. Kahn*, 155 App. Div. 821, 140 N. Y. Supp. 618; *People v. Stone*, 85 Hun 130, 32 N. Y. Supp. 519, 65 N. Y. St. 673; *People v. Arnstein*, 78 Misc. 18, 138 N. Y. Supp. 806; *People v. McCormack*, 68 Misc. 430, 24 N. Y. Crim. 515, 125 N. Y. Supp. 68; *People v. Carr*, 3 N. Y. Crim. 578, 38 Hun 637. N. D.—Rev. Codes, 1905, §9900. **Ohio**.—Gen. Code, 1910, §13,623; *Davis v. State*, 32 Ohio St. 24; *State v. Morrill*, 5 Ohio N. P. 133, 7 Ohio Dec. 52; *State v. Shuman*, 8 Ohio Dec. (Reprint) 373, 7 Wkly. L. Bul. 240; *State v. Fennessey*, 10 Ohio Dec. (Reprint) 608, 22 Wkly. L. Bul. 198; *Com. v. State*, 5 Ohio C. D. 29. **Okla.**—Rev. Laws, 1910, §5791; *Childs v. State*, 4 Okla. Crim. 474, 113 Pac. 545. **Ore.**—Lord's Laws, §1491; *State v. Bloodsworth*, 25 Ore. 83, 34 Pac. 1023; *State v. Doty*, 5 Ore. 491. **Porto Rico**.—Code Crim. Proc., 1902, §153. **S. C.**—*State v. Young*, 30 S. C. 299, 9 S. E. 355. **S. D.**—Code Crim. Proc., 1910, §272; *State v. Carlisle*, 30 S. D. 475, 139 N. W. 127. **Utah**.—Comp. Laws, 1907, §4779. **Wash.**—Rem. & Ball. Code Proc., 1910, §2105. **Wyo.**—Comp. St., 1910, §6188.
- [a] In *People v. Nash*, 1 Idaho 206, it was held that a demurrer on this ground should not be allowed to prevail in a doubtful case.
13. *Rogers v. State*, 1 Ga. App. 527, 58 S. E. 236.
14. **Ariz.**—Penal Code, 1913, §980. **Ark.**—Dig. St., 1904, §2286. **Cal.**—Penal Code, §1004; *People v. Bradbury*, 155 Cal. 808, 103 Pac. 215; *People v. Jim Ti*, 32 Cal. 60; *People v. Horvath*, 23 Cal. App. 306, 137 Pac. 1069. **Ga.**—*Grantham v. State*, 89 Ga. 121, 14 S. E. 892. **Idaho**.—Rev. Codes, §7742; *People v. Stapleton*, 2 Idaho 47, 3 Pac. 6. **Ia.**—Code, 1897, §5328. **Ky.**—Crim. Code, 1906, §165. **Minn.**—Rev. Laws, 1905, §5343. **Miss.**—*State v. Prude*, 76 Miss. 543, 24 So. 871. **Mont.**—Rev. Codes, 1907, §9200. **Nev.**—Rev. Laws, 1912, §7097. **N. Y.**—Code Crim. Proc., §323; *People v. Corbalis*, 178 N. Y. 516, 71 N. E. 106; *People v. Conroy*, 97 N. Y. 62, 2 N. Y. Crim. 565; *People v. Foster*, 60 Misc. 3, 112 N. Y. Supp. 706. **N. D.**—Rev. Codes, 1905, §9900. **Okla.**—Rev. Laws, 1910, §5791. **Ore.**—Lord's Laws, §1491. See *State v. Bruce*, 5 Ore. 68, 20 Am. Rep. 734. **Porto Rico**.—Code Crim. Proc., 1902, §153. **S. D.**—Code Crim. Proc., 1910, §272; *State v. Carlisle*, 30 S. D. 475, 139 N. W. 127. **Wash.**—Rem. & Ball. Code Proc., 1910, §2105.
- [a] **Absence of Technical Nicety.** "It may safely be declared that, where an information or indictment is not bad for want of facts or states a public offense, no demurrer would be interposed and much less allowed merely because such facts are not stated with technical nicety which should of course characterize such a pleading." *Ex parte Hayter*, 16 Cal. App. 211, 116 Pac. 370.
15. *Hardin v. State*, 106 Ga. 384, 32 S. E. 365, 71 Am. St. Rep. 269.
16. **Ga.**—*Boswell v. State*, 114 Ga. 40, 39 S. E. 897; *Cohen v. State*, 7 Ga. App. 5, 65 S. E. 1096. **Md.**—*Foote v. State*, 59 Md. 264. **Ohio**.—*State v. Bateman*, 7 Ohio N. P. 487, 10 Ohio Dec. 68. **Okla.**—*State v. Harmon*, 3 Okla. Crim. 68, 104 Pac. 370.
17. *Boswell v. State*, 114 Ga. 40, 39 S. E. 897; *Eaves v. State*, 113 Ga. 749, 39 S. E. 318; *State v. Jenkins*, 73 Miss. 523, 19 So. 206.
18. See *Holmgren v. United States*, 217 U. S. 509, 30 Sup. Ct. 588, 54 L. ed. 861. But see *Com. v. Kelcher*, 3 Met. (Ky.) 484.
- [a] That the indictment charges a named person "together with others" not named or averred to be unknown is ground for demurrer. *Martin v. State*, 115 Ga. 255, 41 S. E. 576.
- [b] **Blank.**—That the charge after naming the defendant leaves a blank instead of renaming him in charging the offense, is ground for demurrer. *Price v. State*, 67 Ga. 723.
19. *Henderson v. State*, 113 Ga. 1148, 39 S. E. 446; *Sanders v. State*, 86 Ga.

or is disjunctive;²⁰ that intent is not alleged and proof thereof is necessary to make out the offense charged;²¹ that a prior conviction is insufficiently pleaded;²² that the indictment is uncertain;²³ that it fails to name the day or month upon which the offense was committed;²⁴ that the offense is charged to have been committed on a day later than the date of the complaint or finding;²⁵ that it omits the word "unlawfully,"²⁶ and the formal conclusion;²⁷ that the prosecuting officer omitted to sign the information.²⁸

Insufficient Grounds.—In some jurisdictions the following are regarded as insufficient grounds for demurrer, to-wit: misjoinder of counts,²⁹ surplusage,³⁰ indefiniteness,³¹ uncertainty;³² that the court at the time the indictment was found had not been adjourned and convened according to law,³³ or that defendant has not been legally committed;³⁴ that some of the jurors who found the indictment were

717. 12 S. E. 1058; *Stearns v. State*, 81 Md. 341, 32 Atl. 282.

20. *Stearns v. State*, 81 Md. 341, 32 Atl. 282.

21. *Neb.*—Rev. St., 1913, §9086. *Ohio.*—Gen. Code, 1910, §13,623. *Wyo.* Comp. St., 1910, §6188.

22. *State v. Gordon*, 35 Mont. 458, 90 Pac. 173.

23. *Cal.*—*People v. Horvath*, 23 Cal. App. 306, 137 Pac. 1069. *Ga.*—*Johnson v. State*, 90 Ga. 441, 16 S. E. 92. *Me.* *State v. Crocker*, 106 Me. 369, 76 Atl. 703; *State v. Stuart*, 23 Me. 111. *Md.* *Kearney v. State*, 48 Md. 16. *Miss.* *State v. Glennen*, 93 Miss. 836, 47 So. 550, failure to charge time or place. *Ohio.*—But see *State v. Messenger*, 63 Ohio St. 398, 59 N. E. 105. *Wash.* *State v. Bogardus*, 36 Wash. 297, 78 Pac. 942.

24. *Braddy v. State*, 102 Ga. 568, 27 S. E. 670.

[a] **Where Time Not of the Essence of Offense.**—A demurrer to an indictment upon the ground that the day upon which the offense was committed was not stated, will be overruled when the time is not of the essence of the offense. *State v. Burton*, 138 N. C. 575, 50 S. E. 214.

[b] **Failure To Allege Exact Date.** The failure to allege the exact date of the commission of a crime is not ground of demurrer against an information, if the time as alleged is within the statute of limitations. *State v. Gottfreedson*, 24 Wash. 398, 64 Pac. 523.

25. *Conn.*—*State v. Ryan*, 68 Conn. 512, 37 Atl. 377; *State v. Wolfarth*,

42 Conn. 155. *Ga.*—*Spencer v. State*, 123 Ga. 133, 51 S. E. 294; *Bailey v. State*, 65 Ga. 410; *Harris v. State*, 58 Ga. 332. *S. C.*—*State v. Weaver*, 74 S. C. 417, 54 S. E. 615. *Vt.*—*State v. Litch*, 33 Vt. 67.

26. **Omission of word "unlawfully"** is ground for demurrer. *Badger v. State*, 5 Ga. App. 477, 63 S. E. 532.

27. Demurrer held proper to an indictment omitting to conclude "against the peace, government and dignity of the state." *State v. Dyeer*, 85 Md. 246, 36 Atl. 763.

[a] At common law, the omission of the necessary conclusion could be taken advantage of by demurrer. *State v. Minford*, 64 N. J. L. 518, 45 Atl. 817.

28. *Brown v. State*, 9 Okla. Crim. 382, 132 Pac. 359; *Snapp v. State*, 2 Okla. Crim. 515, 103 Pac. 553.

29. *Long v. State*, 165 Ala. 101, 51 So. 636; *Wooster v. State*, 55 Ala. 217, 220; *Hamilton v. People*, 29 Mich. 173.

30. *U. S.*—*United States v. Patterson*, 59 Fed. 280. *Miss.*—*State v. Broughton*, 71 Miss. 90, 13 So. 885. *Ore.* *State v. Runyon*, 62 Ore. 246, 124 Pac. 259. *Eng.*—*Mulcahy v. Reg.*, L. R. 3 H. L. 306.

31. *People v. Draper*, 28 Hun (N. Y.) 1, 1 N. Y. Crim. 138; *State v. Messenger*, 63 Ohio St. 398, 59 N. E. 105; *Searles v. State*, 6 Ohio C. C. 331, 3 Ohio C. D. 478.

32. *People v. Markham*, 64 Cal. 157, 30 Pac. 620, 49 Am. Rep. 700.

33. *McRae v. State*, 71 Ga. 96.

34. *People v. McConnell*, 82 Cal. 620, 23 Pac. 40.

not regularly summoned and impaneled;³⁵ that an unauthorized person was present before the grand jury during its deliberations;³⁶ that they had no authority to bring the indictment;³⁷ that the indictment was not found endorsed and presented as prescribed by law;³⁸ that it was not filed,³⁹ or properly returned⁴⁰ or endorsed with the names of the witnesses examined,⁴¹ or properly endorsed with the file mark of the clerk;⁴² that person verifying the information did not have personal knowledge of the facts therein stated;⁴³ that the copy furnished the accused is defective or varies from the original;⁴⁴ that the indictment has been altered since it was returned into court,⁴⁵ or was written partly in pencil.⁴⁶

Misjoinder and Duplicity.—Duplicity may be taken advantage of by demurrer.⁴⁷ Demurrer will not lie to an indictment or information on the ground that two or more offenses of the same nature on which the same or similar judgment may be given are contained in different

35. *Williams v. State*, 60 Ga. 88; *Patswald v. United States*, 5 Okla. 351, 49 Pac. 57; *Fisher v. United States*, 1 Okla. 252, 31 Pac. 195.

36. *Patswald v. United States*, 5 Okla. 351, 49 Pac. 57.

37. That the grand jury had no power to find a superseding indictment where the jury had disagreed upon the trial of the first indictment. *People v. McCormack*, 68 Misc. 430, 24 N. Y. Crim. 515, 125 N. Y. Supp. 68.

38. *State v. Harris*, 12 Nev. 414.

39. *Price v. State*, 71 Ark. 180, 71 S. W. 948.

40. *State v. Harris*, 12 Nev. 414.

41. *Com. v. Brewer*, 113 Ky. 217, 67 S. W. 994.

42. The objections referred to by statute as being apparent upon the indictment which must be taken by demurrer or motion to quash before the jury is sworn, has no reference to a subsequent act of a clerical officer such as the omission to place his file mark upon the indictment. *State v. Unsworth*, 85 N. J. L. 237, 88 Atl. 1097.

43. *Vickers v. People*, 31 Colo. 491, 73 Pac. 845.

44. *Story v. State*, 178 Ala. 98, 59 So. 480; *People v. Owens*, 132 Cal. 469, 64 Pac. 770.

45. *Gunn v. State*, 10 Ga. App. 819, 74 S. E. 312.

46. *Jones v. Com.*, 124 Ky. 26, 97 S. W. 1118.

47. **U. S.**—*Lemon v. United States*, 164 Fed. 953. **Fla.**—*Irvin v. State*, 52

Fla. 51, 41 So. 785. **Ga.**—*Gilbert v. State*, 65 Ga. 449. **Me.**—*State v. Palmer*, 35 Mo. 9. **Miss.**—*Clue v. State*, 78 Miss. 661, 29 So. 516, 84 Am. St. Rep. 643; *State v. Rees*, 76 Miss. 435, 22 So. 829. **Mo.**—*State v. Blakely*, 184 Mo. 187, 83 S. W. 980; *State v. Sherman*, 137 Mo. App. 70, 119 S. W. 479; *State v. Harrison*, 62 Mo. App. 112. See *Hilderbrand v. State*, 5 Mo. 548. **Pa.** *Kilrow v. Com.*, 89 Pa. 480. **R. I.** *State v. Smith*, 29 R. I. 513, 72 Atl. 710. **Tenn.**—*Scruggs v. State*, 7 Baxt. 38; *Forrest v. State*, 13 Lea 103; *State v. Williams*, 10 Humph. 101. **Wis.** *Cornell v. State*, 104 Wis. 527, 80 N. W. 745.

[a] Duplicity may be reached by special demurrer and perhaps by general demurrer. *Kilrow v. Com.*, 89 Pa. 480.

[b] Under federal practice an objection upon the ground of duplicity must be taken advantage of by special demurrer. *Pooler v. United States*, 127 Fed. 509, 62 C. C. A. 307.

[c] Upon the prosecuting attorney's electing to proceed under but one of the offenses (1) the demurrer will be overruled (Ky. Crim. Code, 1906, §168), (2) or the court upon sustaining the demurrer will require the prosecution to elect to proceed on one of the offenses and dismiss as to the other. *Hazlewood v. Com.*, 141 Ky. 232, 132 S. W. 567. See also *Com. v. Goins*, 9 Ky. Opin. 108; *Blackerter v. Com.*, 8 Ky. Opin. 541.

[d] Where the attorney for the commonwealth failed to elect which charge

counts in the indictment.⁴⁸ It is sometimes provided by statute that a demurrer lies when more than one offense is charged, unless the joinder is permissible.⁴⁹

Statute of Limitations.—Although the indictment shows on its face that the action is barred by the statute of limitations, a demurrer will not lie.⁵⁰ In some cases, however, a demurrer is held proper under

he would prosecute, on overruling of demurrer that error, if error at all, was cured by the defendant filing a demurrer to one of the charges in the indictment, which the court sustained. *Froman v. Com.*, 19 Ky. L. Rep. 948, 42 S. W. 728.

48. **Ia.**—See *State v. Elsham*, 70 Iowa 531, 31 N. W. 66. **Pa.**—*Com. v. Birdsall*, 69 Pa. 482; *Com. v. Gillespie*, 7 Serg. & R. 469; *Com. v. Gouger*, 21 Pa. Super. 217, 232; *Com. v. Stahl*, 1 Pa. Super. 496. **Tex.**—*Dalton v. State*, 4 Tex. App. 333.

49. **Ariz.**—Penal Code, 1913, §980. **Ark.**—Dig. St., 1904, §2286; *Mears v. State*, 84 Ark. 136, 104 S. W. 1095; *Ince v. State*, 77 Ark. 426, 93 S. W. 65. **Cal.**—Penal Code, §1004; *People v. Jochinsky*, 106 Cal. 638, 39 Pac. 1077; *People v. De Coursey*, 61 Cal. 134; *People v. Quivise*, 56 Cal. 396; *People v. Weaver*, 47 Cal. 106; *People v. Taggart*, 43 Cal. 81; *People v. Hawkins*, 34 Cal. 181; *People v. Garnett*, 29 Cal. 62. **Colo.**—White v. People, 8 Colo. App. 289, 45 Pac. 539. **Idaho.**—Rev. Codes, §7742; *People v. Nash*, 1 Idaho 206. **Ky.**—Crim. Code, 1906, §165; *Hazlewood v. Com.*, 141 Ky. 232, 132 S. W. 567; *Johnson v. Com.*, 90 Ky. 488, 14 S. W. 492; *Slagel v. Com.*, 81 Ky. 485; *Nichols v. Com.*, 78 Ky. 180; *Ellis v. Com.*, 78 Ky. 130; *Moore v. Com.*, 18 Ky. L. Rep. 129, 35 S. W. 283; *Com. v. Goins*, 9 Ky. Opin. 108; *Com. v. Webster*, 4 Ky. Opin. 651. **Minn.**—Rev. Laws, 1905, §5343; *State v. Kunz*, 90 Minn. 526, 97 N. W. 131; *State v. Henn*, 39 Minn. 464, 40 N. W. 564. **Mont.**—Rev. Codes, 1907, §9200. **Nev.**—Rev. Laws, 1912, §7097; *State v. Johnson*, 9 Nev. 175. **N. Y.**—Code Crim. Proc., §223; *People v. Klipfel*, 160 N. Y. 371, 54 N. E. 788; *People v. Tower*, 135 N. Y. 457, 32 N. E. 145; *People v. McCarthy*, 110 N. Y. 309, 18 N. E. 128; *People v. Wiechers*, 94 App. Div. 19, 87 N. Y. Supp. 897; *People v. O'Donnell*, 46 Hun 358, 10 N. Y. Supp. 250; *People v. Upton*, 38 Hun

107, 4 N. Y. Crim. 455; *People v. Carr*, 38 Hun 637, 3 N. Y. Crim. 578. **N. D.**—Rev. Codes, 1905, §9900. **Ohio.**—*Devere v. State*, 3 Ohio Dec. 249, 5 Ohio C. C. 509. **Okla.**—Rev. Laws, 1910, §5791; *Childs v. State*, 4 Okla. Crim. 474, 113 Pac. 545, 33 L. R. A. (N. S.) 563; *Gretti v. State*, 4 Okla. Crim. 574, 113 Pac. 206; *Martin v. Territory*, 4 Okla. 105, 43 Pac. 1067. **Ore.**—Lord's Laws, §1491; *State v. Taylor*, 65 Ore. 266, 132 Pac. 713; *State v. Kline*, 50 Ore. 426, 93 Pac. 237; *State v. Reyner*, 50 Ore. 224, 91 Pac. 301; *State v. Carlson*, 39 Ore. 19, 62 Pac. 1016, 1119; *State v. Lee*, 33 Ore. 506, 56 Pac. 415; *State v. Hinkle*, 33 Ore. 93, 54 Pac. 155; *State v. Jarvis*, 18 Ore. 360, 23 Pac. 251, 8 Am. Crim. Rep. 367. **Porto Rico.**—Code Crim. Proc., 1902, §153. **S. D.**—Code Crim. Proc., 1910, §272; *State v. Boughner*, 5 S. D. 461, 59 N. W. 736. **Utah.**—Comp. Laws, 1907, §4779. **Wash.**—Rem. & Ball. Code Proc., 1910, §2105; *State v. McBride*, 72 Wash. 390, 130 Pac. 486; *State v. McCormick*, 56 Wash. 469, 105 Pac. 1037.

[a] **Information for Grand Larceny.** In *State v. Mjelde*, 29 Mont. 490, 75 Pac. 87, it was held that an objection to an information for grand larceny on the ground that it is duplicitous in that it charges several distinct offenses, each of which would constitute only petit larceny, is an objection addressed to the jurisdiction of the court, rather than to the form of the information and hence could not properly be raised by a demurrer.

[b] **Where the misjoinder of offenses is not apparent from the language of the indictment** it cannot be reached by demurrer, but when disclosed by the proof an election will be required. *Hazlewood v. Com.*, 141 Ky. 232, 132 S. W. 567.

50. **U. S.**—*United States v. Cook*, 17 Wall. 168, 21 L. ed. 538; *Greene v. United States*, 154 Fed. 401, 85 C. C. A. 251; *United States v. Andem*, 158 Fed. 996; *United States v. Brace*, 143

such circumstances, on the ground the indictment contains matter which constitutes a legal bar to the prosecution.⁵¹

2. Time for.—The statutes and decisions of the various states are not in harmony as to when is the proper time to put in the demurrer. Under some it should be done either at the time of the arraignment, or at such other time as may be allowed to the defendant for that purpose, but not after pleading to the merits,⁵² while in others it is merely provided that it must be entered before the jury is sworn.⁵³ If

Fed. 703. **Ark.**—*State v. Reed*, 45 Ark. 333; *Gill v. State*, 38 Ark. 524; *State v. Gill*, 33 Ark. 129; *Seoggins v. State*, 32 Ark. 205. **Ia.**—*State v. McIntire*, 58 Iowa 572, 12 N. W. 593; *State v. Hussey*, 7 Iowa 409. **Ky.**—*Com. v. Beals*, 119 S. W. 813. **Miss.**—*Thompson v. State*, 54 Miss. 740, demurrer improper even where bar appears on face of indictment. **N. Y.**—*People v. Durrin*, 2 N. Y. Crim. 328.

But see generally the title "Limitation of Actions."

Necessity of alleging facts in avoidance of bar of statute where indictment shows commencement of prosecution after the period prescribed by the statute. See *infra*, IX, D, 7.

51. **Cal.**—*People v. Ayhens*, 85 Cal. 86, 24 Pac. 635. **Ga.**—*Hanaford v. State*, 54 Ga. 55. **Ky.**—*Williams v. Com.*, 18 Ky. L. Rep. 667, 37 S. W. 839. **La.**—*State v. Bryan*, 19 La. Ann. 435.

52. **Ala.**—*Horton v. State*, 47 Ala. 58. **Ariz.**—*Penal Code*, 1913, §979. **Cal.**—*Penal Code*, §1003. **Ga.**—*Gilmore v. State*, 118 Ga. 299, 45 S. E. 226; *King v. State*, 117 Ga. 39, 43 S. E. 426. **Idaho.**—*Rev. Codes*, §7741. **La.**—*Rev. Laws*, 1904, §1064; *State v. Stelly*, 48 La. Ann. 1478, 21 So. 89; *State v. Jim*, 48 La. Ann. 267, 19 So. 145; *State v. Crenshaw*, 45 La. Ann. 496, 12 So. 628; *State v. Durbin*, 22 La. Ann. 162; *State v. Boudreaux*, 14 La. Ann. 88. **Minn.**—*Rev. Laws*, 1905, §5342. **Mo.**—*See State v. Brisco*, 237 Mo. 154, 135 S. W. 58; *State v. Earll*, 225 Mo. 537, 125 S. W. 467. **Mont.**—*Rev. Codes*, 1907, §9199. **Nev.**—*Rev. Laws*, 1912, §7096. **N. Y.**—*Code Crim. Proc.*, §322. **N. D.**—*Rev. Codes*, 1905, §§9890, 9899; *State v. Kelly*, 25 N. D. 1, 140 N. W. 714. **Okla.**—*Rev. Laws*, 1910, §5790; *Gourley v. State*, 8 Okla. Crim. 598, 129 Pac. 684. **Ore.**—*Lord's Laws*, §1490. **Porto Rico.**—*Code Crim. Proc.*, 1902, §152. **S. D.**—*Code Crim. Proc.*, 1910, §271. **Utah.**—*Comp. Laws*, 1907, §4778.

Can.—32 Viet., ch. 29; *Reg. v. Mason*, 22 U. C. C. P. 246.

See *infra*, XV, A, 1.

[a] In *State v. Roth*, 117 Minn. 404, 136 N. W. 12, it was held that it was not error to refuse to permit defendant to demur to the indictment after the trial had begun; it appearing that the only ground for demurring was that the indictment failed to state facts sufficient to constitute the crime.

[b] **At common law**, a defendant in a prosecution for a felony might, at one and the same time, enter his plea of not guilty to the indictment and his demurrer to the sufficiency thereof, and upon the indictment being held sufficient in law, he would be triable on his pending plea of not guilty, just as if no demurrer had been interposed. *State v. Reeves*, 97 Mo. 668, 10 S. W. 841, 10 Am. St. Rep. 349, *citing* 1 Chitty Crim. Law 435, 440; 2 Hawk., ch. 23, §1281, and ch. 3, §6. See also *State v. Gieseke*, 209 Mo. 331, 108 S. W. 525; *State v. Meagher*, 49 Mo. App. 571.

53. **Colo.**—*Mills' Ann. St.*, 1912, §2082, "before trial." **La.**—*Rev. Laws*, 1904, §1064; *State v. Lewis*, 133 La. 1095, 63 So. 597. **Mich.**—*Comp. Laws*, 1897, §11,920. **N. J.**—*Comp. St.*, 1910, p. 1834. **Pa.**—1 Purdon's Dig. (13th ed.), p. 1032; *Com. v. Frey*, 50 Pa. 245; *Com. v. Newcomer*, 49 Pa. 478; *Com. v. Paxton*, 14 Phila. 665; *Com. v. Hughes*, 11 Phila. 430. **S. C.**—*Crim. Code*, 1902, §57; *State v. Davis*, 86 S. C. 208, 68 S. E. 532; *State v. Rodman*, 86 S. C. 154, 68 S. E. 343; *State v. Ross*, 83 S. C. 434, 65 S. E. 443; *State v. Maddox*, 80 S. C. 452, 61 S. E. 964. **Vt.**—*Pub. St.*, 1906, §2263. **Wash.**—*State v. McBride*, 72 Wash. 390, 130 Pac. 486; *State v. Bodekar*, 11 Wash. 417, 39 Pac. 645.

[a] In *Massachusetts*, before the jury is sworn in the superior court, or before judgment by police, district, municipal court or trial justice. *Mass.*

the defendant has been tried and convicted without a jury, and the court afterwards strikes out the judgment, a demurrer may be put in.⁵⁴

3. Form and Requisites.—A demurrer to an indictment or information must be in writing in many jurisdictions,⁵⁵ although in some it may be oral provided an entry thereof be made on the record.⁵⁶

Particularity Required.—The demurrer must distinctly specify the grounds of objection to the indictment or information, or it will be disregarded.⁵⁷

Rev. Laws, 1902, ch. 219, §21; Com. v. Walton, 11 Allen 238.

[b] In *Com. v. Chapman*, 11 Cush. (Mass.) 422, on a trial for murder, the court refused to allow the prisoner to retract his plea of not guilty, and to demur to the indictment, but consented to hear the objections on a motion to quash the indictment.

[c] In Mississippi, before issuance of venire in capital cases, before jury impaneled in others. Code, 1906, §1426.

54. *State v. Butler*, 72 Md. 98, 18 Atl. 1105.

55. *Ariz.*—Penal Code, 1913, §981. *Cal.*—Penal Code, §1005. *Colo.*—Mills' Ann. St., §2194. *Ga.*—Sims v. State, 110 Ga. 290, 34 S. E. 1020; McGarr v. State, 75 Ga. 155; Wimbish v. State, 70 Ga. 719. *Idaho.*—Rev. Codes, §7743. *Minn.*—Rev. Laws, 1905, §5344. *Mont.*—Rev. Codes, 1907, §9201. *Nev.*—Rev. Laws, 1912, §7098. *N. Y.*—Code Crim. Proc., §324; *People v. Kahn*, 155 App. Div. 821, 140 N. Y. Supp. 618. *N. D.*—Rev. Codes, 1905, §9901; *State v. Woodell*, 22 N. D. 230, 132 N. W. 1003. *Okla.*—Rev. Laws, 1910, §5792. *Ore.*—Lord's Laws, §1492. *Porto Rico.*—Code Crim. Proc., 1902, §154. *S. D.*—Code Crim. Proc., 1910, §273. *Utah.*—Comp. Laws, 1907, §4780.

56. *Ky.*—Crim. Code, 1906, §163. See Pollard's Code, 1904, §3271.

57. *Ariz.*—Penal Code, 1913, §981. *Cal.*—Penal Code, §1005; *People v. Bradbury*, 155 Cal. 808, 103 Pac. 215; *People v. Matuszewski*, 138 Cal. 533, 71 Pac. 701; *People v. Feilen*, 58 Cal. 218, 41 Am. Rev. 258; *People v. Tomalty*, 14 Cal. App. 224, 111 Pac. 513. *Colo.*—Mills' Ann. St., 1912, §2194. *Ga.*—Jones v. State, 115 Ga. 814, 42 S. E. 271; *Gibson v. State*, 79 Ga. 344, 5 S. E. 76. *Idaho.*—Rev. Codes, §7743. *Ia.*—State v. Greene, 10 Iowa 308; *Benham v. State*, 1 Iowa 542. *Minn.*—Rev. Laws, 1905, §5344. *Miss.*—State v. Butterfield Lumb. Co., 103 Miss. 286,

60 So. 322. *Mo.*—Rev. St., 1909, §5112; *State v. Christopher*, 212 Mo. 244, 110 S. W. 697; *State v. Murphy*, 47 Mo. 274; *State v. Webb*, 37 Mo. 366; *State v. Van Houten*, 37 Mo. 357. *Mont.*—Rev. Codes, 1907, §9201. *Nev.*—Rev. Laws, 1912, §7098; *State v. Harrington*, 9 Nev. 91; *State v. Harkin*, 7 Nev. 377. *N. M.*—Territory v. Lockhart, 8 N. M. 523, 45 Pac. 1106. *N. Y.*—Code Crim. Proc., §324. *N. D.*—Rev. Codes, 1905, §9901; *State v. Longstreth*, 19 N. D. 268, 121 N. W. 1114, 1912D, Ann. Cas. 1317. *Okla.*—Rev. Laws, 1910, §5792; *Flohr v. Territory*, 14 Okla. 477, 78 Pac. 565; *Childs v. State*, 4 Okla. Crim. 474, 113 Pac. 545. *Ore.*—Lord's Laws, §1492. *Porto Rico.*—Code Crim. Proc., 1902, §154. *S. D.*—Code Crim. Proc., 1910, §273. *Tex.*—State v. Schoolfield, 29 Tex. 502. *Utah.*—Comp. Laws, 1907, §4780; *People v. Hill*, 3 Utah 334, 3 Pac. 75.

[a] "The object, doubtless, of the legislature in thus requiring that the motion or demurrer 'distinctly specify the grounds of objection,' was that the prosecuting attorney, being apprised of the particular defect, might remedy it by having a new bill found, and thus avoid the accumulation of onerous costs." *State v. Risley*, 72 Mo. 609.

[b] **Illustrations.**—A demurrer on the ground that the indictment "is insufficient in law to compel him to answer thereto" is insufficient. *Benham v. State*, 1 Iowa 541.

[c] A demurrer on the ground that "the indictment does not state any offense" held sufficient under this statutory requirement. *State v. Weeks*, 77 Mo. 496, *overruling State v. Boston*, 63 Mo. 521; *State v. Berry*, 62 Mo. 595; *State v. Van Houten*, 37 Mo. 357, as to this point.

[d] A demurrer to an indictment on the ground that it charges the accused with "two distinct offenses of an en-

4. **Filing or Entry.**—The demurrer should be filed with the clerk,⁵⁸ or, in some jurisdictions, entered in open court.⁵⁹

5. **Hearing and Determination.**—a. *When Heard.*—Upon the demurrer being filed, the argument of the objections presented thereby, should be had either immediately or at such time as the court may appoint.⁶⁰

b. *Withdrawal.*—The court may suffer the defendant to withdraw his demurrer to the indictment after argument and after the court has intimated an opinion that it ought to be overruled and before judgment entered upon the demurrer.⁶¹

c. *Construction.*—In a state where the language of an indictment is to be interpreted liberally in favor of the state, a demurrer raising special objections to an indictment should be strictly construed against the pleader.⁶²

d. *Effect of Demurrer as Admission.*—The general rule is that a demurrer admits the truth of the allegations contained in the indictment or information,⁶³ provided such matters are well pleaded;⁶⁴ but only for the purpose of testing the law arising upon the facts.⁶⁵

e. *Determination and Effect.*—(L) **Generally.**—Upon considering the demurrer, the court should give judgment either allowing or dis-

tirely different nature in one and the same count," is too indefinite to be considered, unless the demurrer discloses to what different offenses of a dissimilar nature reference is intended to be made. *Field v. State*, 126 Ga. 571, 55 S. E. 502; *Sowell v. State*, 126 Ga. 105, 54 S. E. 916; *Wells v. State*, 118 Ga. 556, 45 S. E. 443. See also *State v. Ah Sam*, 7 Nev. 127.

58. **Ariz.**—Penal Code, 1913, §981. **Cal.**—Penal Code, §1005. **Idaho.**—Rev. Codes, §7743. **Mont.**—Rev. Codes, 1907, §9201. **Nev.**—Rev. Laws, 1912, §7093. **N. Y.**—Code Crim. Proc., §324. **N. D.**—Rev. Codes, 1905, §9901; *State v. Wood-ell*, 22 N. D. 230, 132 N. W. 1003. **Okla.**—Rev. Laws, 1910, §5792. **Ore.**—Lord's Laws, §1492. **Porto Rico.**—Code Crim. Proc., 1902, §154. **S. D.**—Code Crim. Proc., 1910, §273. **Utah.**—Comp. Laws, 1907, §4780.

[a] **In Iowa** it should be filed with the clerk or made in open court. *Code*, 1897, §5330.

59. **Ky.** Crim. Code, 1906, §163; *Minn. Rev. Laws*, 1905, §5342.

60. **Ariz.**—Penal Code, 1913, §982. **Cal.**—Penal Code, §1006. **Idaho.**—Rev. Codes, §7744. **Iowa.**—Code, 1897, §5331. **Minn.**—Rev. Laws, 1905, §5344. **Mont.**—Rev. Codes, 1907, §9202. **Nev.**—Rev. Laws, 1912, §7099. **N. Y.**—Code Crim.

Proc., §325. **N. D.**—Rev. Codes, 1905, §9902. **Okla.**—Rev. Laws, 1910, §5793. **Ore.**—Lord's Laws, §1493. **Porto Rico.**—Code Crim. Proc., 1902, §155. **S. D.**—Code Crim. Proc., 1910, §274. **Utah.**—Comp. Laws, 1907, §4781.

61. *United States v. Watkins*, 3 Cranch C. C. 441, 28 Fed. Cas. No. 16,649. This case also held that upon suffering the defendant to withdraw his demurrer, the court may require him to waive his right to move in arrest of judgment for any matter apparent upon the indictment.

62. *Green v. State*, 109 Ga. 536, 35 S. E. 97.

63. **U. S.**—*United States v. Foster*, 211 Fed. 206. **Md.**—*State v. Fearson*, 2 Md. 310. **Ohio.**—*Corthell v. State*, 11 Ohio C. C. 570, 5 Ohio C. D. 123. **Wash.**—*State v. Darwin*, 63 Wash. 303, 115 Pac. 309.

64. *United States v. Mann*, 95 U. S. 580, 24 L. ed. 531. See generally the title "Demurrer."

[a] The conclusions of the pleader in a complaint for criminal libel are not admitted by demurrer. *State v. Darwin*, 63 Wash. 303, 115 Pac. 309.

65. *Com. v. Jones*, 10 Bush (Ky.) 725.

[a] "The law never contemplated that a man charged criminally, means

allowing it, and an order to that effect should be entered on the minutes.⁶⁶

(II.) **Indictment Good as to One Count or Lesser Offense.**—A general demurrer to an indictment or information containing several counts, one of which is good, may be overruled entirely,⁶⁷ and the sustaining of a demurrer to a bad count in an indictment, does not affect the remaining good counts, nor relieve the defendant from liability under them.⁶⁸ If the indictment, though insufficient as to the crime intended to be charged, sufficiently charges a lesser offense, the demurrer may be overruled.⁶⁹

(III.) **As to Defendants Jointly Indicted.**—Though a demurrer by one of several defendants is allowed the indictment may still be good as to others jointly indicted.⁷⁰

(IV.) **Where Demurrer Sustained.**—If the demurrer is sustained such further proceedings should be had as are provided by law.⁷¹ It is

to confess the indictment to be true when he demurs." *Thomas v. State*, 6 Mo. 457; *Ross v. State*, 9 Mo. 696.

66. **Ariz.**—Penal Code, 1913, §983. **Cal.**—Penal Code, §1007. **Idaho.**—Rev. Codes, §7745. **Minn.**—Rev. Laws, 1905, §5344; *State v. Comfort*, 22 Minn. 271. **Mont.**—Rev. Codes, 1907, §9203. **Nev.**—Rev. Laws, 1912, §7100. **N. Y.**—Code Crim. Proc., §326. **N. D.**—Rev. Codes, 1905, §9903. **Okla.**—Rev. Laws, 1910, §5794; *Ex parte Dodson*, 3 Okla. Crim. 514, 107 Pac. 450. **Ore.**—Lord's Laws, §1494. **Porto Rico.**—Code Crim. Proc., 1902, §156. **S. D.**—Code Crim. Proc., 1910, §275. **Utah.**—Comp. Laws, 1907, §4782.

[a] The order in the minutes allowing or disallowing the demurrer is the judgment. *People v. Jordan*, 65 Cal. 644, 4 Pac. 683; *People v. Ah Own*, 39 Cal. 604.

[b] An order sustaining a demurrer disposes of the indictment to the extent that no order to dismiss is necessary. *People v. Whiting*, 126 N. Y. Supp. 1680.

[c] **Overruling Without Prejudice.** In complicated cases, in view of the intricate questions arising on the record a demurrer to the indictment may be overruled without prejudice to the right to afterwards raise any such question. *United States v. Winslow*, 195 Fed. 578.

67. **Ala.**—*Peters v. State*, 166 Ala. 25, 51 So. 952; *Cheatham v. State*, 59 Ala. 40; *Ingram v. State*, 39 Ala. 247, 84 Am. Dec. 782; *State v. Coleman*, 5 Port. 32, 40. **Ark.**—*Cooper v. State*, 37 Ark. 412. **Ga.**—*Sutton v. State*, 122

Ga. 158, 50 S. E. 60; *Gibson v. State*, 79 Ga. 344, 5 S. E. 76. **Ia.**—*State v. Smouse*, 50 Iowa 43. **Me.**—*State v. Miles*, 89 Me. 142, 36 Atl. 70. **Md.**—*Avirett v. State*, 76 Md. 510, 25 Atl. 676, 987. **Minn.**—*State v. Hinckley*, 4 Minn. 345. **Miss.**—*Gates v. State*, 71 Miss. 874, 16 So. 342; *West v. State*, 70 Miss. 598, 12 So. 903. **N. Y.**—*People v. Rice*, 13 N. Y. Supp. 161, 35 N. Y. St. 185. **Va.**—*Hendricks v. Com.*, 75 Va. 934. **W. Va.**—*State v. McClung*, 35 W. Va. 280, 13 S. E. 654; *State v. Cartright*, 20 W. Va. 32.

See 1 Chitty Crim. Law 443; Whart. Crim. Pl. & Pr., §401; 1 Bish. Crim. Proc., §449.

[a] If, after that part of the information demurred to is stricken out, there still remains a good information, the demurrer will be overruled. *People v. Perez*, 87 Cal. 122, 25 Pac. 262.

68. *Turner v. State*, 40 Ala. 21.

69. *People v. Cooper*, 3 N. Y. Crim. 117; *Blanton v. State*, 1 Wash. 265, 24 Pac. 439.

[a] When aggravated assault and battery has not been sufficiently alleged and for such reason has been demurred to, the court may overrule a demurrer on that ground and hold the complaint sufficient for a simple assault and battery. *People v. Zambrana*, 18 Porto Rico 732.

70. *State v. Webster*, 30 Ark. 166; *Coats v. People*, 4 Park. Crim. (N. Y.) 662. But see *People v. Eckford*, 7 Cow. (N. Y.) 535.

71. **Where Sustained for Lack of**

sometimes provided that upon the sustaining of the demurrer the defendant must be discharged and his bail exonerated, unless the court order the cause to be resubmitted to the same or another grand jury.⁷² In other states it is provided that if the demurrer is sustained because the indictment contains matter which is a legal defense or bar, the judgment is final and the defendant is discharged from any further prosecution for the offense.⁷³

(V.) **Where Demurrer Overruled.**—By the common law, upon the overruling of the demurrer to an indictment for felony, the judgment was respondeat ouster; but if the defendant demurred to an indictment for a misdemeanor and failed on the argument, he did not have judgment to answer over, but the decision operated as a conviction and the judgment was final.⁷⁴

But generally in this country if the demurrer is overruled the defendant has a right to plead to the indictment;⁷⁵ if he fails to do so

Jurisdiction.—See Ia. Code, 1897, §5331; Ky. Crim. Code, 1906, §166.

72. Ariz.—Penal Code, 1913, §984; *Territory v. Monroe*, 10 Ariz. 53, 85 Pac. 651; *De Leon v. Territory*, 9 Ariz. 161, 80 Pac. 348. **Cal.**—Penal Code, §1008; *People v. Coronado*, 144 Cal. 207, 79 Pac. 418; *People v. Jordan*, 63 Cal. 219; *Ex parte Hayter*, 16 Cal. App. 211, 116 Pac. 370. **Idaho.**—Rev. Codes, §7746. **Md.**—State v. Hodges, 55 Md. 127. **Minn.**—Rev. Laws, 1905, §5345. **Mont.**—Rev. Codes, 1907, §9204. **Nev.**—Rev. Laws, 1912, §7101. **N. Y.** Code Crim. Proc., §327; *People v. Rosenthal*, 197 N. Y. 394, 90 N. E. 991. **N. D.**—Rev. Codes, 1905, §9904. **Ohio.** *State v. Messenger*, 63 Ohio St. 398, 59 N. E. 105 (on sustaining demurrer defendant is entitled to his discharge); *Winnett v. State*, 18 Ohio C. C. 515, 10 Ohio C. D. 245. **Okla.**—Rev. Laws, 1910, §5795; *Ex parte Dodson*, 3 Okla. Crim. 514, 107 Pac. 450. **Ore.**—Lord's Laws, §§1495, 1496. **Porto Rico.**—Code Crim. Proc., 1902, §157. **S. D.**—Code Crim. Proc., 1910, §§276, 277. **Utah.** Comp. Laws, 1907, §4783.

As to resubmission, see *supra*, ¶I.

As to amendment, see *supra*, XII.

[a] **Oklahoma statute** held to have no application to misdemeanors prosecuted by indictment, transferred to a county court. *Ex parte Dodson*, 3 Okla. Crim. 514, 107 Pac. 450.

[b] **An order allowing the prosecution to confess the demurrer** is equivalent to a sustaining of the demurrer. *People v. Biggins*, 65 Cal. 564, 4 Pac. 570.

[c] **If a demurrer to an information is sustained, there is no case pending** against defendant until the filing of a new information. *People v. Thompson*, 84 Cal. 598, 24 Pac. 384.

73. Ark.—Dig. St., 1904, §2290; *State v. McMinn*, 34 Ark. 160. **Ia.** Code, 1897, §5331; *State v. Fields*, 106 Iowa 406, 76 N. W. 802. **Ky.**—See Crim. Code, 1906, §169 (no provision for resubmission if sustained on this ground); §170 (if sustained on any grounds other than those in §§166, 167, 168, 169, the case may be resubmitted); *Com. v. Shelby*, 18 Ky. L. Rep. 781, 38 S. W. 490. **Wash.**—Rem. & Ball. Code Proc., 1910, §2106; *State v. Bodekar*, 11 Wash. 417, 39 Pac. 645. See *State v. Riley*, 36 Wash. 441, 78 Pac. 1001.

74. Ark.—McCuen v. State, 19 Ark. 630. **Me.**—*State v. Merrill*, 37 Me. 329. **Eng.**—*King v. Taylor*, 3 Barn. & C. 502, 513, 107 Eng. Reprint 820, 824; *King v. Gibson*, 8 East 107, 103 Eng. Reprint 284. See 2 Hale P. C. 257; Hawk., b. 2, ch. 31, §7; 1 Chitty Crim. Law 360, 441.

And see *McGuire v. State*, 35 Miss. 366, 72 Am. Dec. 124.

75. Ariz.—Penal Code, 1913, §987. **Ark.**—Dig. St., 1904, §2292. **Cal.**—Penal Code, §1011. **Ia.**—Code, 1897, §5332. **Ky.**—Crim. Code, 1906, §171. **Mont.** Rev. Codes, 1907, §9207. **Neb.**—Rev. St., 1913, §9091. **Nev.**—Rev. Laws, 1912, §7104. **N. Y.**—Code Crim. Proc., §330; *People v. Crotty*, 9 N. Y. Supp. 937, 30 N. Y. St. 44. **N. C.**—*State v. Polk*, 91 N. C. 652. **N. D.**—Rev. Codes,

final judgment is entered against him⁷⁶ and, if necessary a jury impaneled to fix the punishment.⁷⁷

6. New Trial.—It has been held that the overruling of a demurrer to an indictment cannot be made a ground of a motion for a new trial.⁷⁸

7. Review.—In the absence of statute authorizing it, an order overruling or sustaining a demurrer is not appealable,⁷⁹ but it may be reviewed on appeal from the final judgment.⁸⁰

1905, §9907. **Okla.**—Rev Laws, 1910, §5798. **Ore.**—Lord's Laws, §1498. **Porto Rico.**—Code Crim. Proc., 1902, §160. **S. D.**—Code Crim. Proc., 1910, §279. **Utah.**—Comp. Laws, 1907, §4786. **Wash.**—Rem. & Ball. Code Proc., 1910, §2107; State v. Harding, 20 Wash. 556, 56 Pac. 399, 929; State v. Straub, 16 Wash. 111, 47 Pac. 227. **Wyo.**—Comp. St., 1910, §6193.

[a] *Contra.*—Upon overruling a demurrer to an indictment for a misdemeanor, the court may enter judgment at once or in its discretion, permit the demurrer to be withdrawn and a plea interposed. State v. Sharp, 75 N. J. L. 201, 66 Atl. 926. See also State v. Passaic County Agr. Soc., 54 N. J. L. 260, 23 Atl. 680.

[b] In some of the early cases (1) it has been held that the court might in its discretion permit a defendant charged with a misdemeanor to plead over, but that he could not claim it as a matter of right (**Ark.**—McCuen v. State, 19 Ark. 630. **Conn.**—Wickwire v. State, 19 Conn. 477. **Tenn.**—Bennett v. State, 2 Yerg. 472. **Vt.**—State v. Wilkins, 17 Vt. 151), (2) but to plead over as a matter of right was limited to felony cases. **Conn.**—Wickwire v. State, 19 Conn. 477. **Mass.**—Evans v. Com., 3 Mete. 453. **Tenn.**—State v. Shaw, 8 Humph. 32. **Eng.**—King v. Taylor, 3 Barn. & C. 502, 513, 107 Eng. Reprint 820, 824.

[c] **Granting of Permission To Plead by Appellate Court.**—On demurrer, the trial court may permit defendant to plead over, but this permission cannot be granted by a court of review, on writ of error. People v. Raymond, 3 Denio (N. Y.) 91, 98.

76. Ariz.—Penal Code, 1913, §987. **Ark.**—Dig. St., 1904, §2292; McCuen v. State, 19 Ark. 630. **Cal.**—Penal Code, §1011. **Ia.**—Code, 1897, §5332. **Me.**—State v. Cole, 112 Me. 56, 90 Atl. 709. **Porto Rico.**—Code Crim. Proc., 1902,

§160. **S. D.**—Code Crim. Proc., 1910, §279. **Utah.**—Comp. Laws, 1907, §4786. **Wash.**—Rem. & Ball. Code Proc., 1910, §2107; State v. Harding, 20 Wash. 556, 56 Pac. 399, 929; State v. Straub, 16 Wash. 111, 47 Pac. 227.

[a] The defendant must be given an opportunity to plead and he must in fact decline to plead after overruling his demurrer, before judgment can be rendered against him. People v. Monaghan, 102 Cal. 229, 36 Pac. 511.

77. Ark. Dig. St., 1904, §2292; Rem. & Ball. Code Proc. (Wash.), 1910, §2107.

78. Jones v. State, 92 Ga. 480, 17 S. E. 859; **Roberts v. State**, 92 Ga. 451, 17 S. E. 262; **Palmer v. State**, 91 Ga. 164, 16 S. E. 976; **Robson v. State**, 83 Ga. 166, 9 S. E. 610; **Flemister v. State**, 81 Ga. 768, 7 S. E. 642.

79. Cal.—People v. Hall, 45 Cal. 253; **People v. Ah Fong**, 12 Cal. 424. **D. C.** *In re* Petition of Howgate, 5 App. Cas. 75, unless perhaps where the circumstances are peculiar and of a nature of great public interest. **Ia.**—State v. Doty, 109 Iowa 453, 80 N. W. 505; **State v. Swearingen**, 43 Iowa 336. **Kan.**—State v. Horneman, 16 Kan. 453. **Md.**—Ridgely v. State, 75 Md. 510, 23 Atl. 1099; **Neff v. State**, 57 Md. 385; **Forwood v. State**, 49 Md. 538. **Mass.** *Com. v. Paulus*, 11 Gray 305; *Com. v. Sallen*, 11 Gray 52. **Mo.**—State v. Mullix, 53 Mo. 355. **N. C.**—State v. Polk, 91 N. C. 653.

See 2 STANDARD PROC. 174; 6 STANDARD PROC. 1016. But see **Brown v. State**, 116 Ga. 559, 42 S. E. 795 (judgment on demurrer may be subject of exceptions pendente lite); **Banks v. State**, 114 Ga. 115, 39 S. E. 947; **Com. v. Dunleay**, 157 Mass. 386, 32 N. E. 356; **Com. v. McCormack**, 126 Mass. 258.

80. Ariz.—Territory v. Monroe, 10 Ariz. 53, 85 Pac. 651. **Cal.**—People v. Turner, 39 Cal. 370. **D. C.**—*In re* Petition of Howgate, 5 App. Cas. 74. **Md.**—Ridgely v. State, 75 Md. 510, 23

The state may appeal from an order sustaining a demurrer to an indictment or information,⁸¹ and this right is not affected by a direction of the court submitting the cause to another grand jury,⁸² but the appeal cannot be allowed if after sustaining a demurrer to one or more counts, one good count remains.⁸³

C. PLEAS.—The procedure with reference to pleas which may be interposed to an indictment, information or complaint, is treated elsewhere in this work.⁸⁴

D. MOTION TO STRIKE OUT.—It has been said that where an indictment or information contains surplus statements or averments, they may be stricken out on motion⁸⁵ or disregarded.⁸⁶

E. MOTION TO COMPEL AN ELECTION.—This method of objection is elsewhere treated in this article.⁸⁷

F. OBJECTION TO INTRODUCTION OF EVIDENCE.—An objection by the defendant to the introduction of any evidence is not ordinarily a proper method of attacking an indictment or information.⁸⁸ This

Atl. 1099 (can only be brought up on writ of error after judgment); *Richardson v. State*, 66 Md. 205, 7 Atl. 43; *Neff v. State*, 57 Md. 385; *Forwood v. State*, 49 Md. 538; *Kearney v. State*, 46 Md. 422. N. C.—*State v. Polk*, 91 N. C. 652.

See 6 STANDARD PROC. 1016. But see *McDaniel v. Com.*, 6 Bush (Ky.) 326; *Marston v. Com.*, 18 B. Mon. (Ky.) 485.

[a] Where a demurrer was based upon two grounds, and the court sustained it on one ground but not on the other, and ordered that the indictment and all the proceedings under it be dismissed, the defendant could not maintain an appeal from the judgment of the court in overruling the demurrer on the one ground. *State v. Hoffman*, 67 Iowa 281, 25 N. W. 233.

[b] Error cannot be predicated (1) upon the overruling of a demurrer to a count in an information, where a nolle prosequi is subsequently entered to such count (*Bartley v. State*, 53 Neb. 310, 73 N. W. 744), (2) or where the substantial rights of accused have not been prejudiced. *Hedderly v. United States*, 193 Fed. 561, 114 C. C. A. 227.

[c] The appellate court is not bound by the reasons given by the trial court, but may determine for itself whether the indictment is bad. *Com. v. Cain*, 14 Bush (Ky.) 525.

81. Cal.—*People v. Lee*, 107 Cal. 477, 40 Pac. 754. Md.—*State v. Hodges*, 55 Md. 127. Mo.—Rev. St., 1909, §5305;

State v. Burgdoerfer, 107 Mo. 1, 17 S. W. 646, 14 L. R. A. 851; *State v. Ashcraft*, 95 Mo. 348, 8 S. W. 216; *State v. Stegman*, 90 Mo. 486, 2 S. W. 798; *State v. Bollinger*, 69 Mo. 577. Ore.—*State v. Brown*, 5 Ore. 119.

Right of state to appeal generally, see the titles "Review;" "States and Territories." From order on motion to quash, see *supra*, XIV, A, 12.

82. *People v. Lee*, 107 Cal. 477, 40 Pac. 754.

83. *State v. Stegman*, 90 Mo. 486, 2 S. W. 798.

84. See the titles "Abatement, Pleas of;" "Arraignment and Plea;" "Jeopardy;" "Pleas."

85. *State v. Kendall*, 38 Neb. 817, 821, 57 N. W. 525; *Thornton v. Com.*, 113 Va. 736, 73 S. E. 481.

86. *Gallaher v. State*, 101 Ind. 411, the court saying: "There is no necessity for such a motion. If the matter objected to is mere surplusage it does no harm; if it is material it makes the indictment double, and for that vice the remedy is a motion to quash."

Instructing jury to disregard surplus allegations, see *infra*, XV, G.

87. See *infra*, XVI.

88. U. S.—*Morris v. United States*, 161 Fed. 672, 88 C. C. A. 532; *Nurnberger v. United States*, 156 Fed. 721, 84 C. C. A. 377. Fla.—*Mills v. State*, 58 Fla. 74, 51 So. 278. Kan.—*State v. Pryor*, 53 Kan. 657, 37 Pac. 169; *State v. Ashe*, 44 Kan. 84, 24 Pac. 72; *State v. Jessup*, 42 Kan. 422, 22 Pac. 627; *Rice v. State*, 3 Kan. 135, 141.

mode of objecting may be employed, however, where the objection goes to the jurisdiction of the court,⁸⁰ or, in some case, where it goes to the character of the evidence which should be admitted.⁹⁰

G. INSTRUCTIONS AND MOTIONS TO DIRECT VERDICT.—INSTRUCTIONS DURING TRIAL.—Although rarely done, it has been held that the objection to an indictment may be raised by instructions during the trial.⁹¹ A defect in an indictment cannot be taken advantage of by directing the jury to find a verdict of not guilty.⁹²

Minn.—*State v. Henn*, 39 Minn. 464, 40 N. W. 564. Mo.—*State v. Meyers*, 99 Mo. 107, 12 S. W. 516; *State v. Risley*, 72 Mo. 609; *State v. Raymond*, 86 Mo. App. 537. Okla.—*Wilsford v. State*, 8 Okla. Crim. 535, 129 Pac. 80; *McDaniel v. State*, 8 Okla. Crim. 209, 127 Pac. 358; *Edwards v. State*, 5 Okla. Crim. 20, 113 Pac. 214; *Heacock v. State*, 4 Okla. Crim. 606, 112 Pac. 949; *White v. State*, 4 Okla. Crim. 143, 111 Pac. 1010. *Compare Gourley v. State*, 8 Okla. Crim. 598, 129 Pac. 684. Wash.—*State v. McBride*, 72 Wash. 390, 130 Pac. 486.

89. In *State v. Mjelde*, 29 Mont. 490, 75 Pac. 87, it was held that an objection to the introduction is a proper method of raising the objection of duplicity where such objection is addressed to the jurisdiction of the court rather than to the form of the accusation, as, for example, where an information for grand larceny is objected to on the ground that it joins several distinct offenses, each of which alone would constitute petit larceny.

90. Where the offense is charged to have been committed upon a day later than the date of the complaint, objection may be taken to evidence of an offense committed after the filing of the complaint. *State v. Ryan*, 68 Conn. 512, 37 Atl. 377; *State v. Wolfarth*, 42 Conn. 155.

[a] Where certain property alleged to have been stolen has been properly described and other portions improperly described the proper procedure is to object to any evidence concerning the property improperly described. *Shafer v. State*, 74 Ind. 90.

[b] Where the indictment contains a surplus statement or averment, the objection may be raised by a motion to exclude testimony in support of such an averment. *Thornton v. Com.*, 113 Va. 736, 73 S. E. 481.

91. In *United States v. Gooding*, 12 Wheat. (U. S.) 460, 6 L. ed. 693, the

court says: "Undoubtedly, according to the regular course of practice, objections to the form and sufficiency of an indictment ought to be discussed upon a motion to quash the indictment, which may be granted or refused in the discretion of the court, or upon demurrers to the indictment, or upon a motion in arrest of judgment, which are matters of right. The defendant has no right to insist that such objections should be discussed or decided during the trial of the facts by the jury. It would be very inconvenient and embarrassing to allow a discussion of such topics during the progress of the cause before the jury, and introduce much confusion into the administration of public justice. But, we think, it is not wholly incompetent for the court to entertain such questions during the trial in the exercise of a sound discretion. It should, however, be rarely done, and only under circumstances of an extraordinary nature."

[a] **Surplus Averments Reached by Instruction to Jury.**—One of the methods by which surplus statements or averments in an indictment may be reached is by requesting an instruction to the jury to disregard the averment and all evidence in support of it. *Thornton v. Com.*, 113 Va. 736, 73 S. E. 481.

92. *Wood v. State*, 46 Ga. 322; *State v. Beach*, 147 Ind. 74, 43 N. E. 946, 46 N. E. 145, 36 L. R. A. 179.

[a] In *Cohen v. State*, 7 Ga. App. 5, 65 S. E. 1096, the defendant made a futile attempt in this manner to raise the objection that the statute upon which the accusation was founded was unconstitutional.

[b] **Motion To Direct a Verdict.**—A motion to direct a verdict in a state case cannot be made to take the place of a motion to quash, or used to test the sufficiency of an indictment. *State v. Cameron*, 176 Ind. 385, 96 N. E.

II. **MOTIONS FOR NEW TRIAL.**—A motion for a new trial presupposes a valid indictment and it cannot be properly based upon any objection to the sufficiency or validity of the indictment or errors in the proceedings upon the indictment prior to an issue of fact joined by plea to the indictment.⁹³

I. **MOTION IN ARREST OF JUDGMENT.**—The treatment of matters relative to motions in arrest of judgment will be found elsewhere.⁹⁴

J. **BILL OF PARTICULARS.**—In some jurisdictions it has been held that where the indictment is so vague, indefinite or indistinct as to mislead the accused and embarrass him in the preparation of his defense, the defendant may protect himself against defects in the form of the indictment by demanding a bill of particulars of the matters omitted.⁹⁵

K. **HABEAS CORPUS.**—Since the writ of habeas corpus will not issue unless the indictment is so defective that the proceedings are void, or the court under whose warrant the petitioner is held is without jurisdiction, and cannot be used merely to correct errors, it follows that neither the sufficiency of the information or indictment nor the sufficiency of the evidence before the grand jury can be attacked by a petition for a writ of habeas corpus.⁹⁶

XV. **WAIVER.**—A. **IN GENERAL.**—1. **By Failure To Make Timely Objection.**—The general rule is that where an objection is not made at the time prescribed by law, the ground of objection is waived.⁹⁷ The rule that objections not made in the lower court will

150; *State v. Beach*, 147 Ind. 74, 43 N. E. 949, 46 N. E. 145, 36 L. R. A. 179.

[c] **Treated as a demurrer in State v. Sherman**, 71 Ark. 349, 74 S. W. 293.

93. **Cal.**—*People v. Turner*, 39 Cal. 370. **Ga.**—*Scandrett v. State*, 124 Ga. 141, 52 S. E. 160; *Moses v. State*, 123 Ga. 504, 51 S. E. 503; *Rucker v. State*, 114 Ga. 13, 39 S. E. 902; *Boswell v. State*, 114 Ga. 40, 39 S. E. 897; *Eaves v. State*, 113 Ga. 749, 39 S. E. 313; *Womble v. State*, 107 Ga. 666, 33 S. E. 630; *Davis v. State*, 93 Ga. 45, 18 S. E. 998; *Hunter v. State*, 7 Ga. App. 668, 67 S. E. 894. **Ill.**—*Marsh v. People*, 226 Ill. 464, 80 N. E. 1006; *Stone v. People*, 3 Ill. 326. **Ind.**—*Simons v. State*, 25 Ind. 331.

94. See the title "Arrest of Judgment," 2 STANDARD PROC. 979.

95. *Mills v. State*, 58 Fla. 73, 51 So. 278; *State v. Shade*, 145 N. C. 757, 20 S. E. 537; *State v. Dunn*, 109 N. C. 829, 13 S. E. 881. See 4 STANDARD PROC. 386.

[a] **In a Prosecution for Bigamy.** If the defendant wishes for fuller in-

formation in regard to matters not named in the statute as ingredients of the offense of bigamy, and therefore not required to be charged, so as to prepare his defense, such as the times and places of the marriages, he should ask for a bill of particulars. *State v. Long*, 143 N. C. 670, 57 S. E. 349.

96. **U. S.**—*In re Gregory*, 219 U. S. 210, 31 Sup. Ct. 143, 55 L. ed. 184; *Riggins v. United States*, 199 U. S. 547, 26 Sup. Ct. 147, 50 L. ed. 303; *Harkrader v. Wadley*, 172 U. S. 148, 19 Sup. Ct. 119, 43 L. ed. 399; *In re Lancaster*, 137 U. S. 393, 11 Sup. Ct. 117, 34 L. ed. 713. **N. Y.**—*People v. McLeod*, 1 Hill 377, 25 Wend. 483, 37 Am. Dec. 183; *People v. Warden of City Prison*, 150 App. Div. 644, 135 N. Y. Supp. 883. **Ohio.**—*Ex parte Bushnell*, 9 Ohio St. 77; *Ex parte McKnight*, 3 Ohio N. P. 255, 4 Ohio Dec. 284.

See generally the title "Habeas Corpus," and 10 STANDARD PROC. 940, 944.

97. See the discussion following and the title "Waiver." See also *supra*, under XIV, the sections dealing with

not be considered when made for the first time on appeal⁹⁸ is applicable to objections to defects in an indictment or information,⁹⁹ and ordinarily the right to make such objections is waived if they are not made until the cause has been submitted to the jury.¹

2. Limitations on Rule.—But the failure to make objection at some particular stage of the proceedings is not a waiver of the right to object on the ground that the indictment fails to charge an offense or that the court had no jurisdiction,² or that the grand jury which

the time for making particular objections.

98. See 2 STANDARD PROC. 233.

99. **Ala.**—*Roe v. State*, 82 Ala. 68, 3 So. 2; *Floyd v. State*, 30 Ala. 511; *Shaw v. State*, 18 Ala. 547. **Fla.**—*Westcott v. State*, 31 Fla. 458, 467, 12 So. 846; *Gallaher v. State*, 17 Fla. 370, 380; *Bass v. State*, 17 Fla. 685. See *Frances v. State*, 6 Fla. 306, 313. **Ind.**—*Stoner v. State*, 80 Ind. 89; *Mayer v. State*, 48 Ind. 122. **Mass.**—*Com. v. Lynn*, 154 Mass. 405, 28 N. E. 289; *Com. v. Flannigan*, 137 Mass. 560; *Com. v. Peto*, 136 Mass. 155; *Com. v. Doherty*, 116 Mass. 13; *Com. v. Blanchard*, 105 Mass. 173. **Mich.**—*People v. Smith*, 94 Mich. 644, 51 N. W. 487; *People v. Heffron*, 53 Mich. 527, 19 N. W. 170. **Mo.**—*State v. Blakely*, 184 Mo. 187, 83 S. W. 980; *State v. Meinhardt*, 73 Mo. 562; *State v. Sharpe*, 119 Mo. App. 386, 95 S. W. 298; *State v. Runzi*, 105 Mo. App. 319, 80 S. W. 36. **Nev.**—*State v. O'Flaherty*, 7 Nev. 153. **N. J.**—*State v. Sharkey*, 73 N. J. L. 491, 63 Atl. 866; *Larison v. State*, 49 N. J. L. 256, 9 Atl. 700, 60 Am. St. Rep. 606. **Ohio.**—*Bartlett v. State*, 28 Ohio St. 669; *Young v. State*, 23 Ohio St. 578. **Okla.**—*Shivers v. Territory*, 13 Okla. 466, 74 Pac. 899. **Porto Rico.**—*People v. Apente*, 9 Porto Rico 345; *People v. Acosta*, 8 Porto Rico 557. **Tex.**—*Rowlett v. State*, 23 Tex. App. 191, 4 S. W. 582.

1. **Colo.**—*Curl v. People*, 53 Colo. 578, 127 Pac. 951. **D. C.**—*Lehman v. District of Columbia*, 19 App. Cas. 217, objection to sufficiency of one count, where other is good. **Ind.**—*Woodworth v. State*, 115 Ind. 276, 43 N. E. 933. **Ia.**—See *State v. Stutches*, 144 N. W. 597; *State v. Gulliver*, 142 N. W. 948. **Mich.**—See *People v. Davis*, 171 Mich. 211, 137 N. W. 61. **Mo.**—*State v. Mann*, 83 Mo. 589; *State v. Smallwood*, 68 Mo. 192. **N. J.**—See *State v. Gedicke*, 43 N. J. L. 86; *Noyes v. State*, 41 N.

J. L. 418. **Okla.**—See *White v. State*, 4 Okla. Crim. 143, 111 Pac. 1010. **Tenn.**—*State v. Willis*, 3 Head 157, objection on ground clerk failed to enter fact of return where indictment is indorsed "true bill." **Tex.**—*Green v. State* (Tex. Crim.), 147 S. W. 593.

2. **Cal.**—Penal Code, §1012; *People v. Webber*, 133 Cal. 623, 66 Pac. 38; *People v. Bryon*, 103 Cal. 675, 37 Pac. 754; *People v. Smith*, 103 Cal. 563, 37 Pac. 516; *People v. Ross*, 103 Cal. 425, 37 Pac. 379; *People v. Nelson*, 58 Cal. 104, 107; *People v. Grinnell*, 9 Cal. App. 238, 98 Pac. 681. **Ill.**—*Klawanski v. People*, 218 Ill. 481, 75 N. E. 1028; *People v. Weiss*, 168 Ill. App. 502. **Ind.**—*Robinson v. State*, 177 Ind. 263, 97 N. E. 929. **Ia.**—*State v. Daniels*, 90 Iowa 491, 58 N. W. 891. **Ky.**—*Stroud v. Com.*, 14 Ky. L. Rep. 179, 19 S. W. 976. **Mass.**—*Com. v. Northampton*, 2 Mass. 116. **Mo.**—*State v. Gregory*, 178 Mo. 48, 76 S. W. 970; *State v. Ulrich*, 96 Mo. App. 689, 70 S. W. 933. **Mont.**—*State v. Tudor*, 47 Mont. 185, 131 Pac. 632; *State v. Gordon*, 35 Mont. 458, 90 Pac. 173. **Nev.**—*Ex parte Dickson*, 36 Nev. 94, 133 Pac. 393; *State v. Trolson*, 21 Nev. 419, 32 Pac. 930; *State v. Derst*, 10 Nev. 443. **N. M.**—*Territory v. Church*, 14 N. M. 226, 91 Pac. 720. **N. Y.**—*People v. Payne*, 71 Misc. 72, 129 N. Y. Supp. 1007, 25 N. Y. Crim. 511; *People v. Bell*, 148 N. Y. Supp. 753; *People v. Valentine*, 147 App. Div. 31, 131 N. Y. Supp. 733. **Okla.**—*Rhea v. United States*, 6 Okla. 249, 50 Pac. 992. **Ore.**—*State v. Martin*, 54 Ore. 403, 100 Pac. 1106, 103 Pac. 512; *State v. Mack*, 20 Ore. 234, 25 Pac. 639; *State v. Doty*, 5 Ore. 491; *State v. Bruce*, 5 Ore. 68, 20 Am. Rep. 734. **S. C.**—*State v. Means*, 80 S. C. 401, 61 S. E. 898. **S. D.**—*State v. Julius*, 29 S. D. 638, 137 N. W. 590. **Tex.**—*Jasper v. State* (Tex. Crim.), 164 S. W. 851. **Wyo.**—*McGinnis v. State*, 16 Wyo. 72, 91 Pac. 936.

found the indictment was without jurisdiction to act.³

B. WAIVER OF PARTICULAR GROUNDS OF OBJECTION. — 1. By Pleading to the Merits. — a. Generally. — By entering a plea of not guilty a defendant waives his right to demur;⁴ or make a motion to quash or set aside⁵ or plead in abatement.⁶

Where the cause on appeal is remanded for a new trial it is ordinarily too late to move to quash the indictment.⁷

In Case of Joinder. — The foregoing general rules as to waiver would, of course, have no application where there was a proper joinder of a plea with a demurrer or motion.⁸

b. Admission of Genuineness. — The general rule is that the defendant by pleading and going to trial on an information or indictment admits its genuineness as a record.⁹

c. Objections as to Preliminary Examination or Commitment. — By failing, before pleading to the merits, to raise the objection that he had no preliminary hearing,¹⁰ or that the law had not been complied

[a] Where the accused is prosecuted for a third offense, the objection that the information did not charge the offense as a third offense and did not state whether there had been a conviction for the prior offenses may be raised after pleading to the information. *People v. Buck*, 109 Mich. 687, 67 N. W. 982.

[b] **Locus of Offense Not Stated.** An objection that the information does not show the offense to have been committed in a county within the state, nor within the state, is in the nature of an objection that the court has no jurisdiction and also that the facts stated do not constitute a public offense under the laws of the state and is not waived by failure to demur. *People v. Webber*, 133 Cal. 623, 66 Pac. 38.

3. *People v. Gray*, 261 Ill. 140, 103 N. E. 552, 49 L. R. A. (N. S.) 1215.

4. *Oakley v. State*, 135 Ala. 15, 33 So. 23; *State v. Earll*, 225 Mo. 537, 125 S. W. 467. See the title "Pleas."

5. *Oakley v. State*, 135 Ala. 15, 33 So. 23; *Davis v. State*, 131 Ala. 10, 31 So. 569. See *Ex parte Moon*, 65 Cal. 216, 3 Pac. 644.

6. *Davis v. State*, 131 Ala. 10, 31 So. 569; *Sunday v. State*, 14 Mo. 417. See 1 STANDARD PROC. 57.

7. *State v. Robertson*, 50 La. Ann. 1101, 24 So. 138, he would have to present a very strong exceptional case, to warrant a departure from this rule. Compare *Cox v. State*, 7 Tex. App. 495, where defendant on new trial being

awarded was allowed to move to quash on the ground the record failed to show due presentment of the indictment, although no previous mention of the defect was made.

8. See 2 STANDARD PROC. 883.

9. **U. S.**—*Frishie v. United States*, 157 U. S. 160, 15 Sup. Ct. 586, 39 L. ed. 657. **Ala.**—*Ex parte Winston*, 52 Ala. 419; *Horton v. State*, 47 Ala. 58; *Russell v. State*, 33 Ala. 366; *State v. Clarkson*, 3 Ala. 373. **Ill.**—*Gitchell v. People*, 146 Ill. 175, 33 N. E. 757, 37 Am. St. Rep. 147; *People v. Armond*, 172 Ill. App. 489; *People v. England*, 170 Ill. App. 587. **La.**—*State v. Anderson*, 45 La. Ann. 651, 12 So. 737. **Minn.**—*State v. Schumm*, 47 Minn. 373, 50 N. W. 362; *State v. Dick*, 47 Minn. 375, 50 N. W. 362. **Mo.**—*State v. Randolph*, 139 Mo. App. 311, 123 S. W. 60. **N. H.**—*State v. Rand*, 33 N. H. 216. **Tex.**—*Hardy v. State*, 1 Tex. App. 556.

[a] Where the defendant neither demurs to the indictment nor moves to quash it, but voluntarily goes to trial upon the merits of the case, the supreme court will not consider an assignment of error in a bill of exceptions sued out in such case, alleging that the trial court "should have ruled that the accused was not indictable at all for the offense charged in the indictment." *Southern Express Co. v. State*, 114 Ga. 226, 39 S. E. 899.

10. **Cal.**—*People v. Bowden*, 90 Cal. 195, 27 Pac. 204; *Ex parte McConnell*, 83 Cal. 558, 23 Pac. 1119. **Colo.**—*Laf-*

with in his arrest and preliminary examination,¹¹ the accused waived such grounds of objection.

d. *Objections to Selection and Organization of Grand Jury.*—And by pleading to the merits he waives any objection which he might have made at the time of his arraignment, either as to an irregularity in the summoning, impaneling, or qualifications of the grand jurors,¹² or to

fey v. People, 55 Colo. 575, 136 Pac. 1031. **Mich.**—People v. Jones, 24 Mich. 215. **Neb.**—Ingraham v. State, 82 Neb. 523, 118 N. W. 320; Reed v. State, 66 Neb. 184, 92 N. W. 321; Coffield v. State, 44 Neb. 417, 62 N. W. 875; Hodgkins v. State, 36 Neb. 160, 54 N. W. 86. **N. H.**—State v. Thompson, 20 N. H. 250. **Wyo.**—Nicholson v. State, 18 Wyo. 298, 106 Pac. 929; McGinnis v. State, 16 Wyo. 72, 91 Pac. 936.

[a] **No Legal Commitment by Magistrate.**—If the defendant fails, upon arraignment, to move to set aside the information upon the ground that before the filing thereof he had not been legally committed by a magistrate, he is precluded from afterwards taking the objection. People v. Bawden, 90 Cal. 195, 27 Pac. 204; *Ex parte Moan*, 65 Cal. 216, 3 Pac. 614; People v. Mosler, 8 Cal. App. 372, 97 Pac. 84.

11. **Cal.**—*Ex parte Moan*, 65 Cal. 216, 3 Pac. 614. **Colo.**—Laffey v. People, 55 Colo. 575, 136 Pac. 1031. **Idaho.**—State v. Collins, 4 Idaho 184, 38 Pac. 28; State v. Clark, 4 Idaho 7, 35 Pac. 730.

12. **Ark.**—Miller v. State, 40 Ark. 45; Dixon v. State, 29 Ark. 165; Stansham v. State, 16 Ark. 37; Fenwick v. State, 12 Ark. 630. See also *Ex parte* v. State, 13 Ark. 720, 744. **Cal.**—People v. Stacey, 24 Cal. 307; People v. Henderson, 28 Cal. 466. **Conn.**—Smith v. State, 19 Conn. 493. **Ill.**—People v. Gray, 261 Ill. 140, 103 N. E. 552, 49 Ill. R. A. (N. E.) 1215; People v. Hall, 259 Ill. 592, 102 N. E. 1080; People v. McConley, 256 Ill. 544, 100 N. E. 142; Marsh v. People, 226 Ill. 404, 80 N. E. 1096; Berkenfeld v. People, 191 Ill. 572, 61 N. E. 93; Hagenow v. People, 185 Ill. 515, 59 N. E. 242.

Ind.—Camp v. State, 120 Ind. 377, 22 N. E. 770. **Iowa.**—State v. Belvid, 89 Iowa 505, 60 N. W. 545; State v. Gibbs, 39 Iowa 284. **Ky.**—State v. Harris, 38 Iowa 513. **Mo.**—Mortenson v. State, 3 Mo. 567, 222. **Ky.**—Hagerd v. Com., 70 Ky. 222; Com. v. Pritchett, 11 Bush 277; Com. v. Smith, 10 Bush 476.

La.—State v. Owens, 130 La. 746, 58 So. 557; State v. Wyatt, 50 La. Ann. 1301, 24 So. 335; State v. Brittin, 50 La. Ann. 261, 23 So. 301; State v. Griffin, 38 La. Ann. 502; State v. McGee, 36 La. Ann. 206; State v. Shay, 30 La. Ann. 114. **Me.**—State v. Carver, 49 Me. 588, 77 Am. Dec. 275. **Md.**—Cooper v. State, 64 Md. 40, 20 Atl. 936. **Minn.**—State v. Greenman, 23 Minn. 209; State v. Thomas, 19 Minn. 418, 18 Am. Rep. 345. **Miss.**—Logan v. State, 50 Miss. 269. See Nichols v. State, 46 Miss. 284, no objections to grand jury can be made after it is impaneled. **Mo.**—State v. Sartino, 216 Mo. 408, 115 S. W. 1015; State v. Miller, 191 Mo. 587, 90 S. W. 767. **Neb.**—Goldsberry v. State, 92 Neb. 211, 137 N. W. 1116. **N. M.**—Territory v. Armijo, 7 N. M. 571, 37 Pac. 1117; Territory v. Romero, 2 N. M. 474. **N. Y.**—People v. Farmer, 194 N. Y. 251, 87 N. E. 457. **N. C.**—State v. Banner, 149 N. C. 519, 63 S. E. 84; State v. Gardner, 104 N. C. 739, 10 S. E. 146; State v. Martin, 24 N. C. 101. **Okla.**—Coward v. State, 4 Okla. Crim. 122, 111 Pac. 672. **R. I.**—State v. Maloney, 12 R. I. 251. **Tenn.**—Ransom v. State, 116 Tenn. 355, 96 S. W. 953; McTigue v. State, 4 Baxt. 313. **Tex.**—King v. State (Tex. Crim.), 100 S. W. 387; Grant v. State, 2 Tex. App. 163. **Wis.**—Byrme v. State, 12 Wis. 519.

[a] **Reason for the Rule.**—In State v. Collyer, 17 Nev. 275, 30 Pac. 891, the court says: "A party ought not to be permitted, after taking his chances of a trial, to take advantage of any irregularity in the selection of a grand jury, of which he had knowledge before his plea of not guilty was entered. By pleading to the indictment it will be considered that he consented to the irregularity, and thereby waived his right to make any objection to the method of selecting or impaneling the jury."

[b] **Even though an unconstitutional law, or one assumed to be unconstitutional, has been followed in making**

the organization of the grand jury,¹³ but the rule is not applicable where the whole proceeding of forming the panel is void, as where the jury is not a jury of the court or term in which the indictment is found;¹⁴ or where the jury has been selected by persons having no authority whatever to select them;¹⁵ or where they have not been sworn.¹⁶

c. *Irregularities in Proceedings of Grand Jury.*—Any mere irregularities in the proceedings of the grand jury will be waived by pleading to the merits.¹⁷

f. *Insufficiency as to Matters of Form.*—(I.) *In General.*—If the accused wishes to take advantage of any defects or imperfections as to matters of the form of the indictment or information which do not tend to prejudice his substantial rights, he must do so before pleading to the merits, or such defects are deemed to have been waived.¹⁸

the panel. *United States v. Gale*, 109 U. S. 65, 3 Sup. Ct. 1, 27 L. ed. 857.

13. *State v. Herbert*, 50 La. Ann. 401, 23 So. 300; *State v. Dartez*, 50 La. Ann. 322, 23 So. 334; *State v. Vincent*, 91 Md. 718, 47 Atl. 1036, 52 L. R. A. 83.

[a] The objection that the minutes do not affirmatively show that the foreman of the grand jury was duly appointed and sworn comes too late after the jury is sworn. *State v. Owens*, 130 La. 746, 58 So. 557.

14. *United States v. Gale*, 109 U. S. 65, 3 Sup. Ct. 1, 27 L. ed. 857.

15. *United States v. Gale*, 109 U. S. 65, 3 Sup. Ct. 1, 27 L. ed. 857; *Rodriguez v. United States*, 198 U. S. 156, 25 Sup. Ct. 617, 49 L. ed. 994.

16. *United States v. Gale*, 109 U. S. 65, 3 Sup. Ct. 1, 27 L. ed. 857; *People v. Gray*, 261 Ill. 140, 103 N. E. 552, 49 L. R. A. (N. S.) 1215.

But in Mississippi under the Code of 1906, §1413, it is held that an objection to an indictment based on the ground that the grand jury was not sworn is not well taken, when first raised after conviction on motion in arrest of judgment. *Hays v. State*, 96 Miss. 153, 50 So. 557. Compare *Hardy v. State*, 96 Miss. 844, 51 So. 460, where motion to quash was made without objection.

17. Ark.—*Latourette v. State*, 91 Ark. 65, 120 S. W. 411 (failure to receive legal evidence); *Hamilton v. State*, 62 Ark. 543, 36 S. W. 1054. Ga.—*Nixon v. State*, 121 Ga. 144, 48 S. E. 966. Ill.—*People v. Strauch*, 247 Ill. 220, 93 N. E. 126, presence of an unauthorized person in grand jury

room during the deliberations. *Nev. Nevada v. Harris*, 12 Nev. 414, deputy district attorney in jury room during examination of charge. Okla.—*Oligschlager v. Territory*, 15 Okla. 141, 79 Pac. 913.

[a] **Lack of Knowledge by Accused.**—No exception to this rule arises upon proof that an indictment was found upon insufficient evidence and that the accused did not know, and had no means of ascertaining this fact until after the trial. *Latourette v. State*, 91 Ark. 65, 120 S. W. 411.

[b] **The objection that a sufficient number of grand jurors did not assent to the indictment is waived by going to trial without raising the objection.** *Ex parte Harlan*, 180 Fed. 119.

18. U. S.—*Tyomies Pub. Co. v. United States*, 211 Fed. 385, 128 C. C. A. 47; *Nemcof v. United States*, 202 Fed. 911, 121 C. C. A. 269; *United States v. Bayaud*, 16 Fed. 376. Ala.—*Gaines v. State*, 146 Ala. 16, 41 So. 865; *Oakley v. State*, 135 Ala. 15, 33 So. 23; *Davis v. State*, 131 Ala. 10, 31 So. 569. Colo.—*Laffey v. People*, 55 Colo. 575, 136 Pac. 1031; *Curl v. People*, 53 Colo. 578, 127 Pac. 951, 1914B, Ann. Cas. 171; *Poole v. People*, 24 Colo. 510, 52 Pac. 1025, 65 Am. St. Rep. 245. Conn.—*State v. McGee*, 80 Conn. 614, 69 Atl. 1059. Fla.—*Mills v. State*, 58 Fla. 74, 51 So. 278, 460; *Bryan v. State*, 41 Fla. 643, 26 So. 1022. Ga.—*Nixon v. State*, 121 Ga. 144, 48 S. E. 966; *Phillips v. State*, 86 Ga. 427, 12 S. E. 650 (failure to allege day or month when illegal sale of liquor took place); *Hill v. State*, 41 Ga. 484; *Draper v. State*, 6 Ga. App. 12, 64 S. E. 117;

(II.) **Misnomer.**—By the plea of not guilty, the accused admits that the name by which he is indicted is his true name, and waives the objection of misnomer.¹⁹

- Badger v. State*, 5 Ga. App. 477, 63 S. E. 532; *Lamier v. State*, 5 Ga. App. 472, 63 S. E. 536; *Newsome v. State*, 2 Ga. App. 392, 58 S. E. 672. **Idaho.**—*People v. Stapleton*, 2 Idaho 47, 3 Pac. 6; *People v. Butler*, 1 Idaho 231, indictment not signed by proper officer. **Ill.**—*People v. Krueger*, 237 Ill. 357, 86 N. E. 617; *Johnson v. People*, 22 Ill. 314; *Conolly v. State*, 4 Ill. 474; *People v. Conboy*, 178 Ill. App. 90; *People v. Boyd*, 170 Ill. App. 481; *Krueger v. People*, 141 Ill. App. 510. **Ind.**—*Sturm v. State*, 74 Ind. 278, use of "alliant" instead of "prosecuting attorney." **Kan.**—*State v. Falk*, 46 Kan. 498, 26 Pac. 1023, information not supported by the oath or affirmation of any one. **La.**—*State v. Maloney*, 115 La. 498, 39 So. 539. **Md.**—*Maguire v. State*, 47 Md. 485; *State v. Reed*, 12 Md. 263. **Mass.**—*Sturtevant v. Com.*, 158 Mass. 598, 33 N. E. 648; *Com. v. Schaffner*, 146 Mass. 512, 16 N. E. 280; *Com. v. Butler*, 1 Allen 4; *Com. v. Lewis*, 1 Mete. 151; *Com. v. Inhab. of Dedham*, 16 Mass. 141. **Minn.**—*State v. Bell*, 26 Minn. 388, 5 N. W. 970. **Miss.**—*Josephine v. State*, 39 Miss. 613; *George v. State*, 39 Miss. 570. **Mo.**—*State v. Calvert*, 209 Mo. 280, 107 S. W. 1078; *State v. Fox*, 148 Mo. 517, 50 S. W. 98. **Mont.**—*State v. Pemberton*, 39 Mont. 530, 104 Pac. 556; *State v. Gordon*, 35 Mont. 458, 90 Pac. 173; *State v. Newman*, 34 Mont. 444, 87 Pac. 462; *State v. Shadwell*, 22 Mont. 559, 57 Pac. 281. **Neb.**—*Goddard v. State*, 73 Neb. 739, 103 N. W. 443. **Nev.**—*State v. Harris*, 12 Nev. 414; *State v. Dorst*, 10 Nev. 443; *State v. O'Flaherty*, 7 Nev. 153. **N. J.**—*State v. Webber*, 76 N. J. L. 199, 68 Atl. 1100, indefiniteness and uncertainty. **N. Y.**—*People v. Valentine*, 147 App. Div. 31, 131 N. Y. Supp. 733; *People ex rel. Dismore v. Keeper of Erie Co. Penitentiary*, 125 App. Div. 137, 109 N. Y. Supp. 531; *People v. Lewis*, 111 App. Div. 558, 20 N. Y. Crim. 48, 98 N. Y. Supp. 83; *People v. Wiechers*, 94 App. Div. 19, 87 N. Y. Supp. 897. **N. D.**—*State v. Rhoades*, 17 N. D. 579, 118 N. W. 233. **Ohio.**—*Smith v. State*, 8 Ohio 295; *Arnsman v. State*, 11 Ohio C. C. (N. S.) 113; *Devere v. State*, 5 Ohio C. C. 509, 3 Ohio C. D. 249. **Okl.**—*Rhea v. United States*, 6 Okla. 249, 50 Pac. 992; *Bethel v. State*, 8 Okla. Crim. 61, 126 Pac. 698. **Ore.**—*State v. Kline*, 50 Ore. 426, 93 Pac. 237; *State v. McElvain*, 35 Ore. 365, 58 Pac. 525; *State v. Hinkle*, 33 Ore. 93, 54 Pac. 155. **Porto Rico.**—*People v. Aponte*, 9 Porto Rico 345. **S. C.**—*State v. Maddox*, 80 S. C. 452, 61 S. E. 964; *State v. Means*, 80 S. C. 401, 61 S. E. 898. **S. D.**—*State v. Julius*, 29 S. D. 638, 137 N. W. 590. **Tenn.**—*Palmer v. State*, 121 Tenn. 465, 118 S. W. 1022. **Tex.**—*Harris v. State*, 47 Tex. Crim. 554, 85 S. W. 12; *Henry v. State*, 38 Tex. Crim. 306, 42 S. W. 559; *Ringo v. State*, 2 Tex. App. 291. **Vt.**—*State v. Louanis*, 79 Vt. 463, 65 Atl. 532. **Wash.**—*State v. Phillips*, 65 Wash. 324, 118 Pac. 43. **Wyo.**—*Patrick v. State*, 17 Wyo. 260, 98 Pac. 588, objection for surplusage; *Koppala v. State*, 15 Wyo. 398, 89 Pac. 576, 93 Pac. 662.
- [a] **Setting Forth Christian Name by Initials Only.**—Objection waived by pleading to the merits. *Jones v. State*, 181 Ala. 63, 61 So. 434.
19. **U. S.**—*Lee v. United States*, 156 Fed. 948, 84 C. C. A. 948. **Ala.**—*Verberg v. State*, 137 Ala. 73, 34 So. 848, 97 Am. St. Rep. 17; *Wells v. State*, 88 Ala. 239, 7 So. 272. See also *Welsh v. State*, 96 Ala. 92, 11 So. 450. **Cal.**—*People v. Phillips*, 12 Cal. App. 760, 108 Pac. 731. **Ind.**—*Bader v. State*, 176 Ind. 268, 94 N. E. 1009; *Uterburgh v. State*, 8 Blackf. 202. **Ia.**—*State v. Winstrand*, 37 Iowa 110, 112; *State v. White*, 32 Iowa 17. **Kan.**—*State v. Falk*, 46 Kan. 498, 26 Pac. 1023. **La.**—*State v. Risso*, 131 La. 946, 60 So. 625. **Mass.**—*Com. v. Darcey*, 12 Allen 539; *Turns v. Com.*, 6 Mete. 224. **Nev.**—*State v. Burns*, 8 Nev. 251. **N. H.**—*State v. McGregor*, 41 N. H. 407; *State v. Thompson*, 20 N. H. 250. **R. I.**—*State v. Drury*, 13 R. I. 540. **Tex.**—*Moreno v. State* (Tex. Crim.), 160 S. W. 361.
- [a] If the defendant enter a plea of *nolo contendere* to an indictment, he is precluded from afterwards moving in arrest of judgment on account of a misnomer. *State v. O'Brien*, 18 R. I. 105, 25 Atl. 910.

(III.) **Duplicity.** — The defendant waives the objection of duplicity if he goes to trial without making a proper objection on that ground.²⁰

(IV.) **Failure To Require Election.** — The objection that the prosecuting attorney has not been compelled to make an election as to which count he would proceed upon is waived by failure to raise it before pleading to the merits.²¹

(V.) **Variance.** — A variance between the information and the warrant as to the offense charged, is waived by pleading to the information without objection.²²

(VI.) **Defective or Omitted Verification to Information.** — An objection upon the ground of a defective verification or a total want of verification, must be made before pleading to the merits or it is deemed to have been waived.²³

20. **U. S.**—*Lemon v. United States*, 164 Fed. 953, 90 C. C. A. 617. **Ark.** *Birones v. State*, 105 Ark. 82, 150 S. W. 416; *Mears v. State*, 84 Ark. 136, 104 S. W. 1095. **Cal.**—*People v. Burgess*, 35 Cal. 115; *People v. Garnett*, 29 Cal. 622; *People v. Shotwell*, 27 Cal. 394; *People v. Chadwick*, 4 Cal. App. 63, 87 Pac. 384; *People v. Driggs*, 12 Cal. App. 240, 108 Pac. 62; *People v. Collins*, 9 Cal. App. 622, 99 Pac. 1109. **Colo.**—*Kingsbury v. People*, 44 Colo. 403, 99 Pac. 61. **Fla.**—*Irvin v. State*, 52 Fla. 51, 41 So. 785. **Idaho.**—*People v. Nash*, 1 Idaho 206. **Ky.**—*Moore v. Com.*, 18 Ky. L. Rep. 129, 35 S. W. 283, objection made after conclusion of testimony for the commonwealth. **La.** *State v. Woods*, 112 La. 617, 36 So. 626. **Minn.**—*State v. Briggs*, 84 Minn. 357, 87 N. W. 935. **Mo.**—*State v. Sherman*, 137 Mo. App. 70, 119 S. W. 479. **Mont.**—*State v. Rodgers*, 40 Mont. 248, 106 Pac. 3; *State v. Mahoney*, 24 Mont. 281, 61 Pac. 647. **Neb.**—*Aiken v. State*, 41 Neb. 263, 59 N. W. 888; *Thompson v. People*, 4 Neb. 524. **N. Y.**—*People v. Upton*, 38 Hun 107. **N. C.**—*State v. Burnett*, 142 N. C. 577, 55 S. E. 72. **Ohio.**—*Arnsman v. State*, 30 Ohio C. C. 445. **Ore.**—*State v. Taylor*, 65 Ore. 266, 132 Pac. 713; *State v. Kline*, 50 Ore. 426, 93 Pac. 237; *State v. Reyner*, 50 Ore. 224, 91 Pac. 301; *State v. Carlson*, 39 Ore. 19, 62 Pac. 1016, 1119; *State v. Lee*, 33 Ore. 506, 56 Pac. 415; *State v. Jarvis*, 18 Ore. 360, 23 Pac. 251. **R. I.**—*State v. Hand Brew. Co.*, 32 R. I. 56, 78 Atl. 499, 505. **S. D.** *State v. Burns*, 25 S. D. 364, 126 N. W. 572. **Tenn.**—*Seruggs v. State*, 7 Baxt. 38. **Tex.**—*Green v. State* (Tex. Crim.), 147 S. W. 593; *Cabiness v. State* (Tex. Crim.), 146 S. W. 934.
21. **Miss.**—*Josephine v. State*, 39 Miss. 613; *George v. State*, 39 Miss. 570. **Mo.**—*State v. Calvert*, 209 Mo. 280, 107 S. W. 1078; *State v. Fox*, 148 Mo. 517, 50 S. W. 98. **Wyo.**—*Nicholson v. State*, 18 Wyo. 298, 106 Pac. 929.
22. *People v. Clark*, 33 Mich. 112.
23. **Colo.**—*Dillulo v. People*, 56 Colo. 339, 138 Pac. 33; *Laffey v. People*, 55 Colo. 575, 136 Pac. 1031; *Bergdahl v. People*, 27 Colo. 302, 61 Pac. 228; *Taylor v. People*, 21 Colo. 426, 42 Pac. 652. **Fla.**—*Bryan v. State*, 41 Fla. 643, 26 So. 1022. **Ill.**—*People v. Perca*, 181 Ill. App. 666. **Kan.**—*State v. Osborn*, 44 Kan. 473, 38 Pac. 572; *State v. Allison*, 44 Kan. 423, 24 Pac. 964; *State v. Blackman*, 32 Kan. 615, 5 Pac. 173; *In re Lewis*, 31 Kan. 71, 1 Pac. 283; *State v. Ruth*, 21 Kan. 583; *State v. Adams*, 20 Kan. 311; *State v. Otey*, 7 Kan. 69. **Mich.**—*People v. Gardner*, 62 Mich. 307, 29 N. W. 19; *People v. Murphy*, 56 Mich. 546, 23 N. W. 215; *Lambert v. People*, 29 Mich. 71. **Mo.** *State v. Green*, 229 Mo. 642, 129 S. W. 700; *State v. Temple*, 194 Mo. 237, 92 S. W. 869, 5 Am. & Eng. Ann. Cas. 954; *State v. Tindall*, 188 Mo. 336, 87 S. W. 451; *State v. Speyer*, 182 Mo. 77, 81 S. W. 430; *State v. Brown*, 181 Mo. 192, 79 S. W. 1111; *State v. Brown*, 163 Mo. App. 30, 145 S. W. 1180. **Mont.**—*State v. McCaffery*, 16 Mont. 33, 40 Pac. 63. **Neb.**—*Emery v. State*, 78 Neb. 547, 111 N. W. 374, 9 L. R. A. (N. S.) 1124; *Goddard v. State*, 73 Neb. 739, 162 N. W. 443; *Johnson v. State*, 53 Neb. 103, 73 N. W. 463; *Bailey v. State*, 36 Neb. 808, 55 N. W. 241; *Hodgkins v. State*, 36 Neb. 160, 54 N. W. 86; *Davis v. State*, 31 Neb. 247, 47 N. W. 854. **N. J.**—*State v. Unsworth*, 84 N. J. L. 22, 86 Atl. 61; *State v.*

(VII.) **Omissions or Defects in Endorsement and Signature.**—By pleading and going to trial the defendant waives any right to object to the failure to endorse upon the indictment the names of the witnesses,²¹ or to the omission of the foreman's endorsement of "a true bill,"²² or the clerk's endorsement as to the filing,²³ or to the omission of the signature of the prosecuting attorney²⁷ or informer.²⁸

g. Errors in Presenting the Finding.—Defects in the manner of making the formal presentment of the finding to the court, or in the record thereof,²⁹ or the failure to file the information or indictment

Sharkey, 73 N. J. L. 491, 63 Atl. 866; State v. Farnum, 66 N. J. L. 397, 52 Atl. 956. **N. D.**—State v. Kent, 5 N. D. 516, 67 N. W. 1052, 35 L. R. A. 518. **Okla.**—*In re Cummings*, 11 Okla. 286, 66 Pac. 332; *Ex parte Crawford*, 4 Okla. Crim. xiii, 112 Pac. 41; *Ex parte Simmons*, 4 Okla. Crim. xiv, 112 Pac. 41; *Ex parte Talley*, 4 Okla. Crim. 398, 112 Pac. 36, 31 L. R. A. (N. S.) 805; *Muldrow v. State*, 4 Okla. Crim. 321, 111 Pac. 656. **Wash.**—State v. Stone, 66 Wash. 625, 120 Pac. 76; *Hammond v. State*, 23 Wash. 171, 28 Pac. 334. **Wyo.**—*Hollibaugh v. Hehn*, 13 Wyo. 269, 79 Pac. 1044.

24. **Ariz.**—*Thomas v. Territory*, 11 Ariz. 184, 89 Pac. 591. **Cal.**—*People v. King*, 28 Cal. 265, 272; *People v. Lopez*, 26 Cal. 112; *People v. Symonds*, 22 Cal. 348, 354. **Ky.**—*Com. v. Blackwell*, 97 Ky. 314, 30 S. W. 642. **Mo.**—*State v. Long*, 209 Mo. 366, 108 S. W. 35; *State v. Davidson*, 44 Mo. App. 513. **Nev.**—*State v. Hamilton*, 13 Nev. 386. **Ore.**—*Gue v. Eugene*, 53 Ore. 282, 100 Pac. 254.

[a] **Reason for the Rule.**—In *State v. Brown*, 163 Mo. App. 30, 145 S. W. 1189, the court said: "The obvious purpose of the statutory requirement that the names of the witnesses for the prosecution be indorsed on the information is to enable the defendant to prepare his defense." And if the defendants announce themselves as ready for trial before securing a ruling on their motion to quash the information, they must be held to have waived any objections they might have had to the trial court's action in forcing them to trial.

25. **U. S.**—*Frisbie v. United States*, 157 U. S. 160, 15 Sup. Ct. 586, 39 L. ed. 657. **Ark.**—*McFall v. State*, 73 Ark. 327, 84 S. W. 179; *State v. Agnew*, 52 Ark. 275, 12 S. W. 563. **Cal.**—*People v. Johnston*, 48 Cal. 549. **Fla.**—*Thomas*

v. State, 58 Fla. 122, 51 So. 410; *Frances v. State*, 6 Fla. 306. **Ia.**—*State v. Hughes*, 4 Iowa 554. **Ky.**—*Patterson v. Com.*, 99 Ky. 610, 5 S. W. 765; *Patterson v. Com.*, 86 Ky. 313, 5 S. W. 387. **Minn.**—*State v. Shippey*, 10 Minn. 223, 88 Am. Dec. 70. **Mo.**—*State v. Mertens*, 14 Mo. 94. **N. C.**—*State v. Ledford*, 133 N. C. 714, 45 S. E. 944.

[a] "The endorsement is not essential to the legality and sufficiency of the indictment," and if defendant fails to take advantage of the defect by motion before plea or demurrer he is precluded from afterwards taking the objection. *People v. Lawrence*, 21 Cal. 368.

26. **U. S.**—*Frisbie v. United States*, 157 U. S. 160, 15 Sup. Ct. 586, 39 L. ed. 657. **Ill.**—*People v. Boyd*, 170 Ill. App. 481. **Ia.**—*State v. Hughes*, 4 Iowa 554.

[a] The omission by the clerk of the court to enter upon an indictment the minute required by statute of the "true day, month and year when the same was exhibited" is matter of abatement only, and, unless taken advantage of by the respondent before the plea of the general issue, must be considered as waived. *State v. Butler*, 17 Vt. 145.

27. **Ill.**—*Winship v. People*, 51 Ill. 296 (prosecutor); *Vezain v. People*, 40 Ill. 397, prosecutor. **La.**—*State v. Owens*, 130 La. 746, 58 So. 557. **Mont.**—*State v. Peterson*, 24 Mont. 81, 60 Pac. 809. **Ohio.**—*Rifemaker v. State*, 25 Ohio St. 395. **Okla.**—*Oelke v. State*, 10 Okla. Crim. 49, 133 Pac. 1140.

28. *People v. Conboy*, 178 Ill. App. 90; *Picket v. State*, 22 Ohio St. 405.

29. **Ala.**—*Ex parte Winston*, 52 Ala. 419; *Russell v. State*, 33 Ala. 366. **Ark.**—*Shinn v. State*, 93 Ark. 290, 124 S. W. 263. **Fla.**—*Westcott v. State*, 31 Fla. 458, 12 So. 846; *Gallagher v. State*, 17 Fla. 370. **Ky.**—*Patterson v. Com.*, 99

within the time allowed by law³⁰ are waived by pleading and going to trial.

h. *Want of Authority To File Information.*—By failing to demur or move to quash an information before pleading not guilty defendant waives the objection that the prosecuting attorney had no authority to file the information because of the fact that the grand jury was in session.³¹

i. *Failure To Deliver Copy to Accused.*—Failure to deliver to the defendant a copy of the indictment is waived by going to trial.³²

j. *Waiver of Objections Made.*—Objections which have been properly made are not ordinarily waived by thereafter pleading and going to trial.³³ But objections which have not been disposed of may be waived by such conduct of the defendant.³⁴

2. *Waiver by Demurrer.*—By demurring generally to an indictment or information for a defect which should have been taken advantage of by a special demurrer, the accused waives such defect,³⁵

Ky. 610, 5 S. W. 765; *Patterson v. Com.*, 86 Ky. 313, 5 S. W. 387; *Trusty v. Com.*, 19 Ky. L. Rep. 706, 41 S. W. 766. **La.**—*State v. Dillon*, 50 La. Ann. 23, 23 So. 320. **Mo.**—*State v. Sharpe*, 119 Mo. App. 386, 95 S. W. 298. **Mont.** *State v. Vinn*, 50 Mont. 27, 144 Pac. 773; *State v. Chevigny*, 48 Mont. 382, 138 Pac. 257. **N. C.**—*State v. Ledford*, 133 N. C. 714, 45 S. E. 944. **Ohio.** *Kerr v. State*, 36 Ohio St. 614. **Tex.** *Rowlett v. State*, 23 Tex. App. 191, 4 S. W. 582; *Alderson v. State*, 2 Tex. App. 10; *Spence v. State*, 1 Tex. App. 541. **Wash.**—*State v. Strange*, 50 Wash. 321, 97 Pac. 233, 98 Pac. 588, 99 Pac. 1109.

But see *supra*, p. 103, et seq.

[a] **Grand Jurors Not Present When Indictment Presented.**—A motion to quash the indictment upon the ground that the foreman of the grand jury delivered the indictment to the judge during the session of the court but in the absence of the other grand jurors (who remained in an adjoining room) comes too late after plea of not guilty, even though permission had been given at the time of pleading that such matters as could be taken advantage of by demurrer or motion to quash, could be taken by motion in arrest of judgment. *Breese v. United States*, 226 U. S. 1, 33 Sup. Ct. 1, 57 L. ed. 97.

30. *State v. Chevigny*, 48 Mont. 382, 138 Pac. 257; *State v. Smith*, 12 Mont. 378, 30 Pac. 679; *State v. Seright*, 48 Wash. 307, 93 Pac. 521.

31. *State v. Strange*, 50 Wash. 321, 97 Pac. 233.

32. *Smith v. State*, 8 Ohio 295.

33. **Where defendant moves to quash the presentment and his motion is overruled by the court and subsequently appears and pleads to and goes to trial on the information founded upon the presentment, he is not precluded from objecting to the presentment on appeal after conviction.** *Bishop v. Com.*, 13 Gratt. (Va.) 785.

[a] **Ruling on Demurrer.**—**Ore.** *State v. Hinkle*, 33 Ore. 93, 54 Pac. 155. **Vt.**—*State v. Bosworth*, 74 Vt. 315, 52 Atl. 423. **W. Va.**—*State v. Ball*, 30 W. Va. 382, 4 S. E. 645.

[b] **Ruling on Motion To Quash.** *Com. v. Kennedy*, 131 Mass. 584.

34. **A pending motion to quash is waived by pleading to the merits.** *Long v. State*, 102 Ill. 331.

[a] **Where the record on appeal contains nothing to show any action upon the demurrer to the indictment, the demurrer will be treated as waived or withdrawn.** *Sherrod v. State*, 90 Miss. 856, 44 So. 813.

35. **Cal.**—*People v. Bradbury*, 155 Cal. 808, 103 Pac. 215; *People v. Feilen*, 58 Cal. 218, 41 Am. Rep. 258; *People v. Grinnell*, 9 Cal. App. 238, 98 Pac. 681. **Mont.**—*State v. Tudor*, 47 Mont. 185, 133 Pac. 632. **Nev.**—*State v. Roderigas*, 7 Nev. 328.

[a] **By demurring generally to a joint indictment the defendants waive the objection that they should be individually charged.** *People v. Kelly*, 3 N. Y. Crim. 272.

and where specific objections are made, all objections are waived which are not specified.³⁶ Likewise by demurring the right to plead in abatement is waived.³⁷

3. **By Entering Into Recognizance.**—Defects in or the want of verification of an information may be waived by the accused by his voluntarily entering into a recognizance for his appearance.³⁸ And he may thus also waive any objection which he might have urged to irregularities in the affidavit upon which the information was founded.³⁹

C. **By Change of Venue or Continuance.**—It has been said that by securing or consenting to a general continuance,⁴⁰ or a change of venue⁴¹ without first objecting, defendant waives the right to object to irregularities in the indictment or information or the proceedings preliminary thereto.

D. **By Amendment.**—The effect of an amendment as a waiver is elsewhere treated in this title.⁴²

XVI. ELECTION.—A. **ELECTION BETWEEN INDICTMENTS OR INFORMATIONS.**—If there are pending two or more indictments against a defendant for the same act, the state may, on motion, be required to elect upon which it will proceed;⁴³ the same rule applies where an

36. Cal.—*People v. Mead*, 145 Cal. 509, 78 Pac. 1047; *People v. Chuay Ying Ott*, 100 Cal. 437, 34 Pac. 1080. Ga.—*Osaway v. State*, 9 Ga. App. 191, 70 S. E. 978. Idaho.—*People v. Nash*, 1 Idaho 209. Ill.—*People v. Strauch*, 153 Ill. App. 544.

37. See 1 STANDARD PROC. 57.

38. *State v. Edwards*, 144 Pac. 1009; *State v. Barr*, 54 Kan. 230, 38 Pac. 289; *State v. Ellvin*, 51 Kan. 784, 33 Pac. 547; *State v. Longton*, 35 Kan. 375, 11 Pac. 163; *State v. Bjorkland*, 34 Kan. 377, 8 Pac. 391; *State v. Goff*, 10 Kan. App. 286, 61 Pac. 680; *State v. Hook*, 4 Kan. App. 451, 46 Pac. 44.

[a] The objection that a criminal complaint is verified on information and belief is waived by entering into a recognizance for appearance at a future day. *In re Cummings*, 11 Okla. 280, 60 Pac. 332.

39. *State v. Ellvin*, 51 Kan. 784, 33 Pac. 547.

40. See *Cooper v. State*, 120 Ind. 377, 22 N. E. 320; *In re Cummings*, 11 Okla. 280, 66 Pac. 332.

[a] Where accused asks and obtains a continuance he waives any irregularity in the formation of the grand jury that framed the indictment. *Corradison v. Com.*, 7 Ky. L. Rep. 344.

41. See the following: Ind.—*Cooper v. State*, 120 Ind. 377, 22 N. E. 320.

Ky.—*Parker v. Com.*, 12 Bush 191. Tex.—*Ringo v. State*, 2 Tex. App. 291.

[a] But in *Hardy v. State*, 96 Miss. 844, 51 So. 460, it was held that the objection that the record does not show that the grand jury had been sworn may, if permitted by the trial court, be raised for the first time by motion to quash in the court to which a change of venue has been taken.

42. See *supra*, XIII.

43. U. S.—*United States v. Rumsey*, 5 Int. Rev. Rec. 93, 27 Fed. Cas. No. 16,207. Neb.—Crim. Code, §435; *Johnson v. State*, 88 Neb. 328, 129 N. W. 281. N. C.—*State v. McNeill*, 93 N. C. 552; *State v. Hastings*, 86 N. C. 596; *State v. Watts*, 82 N. C. 656; *State v. Dixon*, 78 N. C. 558; *State v. Johnson*, 50 N. C. 221.

[a] The practice of finding two or more indictments for different degrees of the same offense, or for different offenses, founded on the same matter, disapproved in *People v. Van Horne*, 8 Barb. (N. Y.) 158.

[b] *Contra*.—Where there are a number of indictments pending in the court and charging the defendant with the same offense, the defendant has not the right to force the state to elect upon which it will try. *Bailey v. State*, 11 Tex. App. 140.

indictment and an information are pending for the same act.⁴⁴ And where a defendant is tried under two informations each charging a distinct offense, an election may be required.⁴⁵ The matter of compelling an election, however, in such cases, lies much in the discretion of the trial court.⁴⁶ But where separate and distinct offenses are charged in each indictment or information, no election can be compelled.⁴⁷

B. ELECTION BETWEEN COUNTS. — 1. Counts Relating to the Same Transaction. — a. Discretion of Court. — The motion for an election between counts of an indictment or information is an application to the sound discretion of the trial court,⁴⁸ the granting of which depends

44. *Johnson v. State*, 88 Neb. 328, 129 N. W. 281.

45. *People v. Spier*, 120 App. Div. 786, 105 N. Y. Supp. 741.

46. See *State v. McNeill*, 93 N. C. 552, *infra*, XVI, B, 1.

[a] In *Withers v. Com.*, 5 Serg. & R. (Pa.) 59, the court held that two indictments for conspiracy, found at different sessions of the court, might be tried by the same jury, notwithstanding the objection of the defendants, if the court, in its discretion, should think proper to allow it, especially if the right of the defendant to challenge four of the jurors on each indictment shall be allowed, and an abuse of such discretion, even if such abuse existed, would not be error.

47. *Rex v. Handley*, 5 Car. & P. 565, 24 E. C. L. 710. And see *United States v. Goddard*, 4 Cranch C. C. 444, 25 Fed. Cas. No. 15,220, in which nine indictments were found against the defendant for stealing nine cows, six of them charged to have been stolen at the same time, but belonging to different persons, the court refused to quash any.

48. **U. S.**—*Pointer v. United States*, 151 U. S. 396, 14 Sup. Ct. 410, 38 L. ed. 208; *McGregor v. United States*, 134 Fed. 187, 69 C. C. A. 477; *Gardes v. United States*, 87 Fed. 172, 30 C. C. A. 596; *United States v. Nye*, 4 Fed. 888. **Cal.**—*People v. Shotwell*, 27 Cal. 394. **Colo.**—*Bigerraft v. People*, 30 Colo. 298, 70 Pac. 417; *Roberts v. People*, 11 Colo. 213, 17 Pac. 637. **Conn.**—*State v. Sebastian*, 81 Conn. 1, 69 Atl. 1054. **D. C.**—*Lee v. United States*, 37 App. Cas. 442; *Hyde v. United States*, 27 App. Cas. 362; *Lorenz v. United States*, 24 App. Cas. 337; *United States v. McBride*, 7 Mackey 371. **Fla.**—*Eggart v. State*, 40 Fla. 527, 25 So. 144. **Ga.**—*Johnson v. State*, 26 Ga. 611. **Ind.**—*Knox v.*

State, 164 Ind. 226, 73 N. E. 255; *Myers v. State*, 92 Ind. 390; *McColleugh v. State*, 132 Ind. 427, 31 N. E. 1116; *Dantz v. State*, 87 Ind. 398; *Beaty v. State*, 82 Ind. 228; *State v. Dufour*, 63 Ind. 56; *Snyder v. State*, 59 Ind. 105; *Miller v. State*, 51 Ind. 405. **Me.**—*State v. Hood*, 51 Me. 363; *State v. Flye*, 26 Me. 312. **Md.**—*State v. Bell*, 27 Md. 675, 92 Am. Dec. 658. **Mass.**—*Com. v. Smith*, 162 Mass. 508, 39 N. E. 111; *Com. v. Barnes*, 138 Mass. 511; *Com. v. Bennett*, 118 Mass. 443. **Miss.**—*Hemingway v. State*, 68 Miss. 371, 8 So. 317; *Strawhern v. State*, 37 Miss. 422, 2 Mor. St. Cas. 1338; *Sarah v. State*, 28 Miss. 267, 61 Am. Dec. 544. **Mo.**—*State v. Schmidt*, 137 Mo. 266, 38 S. W. 938; *State v. Leonard*, 22 Mo. 449; *State v. Jackson*, 17 Mo. 544, 59 Am. Dec. 281. **Mont.**—*State v. Van*, 44 Mont. 374, 120 Pac. 479. **Neb.**—*Krause v. State*, 88 Neb. 473, 129 N. W. 1020, Ann. Cas. 1912B, 736; *Miller v. State*, 78 Neb. 645, 111 N. W. 637; *Korth v. State*, 46 Neb. 631, 65 N. W. 792. **N. Y.**—*People v. McCarthy*, 110 N. Y. 309, 18 N. E. 128; *People v. Davis*, 56 N. Y. 95; *Nelson v. People*, 23 N. Y. 293; *Cook v. People*, 2 Thomp. & C. 404; *People v. Baker*, 3 Hill 159; *People v. White*, 55 Barb. 606, *affirmed*, 32 N. Y. 465; *People v. Reavey*, 38 Hun 418. **N. C.** *State v. Barber*, 113 N. C. 711, 18 S. E. 515. **Ohio.**—*Bailey v. State*, 4 Ohio St. 440; *Searles v. State*, 6 Ohio C. C. 331; *State v. Franzret*, 11 Ohio Dec. (Reprint) 775. **R. I.**—*State v. Maloney*, 12 R. I. 251; *State v. Hazard*, 2 R. I. 474, 60 Am. Dec. 96. **S. C.**—*State v. Rountree*, 80 S. C. 387, 61 S. E. 1087; *State v. Bouknight*, 55 S. C. 353, 33 S. E. 451; *State v. Sheppard*, 54 S. C. 178, 32 S. E. 146. **Tenn.**—*Boyd v. State*, 47 Tenn. 69; *Womack v. State*, 47 Tenn. 509. **Vt.**—*State v. Darling*, 77 Vt. 67, 58 Atl. 974; *State v. Smith*, 72 Vt. 366,

largely on the circumstances of each particular case.⁴⁹ So it is held that the prosecutor cannot complain where the court requires him to make an election,⁵⁰ even though erroneously;⁵¹ nor can the defendant, in such a case, object as he could not be prejudiced by the election.⁵² In many states the exercise of this discretion cannot be assigned for error,⁵³ or made the ground of a motion for a new trial,⁵⁴ and exceptions do not lie to the refusal of the trial court to compel the state to elect upon what counts it will proceed.⁵⁵ And even where the question is considered by the appellate court, the ruling below will not be disturbed in the absence of a showing of a manifest abuse of discretion.⁵⁶

48 Atl. 647. **W. Va.**—*State v. Smith*, 24 W. Va. 814. **Wis.**—*Ruth v. State*, 140 Wis. 373, 122 N. W. 733; *Colbert v. State*, 125 Wis. 423, 104 N. W. 61; *Martin v. State*, 79 Wis. 165, 48 N. W. 119; *State v. Leicham*, 41 Wis. 565.

[a] "The defendant had no 'right secured to him by the law' to compel the state to elect, upon which count of the indictment, she would proceed at the trial." *State v. Pitts*, 58 Mo. 556.

[b] In an indictment charging many acts of embezzlement, some of which must be dismissed, it is proper for the trial court, before trial, to require the prosecutor to state upon what counts he relies as setting forth offenses not embraced in the indictments which have been dismissed, to the end that it may be determined upon which counts the accused may be properly tried and thus eliminate much which would tend to confuse and protract the trial. *Davis v. Davis*, 112 Va. 904, 73 S. E. 916.

[c] Two separate offenses of the same character, committed in the same locality, and about the same time, may be joined in separate counts and it is within the discretion of the court whether to require an election. *Martin v. State*, 79 Wis. 165, 48 N. W. 119.

49. *Lorenz v. United States*, 24 App. Cas. (D. C.) 237.

[a] If the counts are so numerous as to embarrass the defense, the court in the exercise of its discretion may compel the prosecutor to elect on which charge he will proceed. *State v. Nelson*, 29 Me. 329.

50. *Ind.*—*State v. Dufour*, 63 Ind. 567. **N. C.**—*State v. Farmer*, 104 N. C. 887, 10 S. E. 503. **S. C.**—*State v. Bonknight*, 55 S. C. 253, 33 S. E. 451, 74 Am. St. Rep. 751.

[a] An unnecessary election gratuitously made by the state need not be adhered to unless the defendant has in some way been prejudiced. *State v. Nelson*, 11 Nev. 334.

51. *State v. Bell*, 27 Md. 675, 92 Am. Dec. 658.

52. *State v. Jones*, 5 Ala. 666.

53. **U. S.**—*Rooney v. United States*, 203 Fed. 928, 122 C. C. A. 230; *McGregor v. United States*, 134 Fed. 187, 69 C. C. A. 477. **D. C.**—*United States v. McBryde*, 7 Mackey, 371. *Ind.*—*Myers v. State*, 92 Ind. 390; *Beatty v. State*, 82 Ind. 228. **Me.**—*State v. Hood*, 51 Me. 363. **Md.**—*Curry v. State*, 117 Md. 587, 83 Atl. 1030; *State v. Bell*, 27 Md. 675, 92 Am. Dec. 658. **Mass.**—*Commonwealth v. Slate*, 11 Gray 60; *Commonwealth v. Davenport*, 2 Allen 299. **Miss.**—*George v. State*, 39 Miss. 570. **Mo.**—*State v. Leonard*, 22 Mo. 449; *State v. Woodward*, 21 Mo. 265; *State v. Jackson*, 17 Mo. 544. **N. Y.**—*People v. McCarthy*, 110 N. Y. 309, 18 N. E. 128; *Nelson v. People*, 23 N. Y. 293; *People v. Baker*, 3 Hill 159; *People v. White*, 55 Barb. 606; *Cook v. People*, 2 Thomp. & C., 404. **N. C.**—*State v. Barber*, 113 N. C. 711, 18 S. E. 515. **Ohio.**—*Bailey v. State*, 4 Ohio St. 440; *Searles v. State*, 6 Ohio C. C. 331.

54. *State v. Hazard*, 2 R. I. 474, 60 Am. Dec. 96.

55. *State v. Hood*, 51 Me. 363; *Com. v. Smith*, 162 Mass. 508, 39 N. E. 111; *Commonwealth v. Sullivan*, 104 Mass. 552; *Com. v. Davenport*, 2 Allen (Mass.) 299; *Com. v. Slate*, 11 Gray (Mass.) 60.

56. **U. S.**—*Gardes v. United States*, 87 Fed. 172, 30 C. C. A. 596. **Colo.**—*Tuttle v. People*, 33 Colo. 243, 79 Pac. 1035; *Roberts v. People*, 11 Colo. 215, 17 Pac. 637. *Ind.*—*Knox v. State*, 164 Ind. 226, 73 N. E. 255, 108 Am. St. Rep.

b. *Election Not Required*.—If two or more offenses of the same character which grow out of the same transaction are joined in an indictment, under separate counts, the state will not ordinarily be required to make an election for which offense a conviction will be asked.⁵⁷

- 291; *McCollough v. State*, 132 Ind. 427, 31 N. E. 1116; *Dantz v. State*, 87 Ind. 398; *State v. Dufour*, 63 Ind. 567. **Miss.** *Hemingway v. State*, 68 Miss. 371, 8 So. 317. **Mo.**—*State v. Schmidt*, 137 Mo. 266, 38 S. W. 938; *State v. Gray*, 37 Mo. 463; *State v. Jackson*, 17 Mo. 544. **Mont.**—*State v. Van*, 44 Mont. 374, 120 Pac. 479. **Neb.**—*Korth v. State*, 46 Neb. 631, 65 N. W. 792. **S. C.**—*State v. Rountree*, 80 S. C. 387, 61 S. E. 1072; *State v. Sheppard*, 54 S. C. 178, 32 S. E. 146. **Tenn.**—*Womack v. State*, 47 Tenn. 509. **Vt.**—*State v. Darling*, 77 Vt. 67, 58 Atl. 974. **Wis.**—*State v. Leicham*, 41 Wis. 565.
57. **U. S.**—*United States v. Dickinson*, 2 McLean 325, 25 Fed. Cas. No. 14,958; *Rooney v. United States*, 203 Fed. 928, 122 C. C. A. 230; *Steinhardt Bros. & Co. v. United States*, 191 Fed. 798, 112 C. C. A. 284; *McGregor v. United States*, 134 Fed. 187, 69 C. C. A. 477; *Terry v. United States*, 120 Fed. 483, 56 C. C. A. 633. **Ala.**—*Butler v. State*, 91 Ala. 87, 9 So. 191; *Mayo v. State*, 30 Ala. 32; *Johnson v. State*, 1 Ala. App. 102, 55 So. 321; *Mangrall v. State*, 1 Ala. App. 189, 55 So. 446. **Ark.**—*Blacknall v. State*, 90 Ark. 570, 119 S. W. 1119. **Colo.**—*Rice v. People*, 55 Colo. 506, 136 Pac. 74. **D. C.**—*Lee v. United States*, 37 App. Cas. 442; *Hyde v. United States*, 27 App. Cas. 362. **Fla.**—*Presley v. State*, 61 Fla. 46, 54 So. 367; *Darby v. State*, 41 Fla. 274, 26 So. 315; *Murray v. State*, 25 Fla. 528, 6 So. 498. **Ga.**—*Johnson v. State*, 26 Ga. 611; *State v. Hogan*, R. M. Charl. 474. **Ill.**—*People v. Warfield*, 261 Ill. 293, 103 N. E. 979; *People v. Gray*, 251 Ill. 431, 96 N. E. 268; *People v. Bernstein*, 250 Ill. 63, 95 N. E. 50; *People v. Weil*, 243 Ill. 208, 90 N. E. 731; *People v. Peters*, 241 Ill. 273, 89 N. E. 704; *Herman v. People*, 131 Ill. 594, 22 N. E. 471, 9 L. R. A. 182; *Looney v. People*, 81 Ill. App. 370; *Goodhue v. People*, 94 Ill. 37; *Bennett v. People*, 96 Ill. 602. **Ind.**—*Knox v. State*, 164 Ind. 226, 73 N. E. 255; *Myers v. State*, 92 Ind. 390; *Short v. State*, 63 Ind. 376; *Wall v. State*, 51 Ind. 453; *Engleman v. State*, 2 Ind. 91, 52 Am. Dec. 494. **Ia.**—*State v. House*, 55 Iowa 466, 8 N. W. 307. **Ky.**—*Britton v. Com.*, 29 Ky. L. Rep. 857, 96 S. W. 556. **La.**—*State v. Ardoin*, 49 La. Ann. 1145, 22 So. 620, 62 Am. St. Rep. 678; *State v. Cook*, 20 La. Ann. 145. **Md.**—*Toomer v. State*, 112 Md. 285, 76 Atl. 118; *State v. Bell*, 27 Md. 675, 92 Am. Dec. 658. **Mich.**—*People v. Kennedy*, 176 Mich. 384, 142 N. W. 771; *People v. Dyer*, 79 Mich. 480, 44 N. W. 937. **Miss.**—*Sarah v. State*, 28 Miss. 267. **Mo.**—*State v. Duvenick*, 237 Mo. 185, 140 S. W. 897; *State v. Sharpless*, 212 Mo. 176, 111 S. W. 69; *State v. Goodale*, 210 Mo. 275, 109 S. W. 9; *State v. Jeffries*, 210 Mo. 302, 109 S. W. 614; *State v. Williams*, 191 Mo. 205, 90 S. W. 448; *State v. Schmidt*, 137 Mo. 266, 38 S. W. 938; *State v. Houx*, 109 Mo. 654, 19 S. W. 35; *State v. Pratt*, 98 Mo. 482, 11 S. W. 977; *State v. Turner*, 63 Mo. 436; *State v. Herreford*, 29 Mo. 399; *State v. Davis*, 29 Mo. 391; *State v. Porter*, 26 Mo. 201; *State v. Sutton*, 64 Mo. 107; *State v. Hicks*, 170 Mo. App. 183, 155 S. W. 482. **Neb.**—*Stevens v. State*, 84 Neb. 759, 122 N. W. 58; *Miller v. State*, 78 Neb. 645, 111 N. W. 637; *Higbee v. State*, 74 Neb. 331, 104 N. W. 748; *Hurlburt v. State*, 52 Neb. 428, 72 N. W. 171; *Korth v. State*, 46 Neb. 631, 65 N. W. 792; *Candy v. State*, 8 Neb. 485, 1 N. W. 454. See *Poston v. State*, 83 Neb. 240, 119 N. W. 520. **N. H.**—*State v. Lincoln*, 49 N. H. 464. **N. Y.**—*Nelson v. People*, 23 N. Y. 293; *People v. Costello*, 1 Denio 83; *People v. White*, 55 Barb. 606; *People v. Austin*, 1 Park. Crim. 154. **N. C.**—*State v. Davenport*, 156 N. C. 679, 72 S. E. 7; *State v. Cole*, 156 N. C. 618, 72 S. E. 221; *State v. Phillips*, 104 N. C. 786, 10 S. E. 463; *State v. Parish*, 104 N. C. 679, 10 S. E. 457; *State v. Morrison*, 85 N. C. 561. **Ohio.**—*Cottell v. State*, 12 Ohio C. C. 467; *Searles v. State*, 6 Ohio C. C. 331; *State v. Franzreb*, 11 Ohio Dec. (Reprint) 775. **Okla.**—*Bond v. State*, 9 Okla. Crim. 696, 129 Pac. 666; *De Graff v. State*, 2 Okla. Crim. 519, 103 Pac. 538. **S. C.**—*State v. Jones*, 86 S. C. 17, 67 S. E. 160; *State v. Sheppard*, 54 S.

There are numerous illustrations of this general rule in the case.⁵⁸ Thus it is held that the state will not be compelled to elect between counts charging an offense and an attempt to commit the offense,⁵⁹ or

C. 178, 32 S. E. 146; *State v. Norton*, 28 S. C. 572, 6 S. E. 820; *State v. Scott*, 15 S. C. 434. **Tex.**—*Golden v. State*, 72 Tex. Crim. 19, 160 S. W. 957; *Day v. State*, 62 Tex. Crim. 527, 138 S. W. 123; *Fox v. State*, 62 Tex. Crim. 430, 138 S. W. 413; *Goode v. State*, 57 Tex. Crim. 220, 123 S. W. 597; *Robinson v. State*, 56 Tex. Crim. 62, 118 S. W. 1037; *Bink v. State*, 50 Tex. Crim. 445, 98 S. W. 863; *Foreman v. State*, 47 Tex. Crim. 179, 85 S. W. 809; *Parks v. State*, 46 Tex. Crim. 100, 79 S. W. 301; *Sisk v. State* (Tex. Crim.), 42 S. W. 985; *Bratt v. State*, 38 Tex. Crim. 121, 41 S. W. 624; *Moore v. State*, 37 Tex. Crim. 552, 40 S. W. 287; *Dill v. State*, 35 Tex. Crim. 240, 33 S. W. 126, 60 Am. St. Rep. 37; *Thompson v. State*, 33 Tex. Crim. 472, 26 S. W. 987; *Thompson v. State*, 32 Tex. Crim. 265, 22 S. W. 979. **Utah.**—*State v. Spencer*, 15 Utah 149, 49 Pac. 302. **Va.**—*Hausenfluck v. Com.*, 85 Va. 702, 8 S. E. 683; *Dowdy v. Com.*, 9 Gratt. 727, 60 Am. Dec. 314. **V. Va.** *State v. Shores*, 31 W. Va. 491, 7 S. E. 413, 13 Am. St. Rep. 875. **Wis.**—*Colbert v. State*, 125 Wis. 423, 104 N. W. 61; *Jackson v. State*, 91 Wis. 253, 64 N. W. 838; *Porath v. State*, 90 Wis. 527, 63 N. W. 1061, 48 Am. St. Rep. 954; *State v. Leicham*, 41 Wis. 565. **Eng.**—*R. v. Austin*, 7 Car. & P. 796, 32 E. C. L. 877.

[a] Where the indictment charged in one count that the assault was made on a certain person, and in the other count that it was made on two other persons, but it was shown that the assault was one continuous transaction, the state was not required to elect on which count of the indictment it would proceed. *Davidson v. State*, 5 Ala. App. 106, 59 So. 687.

[b] Where the motion to elect is made before trial it is properly refused, but if made at the close of the state's case the matter rests in the discretion of the court. *People v. Kellogg*, 105 App. Div. 505, 94 N. Y. Supp. 617.

58. In *Keeler v. State*, 15 Tex. App. 111, the court said: "We will not discuss at this time just what offenses can be charged by different counts in the

same bill. The following can not only be charged in the same indictment, but the state cannot be forced to elect upon which count defendant will be tried. In an indictment for the theft of a certain piece of property, counts for swindling, embezzlement, receiving, and, if an animal, altering mark or brand, branding the horse, mule, ass, cattle, etc., without consent and with intent to defraud. Under an indictment for burglarly, a count for the intended offense may be inserted unless murder or rape be the intended felony, and one or the other of these offenses be actually committed. In this state of the case, we advise that the party be indicted for the murder or the rape, omitting all mention of the burglarly. In forgery, counts for uttering or attempting to utter and pass the forged document, may be inserted. This short enumeration is not to be understood as embracing all of the offenses which may be charged by different counts in the same indictment; but that which we wish to call special attention to is, that the state cannot be compelled to elect upon which count the defendant shall be tried in the cases above enumerated."

[a] Passing or attempting to pass counterfeit money or bank notes knowing them to be such, and having in possession counterfeit money or bank notes, knowing them to be such, with the intention of circulating the same. *Ball v. State*, 48 Ark. 94, 2 S. W. 462, by statute. *Contra*, see *In re Quin*, 6 City Hall Rec. (N. Y.) 63.

[b] **Perjury.**—State need not elect between different assignments of perjury growing out of the same testimony. *McLeod v. State* (Tex. Crim.), 75 S. W. 522.

59. *Cooper v. State* (Tex. Crim.), 147 S. W. 272, charging burglary and an attempt to commit burglary.

[a] Robbery and assault with intent to rob. *Ball v. State*, 48 Ark. 94, 2 S. W. 462 (by statute); *McGregg v. State*, 4 Blackf. (Ind.) 101.

[b] Rape and assault with intent to commit rape. *People v. Satterlee*, 5 Hun (N. Y.) 167.

charging murder and manslaughter;⁶⁰ murder with premeditation and deliberation, and murder in the perpetration of robbery;⁶¹ felonious shooting with intent to kill and a like shooting with intent to wound;⁶² assault with intent to kill and assault with intent to wound;⁶³ aggravated assault and simple battery;⁶⁴ assault and battery with intent to kill, and assault and battery with intent to wound;⁶⁵ assault and false imprisonment, and assault and battery;⁶⁶ assault with intent to kill and shooting at another;⁶⁷ assault with intent to commit bodily injury and assault with intent to commit murder;⁶⁸ burglary in the day time and burglary at night;⁶⁹ burglary of a private residence and burglary in the ordinary form;⁷⁰ burglary and conspiracy to commit burglary;⁷¹ burglary and robbery;⁷² burglary and larceny;⁷³ burglary and receiving stolen goods;⁷⁴ burglary, larceny, and receiving stolen goods;⁷⁵ breaking and entering the dwelling house of another and breaking and entering at the same time the store-house of the same person;⁷⁶ house-breaking and grand larceny;⁷⁷ larceny, and obtaining money or property on false pretense;⁷⁸ embezzlement and larceny;⁷⁹ larceny and receiving stolen goods knowing them to have been stolen;⁸⁰ theft, receiv-

60. *Kelly v. People*, 17 Colo. 130, 29 Pac. 805.

61. *Furst v. State*, 31 Neb. 403, 47 N. W. 1116.

62. *Krause v. State*, 88 Neb. 473, 129 N. W. 1020; *Candy v. State*, 8 Neb. 482, 1 N. W. 454.

63. *Stevens v. State*, 84 Neb. 759, 122 N. W. 58; *Nelson v. People*, 23 N. Y. 293.

64. *Waddell v. State*, 1 Tex. App. 720.

65. *Nelson v. People*, 23 N. Y. 293.

66. *State v. March*, 46 N. C. 526.

67. *Johnson v. State*, 26 Ga. 611.

68. *Rice v. People*, 55 Colo. 506, 136 Pac. 74; *Nelson v. People*, 23 N. Y. 293.

69. *Fox v. State*, 62 Tex. Crim. 430, 138 S. W. 413; *Gonzales v. State*, 12 Tex. App. 657. See *State v. Bouknight*, 55 S. C. 353, 33 S. E. 451, 74 Am. St. Rep. 751.

70. *Hawthorn v. State*, 62 Tex. Crim. 114, 136 S. W. 776.

71. *Dill v. State*, 35 Tex. Crim. 240, 33 S. W. 126, 60 Am. St. Rep. 37.

72. *Ball v. State*, 48 Ark. 94, 2 S. W. 462, by statute.

73. *Ala.*—*Rose v. State*, 117 Ala. 77, 23 So. 638. *Ind.*—*Reed v. State*, 147 Ind. 41, 46 N. E. 135; *McCullough v. State*, 132 Ind. 427, 31 N. E. 1116; *Short v. State*, 63 Ind. 376. *Mo.*—*State v. Turner*, 63 Mo. 436.

See, however, *Gilbert v. State*, 65 Ga. 449.

74. *Com. v. Mullen*, 150 Mass. 394, 23 N. E. 51.

75. *Gandolpho v. State*, 33 Ind. 439; *People v. Baker*, 3 Hill (N. Y.) 159.

76. *State v. Shores*, 31 W. Va. 491, 7 S. E. 413, 13 Am. St. Rep. 875.

77. *Lee v. United States*, 37 App. Cas. (D. C.) 442.

78. *Ball v. State*, 48 Ark. 94, 2 S. W. 462 by statute.

79. *Ala.*—*Butler v. State*, 91 Ala. 87, 9 So. 191. *Ark.*—*Ball v. State*, 48 Ark. 94, 2 S. W. 462 (by statute). *Ind.*—*Griffith v. State*, 36 Ind. 406. *Mo.*—*State v. Porter*, 26 Mo. 201. *N. H.*—*State v. Lincoln*, 49 N. H. 464. *Tex.*—*Burk v. State*, 50 Tex. Crim. 185, 95 S. W. 1064.

Contra, *State v. Finnegean*, 127 Iowa 286, 103 N. W. 155.

80. *U. S.*—*United States v. Prior*, 5 Cranch C. C. 37, 27 Fed. Cas. No. 16,092. *Ala.*—*Orr v. State*, 107 Ala. 35, 18 So. 142. *Ark.*—By statute, Mansfield's Digest, §2108; *Brown v. State*, 108 Ark. 336, 157 S. W. 934. *Ga.*—*Gilbert v. State*, 65 Ga. 449; *State v. Hogan*, R. M. Charl. 474. *Ill.*—*Andrews v. People*, 117 Ill. 195, 7 N. E. 265; *Bennett v. People*, 96 Ill. 602. *Ind.*—*Kennegar v. State*, 120 Ind. 176, 21 N. E. 917; *Gandolpho v. State*, 33 Ind. 439; *Engleman v. State*, 2 Ind. 91, 52 Am. Dec. 494. *Kan.*—*State v. Blakesley*, 43 Kan. 250, 23 Pac. 570. *Mo.*—*State v. Sutton*, 64 Mo. 107; *State v.*

ing stolen cattle and altering the brand on the cattle;⁸¹ theft and swindling;⁸² theft and theft from the person;⁸³ obtaining money by false pretenses, and passing forged paper;⁸⁴ a conspiracy to obtain money by false pretenses and a conspiracy to obtain the same money by means of a confidence game;⁸⁵ forging and uttering the same instrument;⁸⁶ fraudulent sale or removal of mortgaged property, and embezzlement;⁸⁷ adultery and fornication;⁸⁸ rape in the first degree, rape in the second degree, and assault;⁸⁹ rape by force and that the victim was insane;⁹⁰ rape by force and rape by consent on one under the age of consent;⁹¹ rape and incest;⁹² conspiring to falsely accuse a person of arson, and of larceny;⁹³ unlawfully breaking a fence or inclosure and trespass after warning.⁹⁴ But in such cases a conviction can be had for only one felony.⁹⁵

Daubert, 42 Mo. 242; *State v. Gray*, 37 Mo. 463. See *State v. Richmond*, 186 Mo. 71, 84 S. W. 880. **N. Y.**—*People v. Baker*, 3 Hill 159; *People v. Austin*, 1 Park. Crim. 154. **N. C.**—*State v. Barber*, 113 N. C. 711, 18 S. E. 515; *State v. Morrison*, 85 N. C. 561. **Ohio.** *Whiting v. State*, 48 Ohio St. 220, 27 N. E. 96, by statute. **R. I.**—*State v. Hazard*, 2 R. I. 474, 60 Am. Dec. 96. **S. C.**—*State v. Rountree*, 80 S. C. 387, 61 S. E. 1072; *State v. Woodard*, 38 S. C. 353, 17 S. E. 135. **Tex.**—*Bynum v. State* (Tex. Crim.), 72 S. W. 844; *Houston v. State* (Tex. Crim.), 47 S. W. 468; *Sisk v. State* (Tex. Crim.), 42 S. W. 985; *Bratt v. State*, 38 Tex. Crim. 121, 41 S. W. 624; *Womack v. State* (Tex. Crim.), 25 S. W. 772. **Va.**—*Dowdy v. Com.*, 9 Gratt. 727, 60 Am. Dec. 314.

81. *Bratt v. State*, 38 Tex. Crim. 121, 41 S. W. 624. See also *Howard v. State*, 108 Ala. 571, 18 So. 813.

82. *Bink v. State*, 50 Tex. Crim. 445, 98 S. W. 863.

83. *Masterson v. State*, 20 Tex. App. 574.

84. *Foute v. State*, 15 Lea (Tenn.) 712.

85. *People v. Warfield*, 261 Ill. 293, 103 N. E. 979.

86. **Ga.**—*Jordan v. State*, 127 Ga. 278, 56 S. E. 422. **Ind.**—*Miller v. State*, 51 Ind. 465. **Mich.**—*People v. Warner*, 164 Mich. 337, 62 N. W. 405; *People v. Kemp*, 76 Mich. 410, 43 N. W. 439; *Van Sickle v. People*, 29 Mich. 61. **Mo.** See *State v. Carragin*, 210 Mo. 351, 109 S. W. 553, 16 L. R. A. (N. S.) 561, holding that two convictions cannot be had for both forging and uttering an instrument, under one indictment. **N. Y.** *People v. Adler*, 140 N. Y. 331, 35

N. E. 644. **Tex.**—*Carr v. State*, 36 Tex. Crim. 3, 34 S. W. 949; *Crawford v. State*, 31 Tex. Crim. 31, 19 S. W. 766; *Williams v. State*, 24 Tex. App. 342, 6 S. W. 531. **Va.**—See *Hausenfluck v. Com.*, 85 Va. 702, 8 S. E. 683.

Contra, *Ball v. State*, 48 Ark. 94, 2 S. W. 462, *disapproving* *McClellan v. State*, 32 Ark. 609; *Messer v. Com.*, 26 Ky. L. Rep. 40, 80 S. W. 489.

87. *Upshur v. State*, 100 Ala. 2, 14 So. 541.

88. *Sutton v. State*, 124 Ga. 815, 53 S. E. 381.

89. *People v. Adams*, 72 App. Div. 166, 16 N. Y. Crim. 454, 76 N. Y. Supp. 361.

90. *State v. Trusty*, 122 Iowa 82, 97 N. W. 989; *Hubbard v. State* (Tex. Crim.), 147 S. W. 260; *Thompson v. State*, 33 Tex. Crim. 472, 26 S. W. 987.

91. **Colo.**—*Bigcraft v. People*, 30 Colo. 298, 70 Pac. 417. **Ohio.**—*State v. Hensley*, 75 Ohio St. 255, 79 N. E. 462, 116 Am. St. Rep. 734. **Tenn.**—*Wright v. State*, 4 Humph. 194. **Wis.**—*Jackson v. State*, 91 Wis. 253, 64 N. W. 838.

92. **Mo.**—*State v. Goodale*, 210 Mo. 275, 109 S. W. 9. **Tex.**—*Wadkins v. State*, 58 Tex. Crim. 110, 124 S. W. 959, 137 Am. St. Rep. 922. **Wis.**—*Porath v. State*, 90 Wis. 527, 63 N. W. 1061, 48 Am. St. Rep. 954, *overruling* *obiter* in *State v. Shear*, 51 Wis. 460, 8 N. W. 287.

93. *People v. Dyer*, 79 Mich. 480, 44 N. W. 937.

94. *Quinn v. State*, 49 Ala. 353.

95. **Mo.**—*State v. Carragin*, 210 Mo. 351, 109 S. W. 553, 16 L. R. A. (N. S.) 561. **S. C.**—*State v. Hutchings*, 24 S. C. 142. **Tex.**—*Crawford v. State*, 31 Tex. Crim. 51, 19 S. W. 766.

Misdemeanors.—This rule, applicable to felonies, that several counts relating to the same transaction are proper and no election will be required between them, a fortiori applies to misdemeanors.⁹⁶

c. Counts Charging the Same Offense.—(I.) **Rule Stated.**—When the same offense is charged in different counts of the same indictment or information,⁹⁷ or different degrees of the same crime are charged, the prosecution will not be required to make an election.⁹⁸ In some juris-

[a] In *State v. Lincoln*, 49 N. H. 464, 471, the court held that where different offenses are joined in one indictment, the prosecutor will not be compelled to elect at the outset, for that would take away all the advantage of adapting the indictment to the contingencies of the evidence; but the court will always take care that the defendant is not convicted of two offenses under the same indictment.

96. **Ga.**—*Hathcock v. State*, 88 Ga. 91, 13 S. E. 959. **Ky.**—See *Hazlewood v. Com.*, 141 Ky. 232, 132 S. W. 567. **Md.** *Curry v. State*, 117 Md. 587, 83 Atl. 1030; *State v. Blakeney*, 96 Md. 711, 54 Atl. 614. **N. Y.**—*People v. White*, 55 Barb. 606. **Okla.**—*McLaughlin v. State*, 2 Okla. Crim. 343, 102 Pac. 713. **Vt.**—*State v. Barr*, 78 Vt. 97, 62 Atl. 43.

97. **U. S.**—*United States v. Dickinson*, 2 McLean 325, 25 Fed. Cas. No. 14,958. **Ark.**—*Henry v. State*, 71 Ark. 574, 76 S. W. 1071; *State v. Bailey*, 62 Ark. 489, 36 S. W. 690. **Del.**—*State v. Manluff*, 1 Houst. Cr. Cas. 208. **Ga.** *Stewart v. State*, 58 Ga. 577; *Johnson v. State*, 26 Ga. 611. **Ind.**—*Dantz v. State*, 87 Ind. 398; *Joy v. State*, 14 Ind. 139; *Engleman v. State*, 2 Ind. 91, 52 Am. Dec. 494. **Kan.**—*State v. Ricksecker*, 73 Kan. 495, 85 Pac. 547. **Ky.** *Britton v. Com.*, 29 Ky. L. Rep. 857, 96 S. W. 556. **Mich.**—*People v. McDowell*, 63 Mich. 229, 30 N. W. 68. **Mo.**—*State v. Williams*, 191 Mo. 205, 90 S. W. 448; *State v. Lanahan*, 144 Mo. 31, 45 S. W. 1090; *State v. Jackson*, 17 Mo. 544, 59 Am. Dec. 281. **Neb.** *Bartley v. State*, 53 Neb. 310, 73 N. W. 744; *Hurlburt v. State*, 52 Neb. 428, 72 N. W. 471; *Furst v. State*, 31 Neb. 403, 47 N. W. 1116; *Candy v. State*, 8 Neb. 482, 1 N. W. 454. **N. H.**—*State v. Canterbury*, 28 N. H. 195. **N. Y.**—*People v. Wright*, 136 N. Y. 625, 32 N. E. 629; *Armstrong v. People*, 70 N. Y. 38; *Kane v. People*, 8 Wend. 203; *People*

v. Moore, 26 Misc. 168, 14 N. Y. Crim. 60, 56 N. Y. Supp. 802. **N. C.**—*State v. Howard*, 129 N. C. 584, 40 S. E. 71. **Okla.**—*Hughes v. State*, 7 Okla. Crim. 117, 122 Pac. 554; *Williams v. United States*, 17 Okla. 28, 87 Pac. 647. **Tenn.** *Foute v. State*, 15 Lea 712; *Lawless v. State*, 4 Lea 173; *Boyd v. State*, 7 Coldw. 69, 77; *Wright v. State*, 4 Humph. 194. **Tex.**—*Greenwood v. State* (Tex. Crim.), 44 S. W. 177; *Gonzales v. State*, 12 Tex. App. 657. **Vt.**—*State v. Smith*, 72 Vt. 366, 48 Atl. 647. **Va.** *Hausenfluck v. Com.*, 85 Va. 702, 8 S. E. 683. **W. Va.**—*State v. Halida*, 28 W. Va. 499.

[a] In a prosecution for robbery an election will not be required as between several counts each setting out articles of property alleged to have been taken. *Nevill v. State*, 133 Ala. 99, 32 So. 596.

[b] An indictment for burglary in which the same breaking and entry of the dwelling house is alleged in all the counts with intent to commit different and distinct felonies specified and alleged in them, election not necessary. *State v. Manluff*, 1 Houst. Cr. Cas. (Del.) 208.

[c] The court will not put the prosecutor to his election as to which count he will proceed under, where it may be doubtful if the intention be not to charge the same or cognate offenses growing out of the transaction. *People v. Gray*, 251 Ill. 431, 96 N. E. 268.

[d] Charging the same offense to have been committed on different dates does not necessitate an election. *Cook v. People*, 2 Thomp. & C. (N. Y.) 404. 98. *People v. Adams*, 72 App. Div. 166, 16 N. Y. Crim. 454, 76 N. Y. Supp. 361; *Lawless v. State*, 4 Lea (Tenn.) 173.

[a] Manslaughter in the first degree and manslaughter in second degree. *People v. McCarthy*, 110 N. Y. 309, 18 N. E. 128.

dictions it is required that the indictment contain a special averment that the different counts are different descriptions of the same act.⁹⁹

(II.) **Charging the Same Offense To Meet Probable Proof.**—Where several counts charging the same offense are inserted in the indictment or information for the purpose of meeting the various aspects in which the evidence may present itself an election will not be required.¹ Thus, the

99. *Com. v. Cain*, 102 Mass. 487.

1. **U. S.**—*Terry v. Smith*, 120 Fed. 483, 56 C. C. A. 633; *United States v. Dickinson*, 2 McLean 325, 25 Fed. Cas. No. 14,958. **Ala.**—*Butler v. State*, 91 Ala. 87, 9 So. 191; *Howard v. State*, 168 Ala. 571, 18 So. 813; *Upshur v. State*, 100 Ala. 2, 14 So. 541; *Wooster v. State*, 55 Ala. 217; *Mayo v. State*, 30 Ala. 32; *Davidson v. State*, 5 Ala. App. 106, 59 So. 687. **Colo.**—*Rice v. People*, 55 Colo. 506, 136 Pac. 74. **Fla.** *Gantling v. State*, 40 Fla. 237, 23 So. 557; *Murray v. State*, 25 Fla. 528, 6 So. 498. **Ga.**—*Stewart v. State*, 58 Ga. 577. **Ill.**—*People v. Gray*, 251 Ill. 431, 96 N. E. 268; *West v. People*, 137 Ill. 189, 27 N. E. 34, 34 N. E. 254. **Ind.** *Wall v. State*, 51 Ind. 453; *Mershon v. State*, 51 Ind. 14; *Engleman v. State*, 2 Ind. 91; *McGregg v. State*, 4 Blackf. 101. **Ia.**—*State v. Von Kutzleben*, 136 Iowa 89, 113 N. W. 484; *State v. Finnegean*, 127 Iowa 286, 103 N. W. 155; *State v. McPherson*, 9 Iowa 53. **Ky.** *Saylor v. Com.*, 149 Ky. 152, 148 S. W. 6; *Britton v. Com.*, 29 Ky. L. Rep. 857, 96 S. W. 556. **La.**—*State v. Cook*, 20 La. Ann. 145. **Me.**—*State v. Hood*, 51 Me. 363; *State v. Flye*, 26 Me. 312. **Md.**—*Toomer v. State*, 112 Md. 285, 76 Atl. 118; *State v. Bell*, 27 Md. 675, 92 Am. Dec. 658. **Mass.**—*Com. v. State*, 11 Gray 60. **Mo.**—*State v. Cannon*, 232 Mo. 205, 134 S. W. 513; *State v. Carrigan*, 210 Mo. 351, 109 S. W. 553, 16 L. R. A. (N. S.) 561; *State v. Hargreaves*, 188 Mo. 337, 87 S. W. 491; *State v. Houx*, 109 Mo. 654, 19 S. W. 35, 32 Am. St. Rep. 686; *State v. Mallon*, 75 Mo. 355; *State v. Davis*, 29 Mo. 391; *State v. Porter*, 26 Mo. 201; *State v. Jackson*, 17 Mo. 544, 59 Am. Dec. 281; *Storrs v. State*, 3 Mo. 9. **N. H.**—*State v. Lincoln*, 49 N. H. 461. **N. Y.**—*Armstrong v. People*, 70 N. Y. 38; *Lanegan v. People*, 39 N. Y. 39; *O'Brien v. People*, 48 Barb. 274; *Kane v. People*, 8 Wend. 293; *People v. White*, 55 Barb. 606; *People v. Austin*, 1 Park. Crim. 154; *Nelson v. People*, 5 Park. Crim. 39; *People v. Satterlee*, 5 Hun 167;

People v. Kellogg, 105 App. Div. 505, 94 N. Y. Supp. 617. **N. C.**—*State v. Davenport*, 156 N. C. 596, 72 S. E. 7; *State v. Phillips*, 104 N. C. 786, 10 S. E. 463; *State v. Parish*, 104 N. C. 679, 10 S. E. 457; *State v. Morrison*, 85 N. C. 561. **N. D.**—*State v. Bickford*, 28 N. D. 36, 147 N. W. 407. **Ohio.**—*State v. Hensley*, 75 Ohio St. 255, 79 N. E. 462; *Bailey v. State*, 4 Ohio St. 440; *State v. Franzreb*, 11 Ohio Dec. (Reprint) 775; *Cottell v. State*, 12 Ohio C. C. 467. **Okla.**—*Hughes v. State*, 7 Okla. Crim. 117, 122 Pac. 554. **Tenn.** *Foute v. State*, 15 Lea 712. **Tex.**—*Golden v. State*, 72 Tex. Crim. 19, 160 S. W. 957; *Hawthorn v. State*, 62 Tex. Crim. 114, 136 S. W. 776; *Goode v. State*, 57 Tex. Crim. 220, 123 S. W. 597; *Robinson v. State*, 56 Tex. Crim. 62, 118 S. W. 1037; *Bynum v. State* (Tex. Crim.), 72 S. W. 844; *Dill v. State*, 35 Tex. Crim. 240, 33 S. W. 126, 60 Am. St. Rep. 37; *Masterson v. State*, 20 Tex. App. 574; *Faulkner v. State*, 15 Tex. App. 115; *Gonzales v. State*, 12 Tex. App. 657; *Mathews v. State*, 10 Tex. App. 279; *Gonzales v. State*, 5 Tex. App. 584; *Dill v. State*, 1 Tex. App. 278. **W. Va.**—*State v. Piscocineri*, 68 W. Va. 76, 69 S. E. 375; *State v. Shores*, 31 W. Va. 491, 7 S. E. 413, 13 Am. St. Rep. 875. **Wis.**—*Porath v. State*, 90 Wis. 527, 63 N. W. 1061, 48 Am. St. Rep. 954.

[a] If the prosecuting attorney in drafting the indictment intended in fact to charge but one offense, and inserted the second count to obviate uncertainty in the evidence, that fact should be stated to the court on the interposing of a demurrer and made to appear of record. *State v. Jourdan*, 32 Ark. 203.

[b] In a prosecution for rape, though the indictment charge different acts on different dates in the several counts, election will not be compelled where nothing appears on the face of the indictment to indicate that the different counts were not introduced solely for the purpose of meeting the evi-

victim of an assault or a homicide may be given different names in different counts,² and it is proper to allege the ownership of the property which is the subject of the crime in several different persons, in order to meet any uncertainty in the evidence.³ But after the evidence is in, the court should require the state to elect upon which count a conviction will be asked, or submit the case to the jury upon instructions authorizing a conviction under either count, as they find the facts to be, but not upon both,⁴ though the defendant cannot complain of a failure so to do where he is convicted upon only one count.⁵

(III.) **Charging Different Modes or Means of Accomplishing the Crime.** If but one transaction is referred to, the accused cannot require⁶ the

dence as it might transpire, the charges being substantially for the same offense. *People v. Gray*, 251 Ill. 431, 96 N. E. 268.

2. *People v. Johnson*, 2 Wheel. Crim. Cas. (N. Y.) 361; *State v. Smith*, 24 W. Va. 814.

3. *Ala.*—*Bass v. State*, 63 Ala. 108. *Ark.*—*State v. Jourdan*, 32 Ark. 203. *Nev.*—*State v. Nelson*, 11 Nev. 334. *Tex.*—*Smith v. State*, 34 Tex. Crim. 123, 29 S. W. 774. *Va.*—*Dowdy v. Com.*, 9 Gratt. 727, 60 Am. Dec. 314.

4. *State v. Cannon*, 232 Mo. 205, 134 S. W. 513.

5. *State v. Cannon*, 232 Mo. 205, 134 S. W. 513.

6. *Ark.*—*Davidson v. State*, 108 Ark. 191, 158 S. W. 1103, Ann. Cas. 1915B, 436; *State v. Bailey*, 62 Ark. 489, 36 S. W. 690. *D. C.*—*United States v. Neverson*, 1 Mackey 152. *Ga.*—*Williams v. State*, 59 Ga. 400. *Ind.*—*Merrick v. State*, 63 Ind. 327; *Joy v. State*, 14 Ind. 139; *Engleman v. State*, 2 Ind. 91, 52 Am. Dec. 494. *Ia.*—*State v. Finnegean*, 127 Iowa 286, 103 N. W. 155. *Mich.*—*People v. McDowell*, 63 Mich. 229, 30 N. W. 68. *Mo.*—*State v. Cannon*, 232 Mo. 205, 134 S. W. 513. *N. Y.* *People v. Willson*, 109 N. Y. 345, 16 N. E. 540; *People v. Johnson*, 2 Wheel. Crim. Cas. 361; *People v. Kellogg*, 105 App. Div. 505, 94 N. Y. Supp. 617. *Tex.*—*Goode v. State*, 57 Tex. Crim. 220, 123 S. W. 597; *Robinson v. State*, 56 Tex. Crim. 62, 118 S. W. 1037; *Greenwood v. State* (Tex. Crim.), 44 S. W. 177; *Moore v. State*, 37 Tex. Crim. 552, 40 S. W. 287. *Utah.*—*State v. Vance*, 38 Utah 1, 110 Pac. 434.

[a] Carrying a pistol such as is used in the army or navy of the United States and a pistol that is not so used, referring to the same instrument.

State v. Bailey, 62 Ark. 489, 36 S. W. 690.

[b] **Charging a homicide by different instruments** in different counts. *Pierce v. United States*, 160 U. S. 355, 16 Sup. Ct. 321, 40 L. ed. 454; *People v. Johnson*, 2 Wheel. Crim. Cas. (N. Y.) 361.

[c] **Killing with a stone, killing by kicking and beating, and killing by instruments unknown.** *United States v. Neverson*, 1 Mackey (D. C.) 152.

[d] **Murder by poison and by inflicting mortal wounds.** *Merrick v. State*, 63 Ind. 327.

[e] **Murder by striking with an instrument unknown and by stabbing with a knife.** *State v. Lanahan*, 144 Mo. 31, 45 S. W. 1090.

[f] **Abortion by means of drugs and by use of an instrument.** *Moore v. State*, 37 Tex. Crim. 552, 40 S. W. 287.

[g] **Election will not be required between counts charging murder by means and in a manner unknown, and murder while engaged in an attempt to rape deceased.** *People v. Wright*, 136 N. Y. 625, 32 N. E. 629.

[h] "The whole case is submitted to the jury, and it is for them to say from the evidence what the means were that were used and what one caused death." *State v. Vance*, 38 Utah 1, 110 Pac. 434.

[i] **Forgery.**—Several counts, each charging forgery, one by falsely and fraudulently making a bill of exchange in a fictitious name, another by fraudulently obtaining a sum of money by color of the same bill (alleging it to be drawn in a fictitious name), another for fraudulently obtaining a sum of money by color of the same bill, and another for falsely and fraudulently uttering the same bill, the last two counts, however, not alleging the bill

state to elect as between different means set out in several counts by which it is alleged the crime was committed, the matter resting in the discretion of the trial court.⁷

d. *Charging Defendant as Principal and Accessory.*—Where the defendant is charged in different counts with having committed the crime as principal and as accessory, in those states where by statute it is provided that one guilty as an accessory is to be regarded as a principal, the matter of requiring an election as to which count the prosecution will rely upon is addressed to the discretion of the court,⁸ and it is held generally that between counts charging liability as principal and accessory before the fact,⁹ accessory before the fact and accessory after the fact,¹⁰ or as principal in the first degree and as principal in the second degree,¹¹ an election will not be required, since the two counts but charge the same offense in different modes.¹² Where, however, under the statute one charged as a principal cannot be convicted as an accomplice, and vice versa, an election should be required between counts charging liability as a principal and as an accomplice.¹³

e. *Time When Election Will Be Required.*—The court will not require an election, where the counts relate to the same transaction, at the opening of the trial,¹⁴ or after the opening statement on behalf of the state.¹⁵ Thus the election need not be made before the introduction of evidence,¹⁶ and it is sufficient if it be made at the close of the evi-

to be drawn in a fictitious name, may be joined in the same bill of indictment, all the offenses being felonies and of the same nature according to the code. And at the trial the state will not, as a matter of law, be bound to elect on which particular count or counts it would rely for a conviction. *Lascelles v. State*, 90 Ga. 347, 16 S. E. 945, 35 Am. St. Rep. 216.

7. *Pierce v. United States*, 160 U. S. 355, 16 Sup. Ct. 321, 40 L. ed. 454. See *supra*, XVI, B, 1, a.

8. *Tuttle v. People*, 33 Colo. 243, 79 Pac. 1035. See *State v. Marsh*, 70 Vt. 288, 40 Atl. 836.

9. *Ark.*—*Gill v. State*, 59 Ark. 422, 27 S. W. 598; *Corley v. State*, 50 Ark. 305, 7 S. W. 255. *Ga.*—*Williams v. State*, 69 Ga. 11. *Ky.*—*Puckett v. Com.*, 13 Ky. L. Rep. 466, 17 S. W. 335. *La.*—*State v. Ardoin*, 49 La. Ann. 1145, 22 So. 620, 62 Am. St. Rep. 678. *N. H.*—*State v. Sawtelle*, 66 N. H. 488, 32 Atl. 831.

[a] Murder as principal in the first degree, principal in the second degree, and as accessory before the fact, no election required. *Williams v. State*, 69 Ga. 11.

10. "A count charging a person

with being accessory before the fact, may be joined with a count charging him with being accessory after the fact, to the same felony; and the prosecutor cannot be required to elect upon which he will proceed, as the party may be found guilty on both. *R. v. Blackstone*, 8 Carr & Payne 43." *United States v. Dickinson*, 2 McLean 325, 25 Fed. Cas. No. 14,958.

11. *Ga.*—*Williams v. State*, 69 Ga. 11. *Ky.*—*Britton v. Com.*, 29 Ky. L. Rep. 857, 96 S. W. 556. *La.*—*State v. Cook*, 20 La. Ann. 145. *Mo.*—*State v. Testerman*, 68 Mo. 408; *State v. Miller*, 67 Mo. 604. *Ohio.*—*Hotelling v. State*, 3 Ohio C. C. 630. *S. C.*—*State v. Norton*, 28 S. C. 572, 6 S. E. 820.

12. *Gill v. State*, 59 Ark. 422, 27 S. W. 598; *Corley v. State*, 50 Ark. 305, 7 S. W. 255; *State v. Cook*, 20 La. Ann. 145.

13. *Simms v. State*, 10 Tex. App. 131.

14. *People v. Kellogg*, 105 App. Div. 505, 94 N. Y. Supp. 617.

15. *State v. Finch*, 71 Kan. 793, 81 Pac. 494.

16. *State v. Duvenick*, 237 Mo. 185, 140 S. W. 897.

dence for the state,¹⁷ or on submission of the case to the jury.¹⁸

2. Counts Relating to Different Transactions.—a. *Election When Required.*—The right to require the state to elect is confined to cases of felony where the offenses charged in the several counts are actually distinct from each other and do not arise out of the same transaction,¹⁹ in which case the court may require the state to elect upon which count to proceed, or quash the indictment.²⁰

17. **Ga.**—Sutton v. State, 124 Ga. 815, 53 S. E. 381. **N. Y.**—People v. Kellogg, 105 App. Div. 505, 94 N. Y. Supp. 617. **N. C.**—State v. Davenport, 156 N. C. 679, 72 S. E. 7.

18. **People v. Seaman**, 107 Mich. 348, 65 N. W. 203, 61 Am. St. Rep. 326.

19. **U. S.**—United States v. Dickinson, 14, 958. **Ala.**—Upshur v. State, 100 Ala. 2, 14 So. 541; Butler v. State, 91 Ala. 87, 9 So. 191; Wooster v. State, 55 Ala. 217. **Ark.**—State v. Jourdan, 32 Ark. 203. **Del.**—State v. Moore, 2 Penne. 299, 46 Atl. 669; State v. Man-

luff, 1 Houst. Cr. Cas. 208. **D. C.**—Kidwell v. United States, 38 App. Cas. 566.

Ga.—State v. Hogan, R. M. Charl. 474.

Ill.—People v. Warfield, 261 Ill. 293, 103 N. E. 979; People v. Bernstein, 250 Ill. 63, 95 N. E. 50; People v. Weil, 243 Ill. 208, 90 N. E. 731, 134 Am. St. Rep. 357; Herman v. People, 131 Ill. 594, 22 N. E. 471; Andrews v. People, 117 Ill. 195, 7 N. E. 265; Goodhue v. People, 94 Ill. 37; Johnson v. People, 124 Ill. App. 213. **Ind.**—Griffith v. State, 36 Ind. 406; McGregg v. State, 4 Blackf. 101. **Ia.**—State v. Von Kutzleben, 136 Iowa 89, 113 N. W. 484; State v. Jamison, 110 Iowa 337, 81 N. W. 594; State v. House, 55 Iowa 466, 8 N. W. 307; State v. McPherson, 9 Iowa 53. **La.**—State v. John, 129 La. 208, 55 So. 766; State v. Jacob, 10 La. Ann. 141; State v. Cazeau, 8 La. Ann. 109. **Me.**—State v. Flye, 26 Me. 312. **Md.**—State v. McNally, 55 Md. 559; State v. Bell, 27 Md. 675, 92 Am. Dec. 658. **Mich.**—People v. McKinney, 10 Mich. 54, 95. **Mo.**—State v. Cannon, 232 Mo. 205, 134 S. W. 513; State v. Davis, 29 Mo. 391; State v. Porter, 26 Mo. 201. **Neb.**—Miller v. State, 78 Neb. 645, 111 N. W. 637; Furst v. State, 31 Neb. 403, 47 N. W. 1116; Candy v. State, 8 Neb. 482, 1 N. W. 454. **N. Y.**—Nelson v. People, 23 N. Y. 293; Kane v. People, 8 Wend. 203; People v. Austin, 1 Park. Crim. 154. **N. C.**—State v. Davenport, 156 N. C. 596, 72 S. E. 7; State v. Parish,

104 N. C. 679, 10 S. E. 457; State v. Morrison, 85 N. C. 561; State v. Reel, 80 N. C. 442. **Ohio.**—State v. Franzreb, 11 Ohio Dec. (Reprint) 775. **Okl.**—Hughes v. State, 7 Okla. Crim. 117, 122 Pac. 554; De Graff v. State, 2 Okla. Crim. 519, 103 Pac. 538; McLaughlin v. State, 2 Okla. Crim. 343, 102 Pac. 713. **Pa.**—Com. v. Manson, 2 Ashm. 31; Com. v. Fry, 5 Lans. Law Rev. 75. **S. C.**—State v. Jones, 86 S. C. 17, 67 S. E. 160; State v. Sheppard, 54 S. C. 178, 32 S. E. 146; State v. Woodard, 38 S. C. 353, 17 S. E. 135; State v. Norton, 28 S. C. 572, 6 S. E. 820; State v. Scott, 15 S. C. 434. **Tex.**—Goode v. State (Tex. Crim.), 123 S. W. 597; Masterson v. State, 20 Tex. App. 574. **Utah.**—State v. Spencer, 15 Utah 149, 49 Pac. 302. **Va.**—See Mitchell v. Com., 93 Va. 775, 20 S. E. 892. **W. Va.**—State v. Shores, 31 W. Va. 491, 7 S. E. 413, 13 Am. St. Rep. 875; State v. Halida, 28 W. Va. 499; State v. Smith, 24 W. Va. 814.

[a] The election being required in certain cases to prevent prejudice to the defendant by bringing in evidence of other crimes for which the defendant is not indicted, and to avoid bolstering up a conviction of the offense charged by other and different offenses. Smith v. State, 52 Ala. 384; Davidson v. State, 5 Ala. App. 106, 59 So. 687.

[b] Where defendant is charged in two counts with statutory rape committed on two different females, there being a lapse of six months between the two offenses, it is reversible error not to require the prosecution to elect. Kidwell v. United States, 38 App. Cas. (D. C.) 566.

[c] It has been broadly held that if the indictment charges more than one offense the state must elect, and a failure to do so constitutes reversible error. State v. Caine (Iowa), 105 N. W. 1018.

20. **Ala.**—Mayo v. State, 30 Ala. 32. **Md.**—Toomer v. State, 112 Md. 285, 76 Atl. 118; State v. Blakeney, 96 Md. 711,

Where the character of the offenses charged is such that the defendant may properly be convicted under more than one count an election will be denied,²¹ and it seems that in some jurisdictions different felonies of the same class or grade and subject to the same punishment may be joined and an election will not necessarily be required,²² depend-

54 Atl. 614; *State v. McNally*, 55 Md. 559, 562. Mich.—*People v. McKinney*, 10 Mich. 54, 95. Miss.—*Burges v. State*, 81 Miss. 482, 33 So. 499. N. C.—*State v. Morrison*, 85 N. C. 561. Okla.—*McLaughlin v. State*, 2 Okla. Crim. 343, 102 Pac. 713.

[a] In *Mayo v. State*, 30 Ala. 32, after citing many authorities the court says: "The principle to be extracted from these authorities is, that the court should always interpose either by quashing the instrument, or by compelling an election, where an attempt is made as manifested by either the indictment or the evidence, to convict the accused of two or more offenses growing out of distinct and separate transactions."

[b] Distinct larcenies cannot be joined in the same indictment. *State v. Jourdan*, 32 Ark. 203. But *Com. v. Sullivan*, 104 Mass. 552, permits it to be done and holds that the matter rests entirely in the discretion of the court.

[c] The indictment should not be dismissed on the ground that it charges two offenses; the proper practice is to require the state to elect for which offense it will prosecute. *Com. v. Reincke Coal Min. Co.*, 117 Ky. 885, 79 S. W. 287.

[d] Where the indictment charges two separate and distinct offenses, in one count a capital felony, and in the other an ordinary felony, committed on different dates, the court on motion should either quash the indictment or compel the state to elect. *Betts v. State*, 60 Tex. Crim. 631, 133 S. W. 251.

21. Conn.—*State v. Tucker*, 75 Conn. 261, 52 Atl. 711. Fla.—*Eggart v. State*, 40 Fla. 527, 25 So. 144. Ill.—*People v. Bernstein*, 250 Ill. 63, 95 N. E. 50.

22. See the following cases: U. S. *Gardes v. United States*, 87 Fed. 172, 30 C. C. A. 596. Ala.—*Howard v. State*, 108 Ala. 571, 18 So. 813. D. C. *Hyde v. United States*, 27 App. Cas. 362. Mass.—*Benson v. Com.*, 158 Mass. 164, 33 N. E. 384; *Com. v. Mullen*, 150

Mass. 394, 23 N. E. 51. Neb.—*Bartley v. State*, 53 Neb. 310, 73 N. W. 744. Tenn.—*Foute v. State*, 15 Lea 712; *Smith v. State*, 8 Lea 386.

[a] United States compiled statutes (Rev. St. [1901], §1024), 1913, §1690, provides: "When there are several charges against any person for the same act, or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offenses, which may be properly joined instead of having several indictments the whole may be joined in one indictment in separate counts; and if two or more indictments are found in such cases, the court may order them to be consolidated."

[b] In *Pointer v. United States*, 151 U. S. 396, 14 Sup. Ct. 410, 38 L. ed. 208, the court sustained an indictment charging in different counts the defendant with the commission of two murders, "distinct crimes, the victims being different persons, during the course of its opinion the court said: "While recognizing as fundamental the principle that the court must not permit the defendant to be embarrassed in his defense by a multiplicity of charges embraced in one indictment and to be tried by one jury, and while conceding that regularly or usually an indictment should not include more than one felony, the authorities concur in holding that a joinder in one indictment, in separate counts, of different felonies, at least of the same class or grade, and subject to the same punishment, is not necessarily fatal to the indictment upon demurrer or upon motion to quash or on motion in arrest of judgment, and does not, in every case, by reason alone of such joinder, make it the duty of the court, upon motion of the accused, to compel the prosecutor to elect upon what one of the charges he will go to trial. The court is invested with such discretion as enables it to do justice between the government and the accused. If it be discovered at

ing upon the circumstances of the particular case and requiring the exercise of a considerable degree of discretion by the trial judge.²² It has been stated that if in reviewing the record the court can see no prejudice resulting to the defendant, a reversal will not be had although it is bad practice not to compel an election where distinct felonies are charged in different counts.²⁴

In misdemeanors the prosecutor may join several distinct offenses in different counts of the same indictment and try them at the same time no election being required,²⁵ though not if the number of counts is so

any time during a trial that the substantial rights of the accused may be prejudiced by a submission to the same jury of more than one distinct charge of felony upon two or more of the same class, the court, according to the established principles of criminal law, can compel an election by the prosecutor. . . . In the present case, we cannot say from anything on the face of the indictment that the court erred or abused its discretion. . . . The indictment showed that the two murders were committed on the same day, in the same county and district, and with the same kind of an instrument. These facts alone justified the court in forbearing, at the beginning of the trial, and before the facts were disclosed, to compel an election by the prosecutor between the two charges of murder. When, however, the evidence was concluded—indeed, as soon as the defendant testified in his own behalf—the wisdom of the course pursued by the court became manifest; for it appeared that the two murders were committed at the same place, on the same occasion, and under such circumstances, that the proof in respect to one necessarily threw light upon the other. . . . It is, therefore, clear that the accused was not confounded in his defense by the union of the two offenses of murder in the same indictment, and that his substantial rights were not prejudiced by the refusal of the court to compel the prosecutor to elect.”

[c] In *United States v. Bickford*, 4 Blatchf. 337, 24 Fed. Cas. No. 14,591, an indictment contained over one hundred counts each charging a distinct felony, transmitting false papers to the pension office in support of applications for bounty land; a few days before trial prosecutor gave notice that testimony would be offered on only twenty different counts. On trial the

court refused to require a further election.

[d] There is no impropriety in trying a prisoner for different offenses at the same time, if the offenses are charged in the same indictment, and are of the same grade, and subject to the same punishment. *People v. Gates*, 13 Wend. (N. Y.) 311; *People v. Rynders*, 12 Wend. (N. Y.) 425.

[e] Several larcenies of the goods of different persons may be charged in different counts. *State v. Nelson*, 29 Me. 329.

[f] Felonies of the same general description, and mode of trial and nature of punishment the same, may be tried together. *Benson v. Com.*, 158 Mass. 164, 33 N. E. 384.

23. *Chadwick v. United States*, 141 Fed. 225, 72 C. C. A. 343.

[a] “If it does not appear that any substantial right of the defendant may be prejudiced by the submission to the same jury of more than one distinct accusation according to the orderly methods of a court of justice, it should not compel an election and thus cause repeated trials of offenses of the same class.” *Chadwick v. United States*, 141 Fed. 225, 72 C. C. A. 343.

24. *Chadwick v. United States*, 141 Fed. 225, 72 C. C. A. 343; *Burges v. State*, 81 Miss. 482, 33 So. 499.

25. *U. S.—Hartman v. United States*, 168 Fed. 30, 94 C. C. A. 124; *United States v. Devlin*, 6 Blatchf. 71, 25 Fed. Cas. No. 14,955; *United States v. Dickinson*, 2 McLean 325, 25 Fed. Cas. No. 14,958. *Ala.*—*Guarreno v. State*, 157 Ala. 17, 48 So. 65; *Taylor v. State*, 100 Ala. 68, 14 So. 875; *Wootter v. State*, 55 Ala. 217; *Covy v. State*, 4 Port. 186. See *Scrutehings v. State*, 151 Ala. 1, 43 So. 962. *Ark.*—*Orr v. State*, 18 Ark. 540. *Contra, State v. Lancaster*, 36 Ark. 55. *Ga.*—*Williams v. State*, 107 Ga. 693, 33 S. E. 641;

great as to embarrass the trial,²⁶ the matter resting in the discretion of the court²⁷

Exception must be taken to the ruling of the trial court denying an election or the matter cannot be considered on appeal.²⁸

b. *Motion To Elect or Other Objection.*—(I.) *Form of Motion or Objection.*—The usual method of requiring an election between counts is by motion addressed to the trial court that the prosecution be required to elect upon which count or counts it will rely for a conviction,²⁹ though the requiring of an election may also be upon demurrer³⁰ for

Lynes v. State, 46 Ga. 208. **Ill.**—Ket-
tles v. People, 221 Ill. 221, 77 N. E.
472; Goodhue v. People, 94 Ill. 37; Peo-
ple v. Carter, 171 Ill. App. 43; John-
son v. People, 124 Ill. App. 213. **Kan.**
State v. Skinner, 34 Kan. 256, 8 Pac.
420. **La.**—State v. John, 129 La. 208,
55 So. 736. **Md.**—State v. Blakeney,
55 So. 736. **Md.**—State v. Blakeney,
96 Md. 711, 54 Atl. 614. **Mass.**—See
Com. v. Edds, 14 Gray 406. **Mo.**—State
v. Kibby, 7 Mo. 317; State v. Pigg, 85
Mo. App. 399; State v. Boyer, 70 Mo.
App. 156. **Neb.**—Little v. State, 60
Neb. 749, 84 N. W. 248, 51 L. R. A.
717; McArthur v. State, 60 Neb. 390,
83 N. W. 196. **N. Y.**—Kane v. People,
8 Wend. 203; People v. Costello, 1
Denio 83. **N. C.**—State v. Haney, 19
N. C. 390. **Pa.**—Com. v. Manson, 2
Ashm. 31. **S. C.**—State v. Rountree, 80
S. C. 387, 61 S. E. 1072. **Tex.**—Golden
v. State, 72 Tex. Crim. 19, 160 S. W.
957; Mueller v. State (Tex. Crim.), 153
S. W. 1142; Gould v. State (Tex. Crim.),
147 S. W. 247; Hubbert v. State (Tex.
Crim.), 147 S. W. 267; Tucker v. State
(Tex. Crim.), 145 S. W. 611; Sweeney
v. State, 59 Tex. Crim. 370, 128 S. W.
390; Woodward v. State (Tex. Crim.),
126 S. W. 271; Jarrett v. State (Tex.
Crim.), 117 S. W. 833; Bivens v. State
(Tex. Crim.), 97 S. W. 86; Daniels v.
State (Tex. Crim.), 77 S. W. 215; Mas-
sey v. State (Tex. Crim.), 65 S. W. 911;
Newsom v. State (Tex. Crim.), 57 S.
W. 670; Herod v. State, 41 Tex. Crim.
597, 56 S. W. 59; Timon v. State, 34
Tex. Crim. 363, 30 S. W. 808; Stebbins
v. State, 31 Tex. Crim. 294, 20 S. W.
552; Armstrong v. State, 28 Tex. App.
526, 13 S. W. 864; Waddell v. State, 1
Tex. App. 720. **Va.**—Mitchell v. Com.,
93 Va. 775, 20 S. E. 892. **Wis.**—State
v. Gummer, 22 Wis. 441.

imprisonment in a penitentiary is pos-
sible, does not prevent a joinder of sev-
eral counts each charging a statutory
misdemeanor of the same class. Hart-
man v. United States, 168 Fed. 30, 94
C. C. A. 124.

[b] "In offenses inferior to felony,
the practice of quashing the indict-
ment, or calling upon the prosecutor to
elect on which charge he will proceed,
does not exist." Lynes v. State, 46
Ga. 208.

[c] In Michigan the doctrine of
election is applied to misdemeanors.
People v. Rohrer, 100 Mich. 126, 58
N. W. 661; People v. Keefer, 97 Mich.
15, 56 N. W. 105; Tiedke v. Saginaw,
43 Mich. 64, 4 N. W. 627.

[d] In a misdemeanor the indict-
ment may charge a theft on a certain
date, and in a separate count may
charge another theft to have been com-
mitted on a separate and distinct date
and from another person and no election
will be required. Golden v. State, 72
Tex. Crim. 19, 160 S. W. 957.

26. State v. Nelson, 29 Me. 329.

[a] Where the information charges
the same offense in the same language,
a demurrer should be sustained to all
but one of the counts, or the state
should be required to elect on which
count it will stand. State v. Von Halt-
schuherr, 72 Iowa 541, 34 N. W. 323.

27. Goodhue v. People, 94 Ill. 37.
See Pearce v. State, 97 Ark. 5, 132 S.
W. 986; State v. Lief, 248 Mo. 722,
154 S. W. 1133.

28. Johnson v. State, 29 Ala. 62, 65
Am. Dec. 383.

29. See cases cited under *supra*,
XVI, B, 2.

30. State v. Jourdan, 32 Ark. 203.

[a] Under a statute providing that
the charging of more than one offense
can only be taken advantage of by
demurrer, it seems that an election can-

[a] The fact that different pen-
alties are attached, by some of which

the improper joinder, or in some states by objection to the evidence.³¹

Motion to quash the indictment or certain counts thereof for misjoinder, is equivalent to compelling an election,³² and is the proper remedy where it appears on the face of the indictment or on the opening of the case that two or more distinct and separate offenses are charged.³³

(II.) **Necessity for.**—Though the counts charge separate and distinct offenses the defendant may be lawfully tried therefor unless he make seasonable objections thereto,³⁴ though it has been held that in such case the court should require an election without motion.³⁵ Failure to require an election is not ground for the arrest of judgment.³⁶

(III.) **Time for Motion.**—The motion to compel an election comes too late in some states, when not made until after plea and after all the evidence is in,³⁷ as the motion should be made before plea.³⁸ Though, in some jurisdictions, if the objection is not made until after plea it lies in the discretion of the court whether to compel the state to elect and the ruling of the court is not ground of error.³⁹ And it has been held that the motion to require the state to elect may be made at any time during the trial.⁴⁰

not be required where defendant failed to demur. See *People v. Shotwell*, 27 Cal. 394.

[b] **On sustaining a demurrer** for improper joinder of offenses the court will require the state to elect on which offense to prosecute. *Hazlewood v. Com.*, 141 Ky. 232, 132 S. W. 567.

[c] **If an indictment is bad as to all counts** no election can be made but a demurrer will be sustained to the whole. *Com. v. Bradley*, 132 Ky. 512, 116 S. W. 761.

31. See *Blackwell v. State*, 51 Tex. Crim. 24, 100 S. W. 774.

32. See the following cases: *Ala.* *Mayo v. State*, 30 Ala. 32. *D. C.*—*Kidwell v. United States*, 38 App. Cas. 566. *Ind.*—*Engleman v. State*, 2 Ind. 91, 52 Am. Dec. 494; *Weinzorpflin v. State*, 7 Blackf. 186; *State v. Smith*, 8 Blackf. 489. *Miss.*—*Sarah v. State*, 28 Miss. 267. *W. Va.*—*State v. Shores*, 31 W. Va. 491, 7 S. E. 413, 13 Am. St. Rep. 875; *State v. Smith*, 24 W. Va. 814.

[a] The state in answer to a motion to quash has the right to elect upon which count it will proceed. *Betts v. State*, 60 Tex. Crim. 631, 133 S. W. 251.

33. *State v. Shores*, 31 W. Va. 491, 7 S. E. 413, 13 Am. St. Rep. 875; *State v. Smith*, 24 W. Va. 814.

34. *Miss.*—*Teat v. State*, 53 Miss. 439, 24 Am. Rep. 708. *Neb.*—*Lillie v. State*, 83 Neb. 268, 119 N. W. 476.

N. C.—See *State v. Reel*, 80 N. C. 442,

holding the question of election cannot be raised as a ground in arrest of judgment.

[a] Where no objection was made until the case was about to be submitted to the jury, when the people were required to elect, and did elect, held the defendant could not complain. *People v. Rice*, 103 Mich. 350, 61 N. W. 540.

[b] A motion to require the prosecution to elect must be made or motion to quash or objection to evidence must be made, or the defendant cannot object if the case is submitted to the jury under more than one count. *Blackwell v. State*, 51 Tex. Crim. 24, 100 S. W. 774.

35. *State v. Woodard*, 38 S. C. 353, 17 S. E. 135; *State v. Norton*, 28 S. C. 572, 6 S. E. 820; *State v. Scott*, 15 S. C. 434; *State v. Nelson*, 14 Rich. L. (S. C.) 169, 172.

36. *State v. Reel*, 80 N. C. 442.

37. *State v. Jacob*, 10 La. Ann. 141; *Cannon v. State*, 75 Miss. 364, 20 So. 827; *Hemingway v. State*, 68 Miss. 371, 8 So. 317; *George v. State*, 39 Miss. 570.

38. *State v. Jacob*, 10 La. Ann. 141; *Hemingway v. State*, 68 Miss. 371, 8 So. 317.

39. *Weinzorpflin v. State*, 7 Blackf. (Ind.) 186; *Josephine v. State*, 39 Miss. 613; *George v. State*, 39 Miss. 570.

40. *State v. Bell*, 27 Md. 675, 92 Am. Dec. 658.

c. *Time for Election*.—Where a party is charged with different felonies in one indictment he can, as a matter of right, demand that an election be made by the state before trial,⁴¹ so if it appear from the indictment that distinct and separate offenses are charged, election may be made on its reading to the jury,⁴² or if it appear from the evidence, election should be made when that shows the existence of different transactions and different offenses.⁴³ In some cases it seems the court in its discretion need not require the state to elect until after the close of the evidence for the state,⁴⁴ though the election should in all cases be made not merely before the case goes to the jury, but before the prisoner is called upon for his defense.⁴⁵

d. *Sufficiency of Election*.—The election by the state should clearly designate the count under which a conviction is sought.⁴⁶ Where the court in its instructions restricts the consideration of the jury to a particular count or counts, it is equivalent to an election on the part of the state to rely on such count or counts.⁴⁷

41. *Com. v. Manson*, 2 Ashm. (Pa.) 31.

[a] In *Burges v. State*, 81 Miss. 482, 33 So. 499, the accused, after the jury was impeached, moved the court to require an election, which motion was denied. The evidence both for the state and defense was introduced, after which the state made its election. The court in reviewing the case held that it was error not to require the election before any evidence was introduced for the state.

42. *Gilbert v. State*, 65 Ga. 449.

43. *Gilbert v. State*, 65 Ga. 449.

[a] Where the indictment while containing several counts on its face shows that the transaction is not severable, but the proof discloses that several distinct transactions are set out, on timely demand, the court should require an election. *Bass v. State*, 63 Ala. 108; *Harris v. State*, 55 Tex. Crim. 469, 117 S. W. 839. See also *Simms v. State*, 10 Tex. App. 131.

44. Where an information contains two or more counts charging distinct and separate offenses of the same nature, the trial court may, in the exercise of a sound discretion, require the state to elect on which count it will rely for conviction, either before the commencement of the trial, or after the state has produced its evidence in chief and before the accused is required to make his defense. *Blair v. State*, 72 Neb. 501, 101 N. W. 17.

[a] Where the defendant was charged with several distinct embezzle-

ments in different counts and a motion that the state be required to elect was made, the action of the trial court in withholding its ruling upon this motion until the close of the introduction of the state's testimony in chief, at which time the motion was sustained and the state required to elect, held not to be an abuse of discretion. *Korth v. State*, 46 Neb. 631, 65 N. W. 792.

45. Ga.—*Gilbert v. State*, 65 Ga. 449. Vt.—*State v. Smith*, 22 Vt. 74. W. Va. *State v. Smith*, 24 W. Va. 814.

46. See *State v. Rudy*, 9 Kan. App. 69, 57 Pac. 263; *State v. Duveniek*, 237 Mo. 185, 140 S. W. 897.

[a] In a prosecution for embezzlement where the defendant was alleged to have been both the attorney and agent of the prosecutrix, held sufficient election as to which capacity it would rely on where it elected to rely upon the fiduciary relation of principal and agent, and not that of attorney and client. *State v. Lewis*, 31 Wash. 75, 71 Pac. 778.

47. *Mueller v. State* (Tex. Crim.), 153 S. W. 1142; *Betts v. State*, 57 Tex. Crim. 389, 124 S. W. 424; *Roberson v. State*, 51 Tex. Crim. 335, 101 S. W. 800; *Blackwell v. State*, 51 Tex. Crim. 24, 100 S. W. 774; *Ricks v. State*, 48 Tex. Crim. 229, 87 S. W. 345; *Martin v. State*, 47 Tex. Crim. 29, 83 S. W. 390, affirmed in 200 U. S. 316, 26 Sup. Ct. 338, 50 L. ed. 497; *Parks v. State*, 46 Tex. Crim. 100, 79 S. W. 301; *Moore v. State*, 37 Tex. Crim. 552, 40 S. W. 287; *Smith v. State*, 34 Tex. Crim. 123, 29

There is no merit in the contention that the court failed to require an election where the state entered a *nolle prosequi* as to the first of two counts,⁴⁸ or offered proof of but one count.⁴⁹

c. *Effect of Election.* (I.) *As a Cure for Misjoinder.*—Where two distinct offenses are improperly charged, the misjoinder is cured by the election of the state to prosecute for only one offense.⁵⁰

(II.) *On Second Trial.*—Where the court on the first trial submits the case under a particular count, this is tantamount to an election to rely on that one and a dismissal of the other counts, and on a succeeding trial the case must be submitted under that same count.⁵¹

(III.) *As an Abandonment of Other Counts.*—An election to try on one count does not acquit the defendant of the other charges,⁵² though it obliterates from the indictment the charges not selected,⁵³ and is a practical abandonment of the other counts.⁵⁴ And it has been held that where the state elects to proceed on one count, it is equivalent to a verdict of not guilty on the others.⁵⁵

C. ELECTION BETWEEN DIFFERENT TRANSACTIONS DEVELOPED DURING TRIAL.—1. *When Election Required.*—Where the indictment for a felony permits proof of, and several distinct offenses are attempted to be proved, under a single count, an election must be made by the prosecution to stand on one particular offense⁵⁶ developed in the evi-

S. W. 774; *Parks v. State*, 29 Tex. App. 597, 16 S. W. 532; *Dalton v. State*, 4 Tex. App. 333; *Weathersby v. State*, 1 Tex. App. 643.

48. *Heller v. People*, 2 Colo. App. 459, 31 Pac. 773; *State v. Lee*, 228 Mo. 480, 128 S. W. 987.

49. *Pearce v. State*, 97 Ark. 5, 132 S. W. 986.

50. *State v. Buck*, 59 Iowa 382, 13 N. W. 342; *Stamper v. Com.*, 102 Ky. 33, 42 S. W. 915. But see *Thomas v. State*, 111 Ala. 51, 20 So. 617.

51. *Parks v. State*, 46 Tex. Crim. 100, 79 S. W. 301.

52. *Com. v. Bass*, 4 Kulp (Pa.) 76.

[a] Where an election charges distinct offenses and an election is made, no jeopardy can be incurred under counts not relied upon; but a *nol. pros.* may be entered as to such counts, and a new indictment found. *Joy v. State*, 14 Ind. 139.

53. *Ellis v. Com.*, 3 Ky. L. Rep. 251.

54. *State v. Smalley*, 50 Vt. 736.

55. *State v. McNeill*, 93 N. C. 552.

56. *Ala.—Williams v. State*, 77 Ala. 53; *Peacher v. State*, 61 Ala. 22; *Warriek v. State*, 8 Ala. App. 391, 62 So. 342. *Cal.—People v. Williams*, 133 Cal. 168, 65 Pac. 323; *People v. Castro*, 133 Cal. 11, 65 Pac. 13; *People v. Mancuso*, 23

Cal. App. 146, 137 Pac. 278; *People v. Simon*, 21 Cal. App. 88, 131 Pac. 102; *People v. Bartnett*, 15 Cal. App. 89, 113 Pac. 879; *People v. Hatch*, 13 Cal. App. 521, 109 Pac. 1097. *Colo.—Schuette v. People*, 33 Colo. 325, 80 Pac. 890. *Ill. Goodhue v. People*, 94 Ill. 37. *Idaho. State v. Lancaster*, 10 Idaho 410, 78 Pac. 1081. *Ind.—Long v. State*, 56 Ind. 182, 26 Am. Rep. 19; *Mills v. State*, 52 Ind. 187; *Engleman v. State*, 2 Ind. 91, 52 Am. Dec. 494; *Squires v. State*, 3 Ind. App. 114, 28 N. E. 708. *Ia.—State v. Dean*, 148 Iowa 566, 126 N. W. 692; *State v. Loftus*, 128 Iowa 529, 104 N. W. 906; *State v. Norris*, 122 Iowa 154, 97 N. W. 999; *State v. Higgins*, 121 Iowa 19, 95 N. W. 244; *State v. King*, 117 Iowa 484, 91 N. W. 768; *State v. Brown*, 58 Iowa 298, 12 N. W. 318; *State v. Fidment*, 35 Iowa 541. *Kan.—State v. Grimmings*, 31 Kan. 376, 2 Pac. 574; *State v. Collins*, 8 Kan. App. 398, 57 Pac. 38. *Ky.—Newsom v. Com.*, 145 Ky. 627, 140 S. W. 1042; *Com. v. Illinois C. R. Co.*, 118 Ky. 775, 82 S. W. 381; *Smith v. Com.*, 109 Ky. 685, 60 S. W. 531; *Kehoe v. Com.*, 28 Ky. L. Rep. 35, 88 S. W. 1107. *Me.—State v. Acheson*, 91 Me. 240, 39 Atl. 370. *Mo. State v. Jackson*, 242 Mo. 410, 146 S. W. 1166; *State v. Pruitt*, 202 Mo. 49, 100

dence, as for example, where on a charge of statutory rape,⁵⁷ or in-

S. W. 431; *State v. Palmberg*, 199 Mo. 233, 97 S. W. 566. **N. D.**—*State v. Poull*, 14 N. D. 557, 105 N. W. 717. **Ohio**.—*Bainbridge v. State*, 30 Ohio St. 264; *State v. Franzreb*, 11 Ohio Dec. (Reprint) 775. **S. C.**—*State v. Hutchings*, 24 S. C. 142. **S. D.**—*State v. Boughner*, 7 S. D. 103, 63 N. W. 542. **Tenn.**—*Jamison v. State*, 117 Tenn. 58, 94 S. W. 675; *Holt v. State*, 107 Tenn. 539, 64 S. W. 473; *Womack v. State*, 7 Coldw. 508. **Tex.**—*Madrid v. State*, 71 Tex. Crim. 420, 161 S. W. 93; *Golden v. State*, 72 Tex. Crim. 19, 160 S. W. 957; *Ulmer v. State*, 71 Tex. Crim. 579, 160 S. W. 1188; *Brogdon v. State*, 63 Tex. Crim. 475, 140 S. W. 352; *Mazureczk v. State*, 59 Tex. Crim. 211, 128 S. W. 136; *Bader v. State*, 57 Tex. Crim. 392, 122 S. W. 555; *Gelber v. State*, 56 Tex. Crim. 460, 120 S. W. 863; *Henderson v. State*, 49 Tex. Crim. 511, 93 S. W. 550; *Powell v. State*, 47 Tex. Crim. 155, 82 S. W. 516; *Scott v. State*, 46 Tex. Crim. 305, 81 S. W. 950; *Stone v. State*, 45 Tex. Crim. 91, 73 S. W. 956; *Price v. State*, 44 Tex. Crim. 304, 70 S. W. 966; *Batchelor v. State*, 41 Tex. Crim. 501, 55 S. W. 491; *Larned v. State*, 41 Tex. Crim. 509, 55 S. W. 826; *Lunn v. State*, 44 Tex. 85. **Utah**.—*State v. Hoben*, 36 Utah 186, 102 Pac. 1000; *State v. Hilberg*, 22 Utah 27, 61 Pac. 215. **Wash.** *State v. Workman*, 66 Wash. 292, 119 Pac. 751; *State v. Boone*, 65 Wash. 331, 118 Pac. 46; *State v. Osborne*, 39 Wash. 548, 81 Pac. 1096. **W. Va.**—*State v. Calhoun*, 67 W. Va. 666, 69 S. E. 1098.

[a] **May Be by State on Its Own Motion.**—*State v. Johnson*, 23 Minn. 569.

[b] **Reason for Rule.**—"Some of the jury may have been satisfied that an assault was committed on one of the occasions specified, and others of an assault on a different occasion, and thus a verdict rendered without unanimity respecting either of the occasions described in the testimony." *State v. Acheson*, 91 Me. 240, 39 Atl. 370.

[c] In *State v. Hilberg*, 22 Utah 27, 61 Pac. 215, where the trial court failed to require an election, the appellate court said: "Such a course was calculated to confound, distract and confuse the defendant in his defense. He was expected to meet one charge at a specified time, but was required to de-

fend against and meet six different acts occurring during a period of fourteen months, upon one of which the jury was asked to convict. . . . No jury should be set to fishing or hunting for a charge which they are called upon to try. Such a course deprived the defendant of a fair trial, and compelled him, without warning, to defend against acts of which he had no notice." See also *People v. Davis*, 175 Mich. 594, 141 N. W. 667; *State v. Workman*, 66 Wash. 292, 119 Pac. 751.

As to admissibility of evidence of prior acts, see 10 ENCY. OF EV. 595.

[d] **There must be some evidence of two or more offenses before an election will be required.** *Tabor v. State*, 34 Tex. Crim. 631, 31 S. W. 662.

[e] **In a prosecution for gambling the state is not bound to elect the game the prosecuting witness had in mind when he made the affidavit.** *Winston v. State*, 145 Ala. 91, 41 So. 174.

[f] **Election as to Ownership of Stolen Property.**—Where the indictment charges the larceny of a hog, the property of a person whose name is to the grand jury unknown, and two witnesses testify on the part of the prosecution, the testimony of each tending to show that the hog belonged to him, an election as to the fact of ownership will not be compelled. *Black v. State*, 83 Ala. 81, 3 So. 814, 3 Am. St. Rep. 691.

57. **Cal.**—*People v. Williams*, 133 Cal. 168, 65 Pac. 323; *People v. Castro*, 133 Cal. 11, 65 Pac. 13. **Colo.**—*Schuette v. People*, 33 Colo. 325, 80 Pac. 890. **Idaho.**—*State v. Lancaster*, 10 Idaho 410, 78 Pac. 1081. **Ia.**—*State v. Norris*, 122 Iowa 154, 97 N. W. 999; *State v. King*, 117 Iowa 484, 91 N. W. 768. **Ky.**—*Newsom v. Com.*, 145 Ky. 627, 140 S. W. 1042. **Me.**—*State v. Acheson*, 91 Me. 240, 39 Atl. 570. **Mo.**—*State v. Hughes*, 258 Mo. 264, 167 S. W. 529; *State v. Palmberg*, 199 Mo. 233, 97 S. W. 566. **Tenn.**—*Jamison v. State*, 117 Tenn. 58, 94 S. W. 675. **Tex.**—*Ulmer v. State*, 71 Tex. Crim. 579, 160 S. W. 1188; *Powell v. State*, 47 Tex. Crim. 155, 82 S. W. 516; *Stone v. State*, 45 Tex. Crim. 91, 73 S. W. 956; *Price v. State*, 44 Tex. Crim. 304, 70 S. W. 966; *Batchelor v. State*, 41 Tex. Crim. 501,

cest,⁵⁸ evidence is introduced tending to show several acts of intercourse. This rule has no application where a series of acts form part of one and the same transaction,⁵⁹ or where but one crime is committed though several acts be shown,⁶⁰ or where the different acts developed are part of a continuing offense,⁶¹ as for example a continuing embezzlement.⁶²

55 S. W. 491. **Utah.**—*State v. Hilberg*, 22 Utah 27, 61 Pac. 215. **Wash.**—*State v. Workman*, 66 Wash. 292, 119 Pac. 751; *State v. Osborne*, 39 Wash. 548, 81 Pac. 1096.

58. **Ia.**—*State v. Hurd*, 101 Iowa 391, 70 N. W. 613. **Ky.**—*Smith v. Com.*, 109 Ky. 685, 60 S. W. 531. **Mo.**—*State v. Pruitt*, 202 Mo. 49, 100 S. W. 431.

59. **Ala.**—*Ellis v. State*, 105 Ala. 72, 17 So. 19; *Beasley v. State*, 59 Ala. 20; *Johnson v. State*, 35 Ala. 363. **Cal.**—*People v. Oppenheimer*, 156 Cal. 733, 106 Pac. 74; *People v. Simon*, 21 Cal. App. 88, 131 Pac. 102; *People v. Petruzo*, 13 Cal. App. 569, 110 Pac. 324. **Ga.**—*Cody v. State*, 118 Ga. 784, 45 S. E. 622. **Ia.**—*State v. Dean*, 148 Iowa 566, 126 N. W. 692. **Mich.**—*People v. Dyer*, 79 Mich. 480, 44 N. W. 937. **Mo.**—*State v. Jackson*, 242 Mo. 410, 146 S. W. 1166. **N. C.**—*State v. Bishop*, 98 N. C. 773, 4 S. E. 357; *State v. March*, 46 N. C. 526. **Tex.**—*Sisk v. State* (Tex. Crim.), 42 S. W. 985. **Wash.**—*State v. Ray*, 62 Wash. 582, 114 Pac. 439.

[a] Where it is shown that the defendant fired three separate shots at the party assaulted in quick succession, the state cannot be required to elect for which of the shots it would prosecute, since the firing of the subsequent shots will be regarded as a continuation of the assault and done under the impulse of the same design. *Ellis v. State*, 105 Ala. 72, 17 So. 119.

[b] Where one count charged an attempt to poison one person and the other an attempt to poison another person, and evidence disclosed one transaction consisting of a solicitation by the defendant of the cook of the household of the two persons, to put poison furnished in food prepared for the household, it was held that the state need not elect. *Johnson v. State*, 1 Ala. App. 102, 55 So. 321.

[c] In an indictment for larceny, containing one count, but charging the stealing of several articles, and the proof shows but one transaction, the

state will not be required to elect. *State v. Bishop*, 98 N. C. 773, 4 S. E. 357.

[d] On a prosecution for burglary where defendant entered the same house twice during a night in pursuit of the same purpose, the state need not elect. *State v. Fitzsimon*, 18 R. I. 236, 27 Atl. 446.

[e] It is not error on a trial for perjury to refuse to compel the state to elect upon which separate statement or statements of the defendant it will ask for a conviction, where those statements are such that any separation of them is practically impossible, and they were either all true or all wilfully false. *Hanscom v. State*, 93 Wis. 273, 67 N. W. 419.

60. *State v. Groves*, 21 R. I. 252, 43 Atl. 181 (offense of being a common gambler); *Payne v. State*, 112 Tenn. 587, 79 S. W. 1025, practicing medicine without a license. See, however, *People v. Clark*, 33 Mich. 113.

[a] In seduction an election cannot be required though several acts of intercourse be shown, as the crime was committed at the time of the first act, and subsequent acts were material only to show relationship between the parties and to corroborate prosecutrix as to the initial act. *State v. Nugent*, 134 Iowa 237, 111 N. W. 927.

61. *State v. Dean*, 148 Iowa 566, 126 N. W. 692; *State v. Higgins*, 121 Iowa 19, 95 N. W. 244. See also *Com. v. Sullivan*, 146 Mass. 142, 15 N. E. 491.

[a] **Adultery.**—In a prosecution for adultery where the proof shows a continued adulterous relationship extending over a given period of time, the state will not be required to elect to rely on any particular act of illicit intercourse, even though the indictment charges the offense to have been committed at a certain date. *State v. Higgins*, 121 Iowa 19, 95 N. W. 244.

62. **Ala.**—*Willis v. State*, 134 Ala. 429, 33 So. 226. **Ga.**—*Jackson v. State*, 76 Ga. 551. **Ill.**—*Ker v. People*, 110 Ill. 627, 51 Am. Rep. 706. **Ohio.**—*Campbell*

Evidence of acts occurring prior to the act on which the state elects to stand, while admissible, is only for the purpose of tending to show the commission of the act relied upon.⁶³

2. Motion To Compel Election.—a. *Necessity for.*—It is held that the defendant must avail himself of the right to compel an election by motion addressed to the court,⁶⁴ though there appears to be authority to the contrary.⁶⁵

In misdemeanor cases a motion to require an election is necessary.⁶⁶

b. *Time for Motion.*—The defendant may exercise his right to require the state to elect at any time before the case is submitted to the jury.⁶⁷

3. Time for Election.—The general rule in regard to an election as to offenses is that it should be made as soon as it can be done intelligently, the application of the rule depending necessarily upon the development of the facts in each particular case.⁶⁸ So the time of the

v. State, 35 Ohio St. 70; *Gravatt v. State*, 25 Ohio St. 162; *Young v. State*, 26 Ohio C. C. 747, *affirmed*, 73 Ohio St. 372, 78 N. E. 1138. **Wash.**—*State v. Boone*, 65 Wash. 331, 118 Pac. 46; *State v. Ray*, 62 Wash. 582, 114 Pac. 439.

See, however: **Cal.**—*People v. Hatch*, 13 Cal. App. 521, 109 Pac. 1097. **Mass.** *Com. v. Parker*, 165 Mass. 526, 43 N. E. 499. **Wyo.**—*Edelhoff v. State*, 5 Wyo. 19, 36 Pac. 627.

63. *State v. Palmberg*, 199 Mo. 233, 97 S. W. 566. See 10 ENCY OF EV. 595.

64. Ill.—*David v. People*, 204 Ill. 479, 68 N. E. 540. **Mo.**—*State v. Wising*, 187 Mo. 96, 85 S. W. 557. **W. Va.** *State v. Calhoun*, 67 W. Va. 666, 69 S. E. 1098.

See *Wooten v. State*, 57 Tex. Crim. 89, 121 S. W. 703; *Vogel v. State*, 138 Wis. 315, 119 N. W. 190.

[a] **Objection to the introduction of evidence** will not take the place of a motion to elect. *State v. Chicago, M. & St. P. Ry. Co.*, 77 Iowa 442, 42 N. W. 365, 4 L. R. A. 298; *Bradshaw v. State*, 32 Tex. Crim. 381, 23 S. W. 892.

[b] **Special requested instructions** confining the consideration of the jury will not take the place of a motion to elect. *Bradshaw v. State*, 32 Tex. Crim. 381, 23 S. W. 892.

65. *People v. Williams*, 133 Cal. 165, 65 Pac. 323; *People v. Castro*, 133 Cal. 11, 65 Pac. 13.

66. Ia.—*State v. Chicago, M. & St. P. Ry. Co.*, 77 Iowa 442, 42 N. W. 365. **Kan.**—*State v. Ferguson*, 8 Kan.

App. 810, 57 Pac. 555. **Tex.**—*Bradshaw v. State*, 32 Tex. Crim. 381, 23 S. W. 892.

[a] It is not sufficient to object to the introduction of evidence, or request instructions limiting the consideration of the jury; a motion to elect must be made. *Bradshaw v. State*, 32 Tex. Crim. 381, 23 S. W. 892.

67. *State v. Gaunts*, 60 Kan. 660, 57 Pac. 503; *Womack v. State*, 7 Coldw. (Tenn.) 508. See also: **Ill.**—*Goodhue v. State*, 94 Ill. 37. **Kan.**—*State v. Bon-sor*, 49 Kan. 758, 31 Pac. 736. **Miss.** *Wash v. State*, 14 Smed. & M. 120. **Tenn.**—*Womack v. State*, 7 Coldw. 509.

68. *Peacher v. State*, 61 Ala. 22; *State v. Hughes*, 258 Mo. 264, 167 S. W. 529; *State v. Hurley*, 242 Mo. 452, 146 S. W. 1154. See: **Colo.**—*Warford v. People*, 43 Colo. 107, 96 Pac. 556. **Mo.** *State v. Henderson*, 243 Mo. 503, 147 S. W. 480. **Tex.**—*Blackwell v. State*, 51 Tex. Crim. 24, 100 S. W. 774; *Lunn v. State*, 44 Tex. 85.

[a] Where the information charges but one offense and contains but one count, an election will not be required until the testimony discloses that the prosecution is attempting to establish two or more substantive offenses of the character charged in order to convict of the one charged in the information. *Warford v. People*, 43 Colo. 107, 96 Pac. 556.

[b] "In a prosecution for statutory rape upon a female under fourteen years of age, each act of intercourse is a separate felony and an election is proper at the earliest time when it

election must be left largely to the discretion of the trial court,⁶⁰ and the accused has no ground of complaint where it is not shown that this discretion has been abused to his injury.⁷⁰

It is not necessary that an election be made when the parties announce themselves ready for trial,⁷¹ or immediately after the opening statement of the prosecution during which reference is made to each offense,⁷² or at the close of the testimony in chief of the prosecutrix.⁷³ So it is held that the election need not be made until after the close of the state's case,⁷⁴ but must be made before the defense opens.⁷⁵ Other courts hold that failure to make election until all of the state's evidence is in, is such a violation of the legal rights of the defendant as calls for a reversal.⁷⁶

is apparent that the state can make an intelligent election." *State v. Henderson*, 243 Mo. 508, 147 S. W. 480.

69. **Minn.**—*State v. Schueller*, 120 Minn. 26, 138 N. W. 937. **Mo.**—*State v. Hughes*, 258 Mo. 264, 167 S. W. 529; *State v. McKinney*, 254 Mo. 688, 163 S. W. 822; *State v. Palmberg*, 199 Mo. 233, 97 S. W. 566. **N. D.**—*State v. Poull*, 14 N. D. 557, 105 N. W. 717. **Tex.**—*Lunn v. State*, 44 Tex. 85. **Vt.** *State v. Willett*, 78 Vt. 157, 62 Atl. 48.

70. *State v. Hughes*, 258 Mo. 264, 167 S. W. 529.

71. *Elam v. State*, 26 Ala. 48; *State v. Wissing*, 187 Mo. 96, 85 S. W. 557. But see *People v. Williams*, 133 Cal. 168, 65 Pac. 323; *People v. Castro*, 133 Cal. 11, 65 Pac. 13.

72. *State v. Schueller*, 120 Minn. 26, 138 N. W. 937; *State v. Hughes*, 258 Mo. 264, 167 S. W. 529. But see *People v. Bartnett*, 15 Cal. App. 89, 113 Pac. 879.

73. *State v. Hurley*, 242 Mo. 452, 146 S. W. 1154. See *Squires v. State*, 3 Ind. App. 114, 28 N. E. 708.

74. **Ill.**—*Schintz v. People*, 178 Ill. 320, 52 N. E. 903. **Ind.**—*Long v. State*, 56 Ind. 182, 26 Am. Rep. 19; *Squires v. State*, 3 Ind. App. 114, 28 N. E. 708. **Ia.**—*State v. Hurd*, 101 Iowa 391, 70 N. W. 613. **Kan.**—*State v. Gomes*, 9 Kan. App. 63, 57 Pac. 262. **Mo.** *State v. Hughes*, 258 Mo. 264, 167 S. W. 529; *State v. Pruitt*, 202 Mo. 49, 100 S. W. 431; *State v. Palmberg*, 199 Mo. 233, 97 S. W. 566. **N. D.**—*State v. Poull*, 14 N. D. 557, 105 N. W. 717. **S. C.**—*State v. Sims*, 3 Strobb. L. 137. **Vt.**—*State v. Willett*, 78 Vt. 157, 62 Atl. 48. **Va.**—*Dix v. Com.*, 110 Va. 907, 67 S. E. 344.

[a] In *Com. v. Coyne*, 207 Mass. 21, 92 N. E. 1028, the court says: "The decisions without exception, while recognizing the right to compel an election, are not entirely in accord as to when the defendant must exercise it, but by our practice, and the great weight of authority, he should do so at the close of the government's evidence, and before being called upon to open his defense. *Com. v. O'Connor*, 107 Mass. 219; *Com. v. O'Hanlon*, 155 Mass. 198, 29 N. E. 518; *Williams v. State*, 77 Ala. 53; *Scruggs v. State*, 111 Ala. 60, 20 So. 642; *State v. Chisnell*, 36 W. Va. 659, 15 S. E. 412; *State v. Smith*, 22 Vt. 74; *State v. Hurd*, 101 Iowa 391, 70 N. W. 613; *Lebkovitz v. State*, 113 Ind. 26, 14 N. E. 363, 597; *Goodhue v. People*, 94 Ill. 37."

[b] The proper course is, after the evidence is in, to require the state to elect which of such acts is relied upon for a conviction. *State v. Workman*, 66 Wash. 292, 119 Pac. 751.

[c] Motion made when the evidence is only beginning to disclose whether more than one distinct offense has been committed, is premature. *Squires v. State*, 3 Ind. App. 114, 28 N. E. 708.

75. *Lunn v. State*, 44 Tex. 85.

76. *People v. Flaherty*, 162 N. Y. 532, 57 N. E. 73.

[a] In cases of statutory rape where there is evidence that the accused has committed the crime on more than one occasion before the finding of the indictment, the state should be required to elect before the trial is begun which one of the several acts committed it will rely on to secure a conviction. *Newsom v. Com.*, 145 Ky. 627, 140 S. W. 1042.

[b] Permitting the prosecution to

On a second trial where the first trial has shown several acts any one of which the state may rely upon for conviction, the state should on request of defendant, make its election at the beginning of the trial.⁷⁷

4. **Election by Whom Made.** — The state has the authority to elect upon which of several transactions it will predicate its prosecution; election is not made by the accused.⁷⁸

5. **Sufficiency of Election.** — a. *In General.* — The court may exercise some discretion with regard to the definiteness of the election;⁷⁹ however, the election must be sufficiently definite and certain to distinguish the particular transaction relied upon,⁸⁰ and a failure to make

prove seven distinct acts of intercourse under an indictment charging defendant with the crime of sexual intercourse with a female not his wife, under the statutory age, on a date named, and authorizing it, after all its evidence from many witnesses has been concluded, to elect which one of the seven crimes attempted to be proved should be treated as the particular crime charged in the indictment, is such a violation of the legal rights of the accused as calls for a reversal. "We do not mean to say that a trial court should not, under any circumstances admit corroborative evidence in advance of evidence tending to prove the offense charged, but there was no excuse for taking that course in this case. The grievance of the defendant herein is founded on much broader lines than the mere order of procedure, and is that the court sustained the efforts of the district attorney to prevent him during seven days of the trial from finding out as to which one of the seven offenses testified to by the complainant he was indicted for and was to be tried for. This was done on the erroneous view of the law that the indictment covered not simply one offense, but each and every one of seven distinct offenses down to such time as the district attorney should be pleased to elect, or the court should compel him to choose, one offense for presentation to the jury, at which moment the other six offenses would cease to be covered by the indictment. This is a view for which we have been unable to find any support either in principle or authority." *People v. Flaherty*, 162 N. Y. 532, 57 N. E. 73.

77. *State v. Palmberg*, 199 Mo. 233, 97 S. W. 566.

78. *James v. State*, 63 Tex. Crim.

75, 138 S. W. 612; *Blackwell v. State*, 51 Tex. Crim. 24, 100 S. W. 774; *Bradshaw v. State*, 32 Tex. Crim. 381, 23 S. W. 892.

[a] The accused person cannot dictate to the court upon which transaction the state will prosecute. *Bradshaw v. State*, 32 Tex. Crim. 381, 23 S. W. 892.

79. *State v. Crimmins*, 31 Kan. 376, 2 Pac. 574.

80. *State v. Collins*, 8 Kan. App. 398, 57 Pac. 38; *State v. Saxton*, 2 Kan. App. 13, 41 Pac. 1113.

[a] Where the information contained two counts, one charging the commission of the offense on a certain date, and the other charging its commission between two dates, at the commencement of the trial the accused moved for an order requiring the state to elect upon which count it would claim a conviction. This motion was denied, but with liberty to renew it at the close of the case for the state. Before he closed its case, the state's attorney, in the absence of the jury, but in the presence of the court, stated that he elected to stand on the first count. The court did not then understand this statement to amount to an election, but it was so intended by the state's attorney, and understood by counsel for the defendant, and, at the close of the evidence of the state, the court, on hearing the stenographer's notes read, ruled that it constituted an election at the time it was made. Held, no abuse of discretion. *State v. Sebastian*, 81 Conn. 1, 69 Atl. 1054.

[b] Where after the formal election by the district attorney, the court said: "The act you select is the first act of sexual intercourse between these parties, and you claim it occurred in the latter part of January or the first part of February and prior to the 20th

such election definite and certain is reversible error.⁸¹

b. *Implied Election*.—Where the evidence tends to show several distinct offenses yet the case is tried throughout on the theory that the state relies for conviction upon proof of a specific act on a specific date, the state is held to have voluntarily made its election.⁸² In the absence of a specific election the prosecution will be deemed to have elected by implication to rely upon the first alleged offense shown,⁸³ though some

day of February." Held sufficient election. *People v. Soto*, 11 Cal. App. 431, 105 Pac. 420.

[c] In a prosecution for illegal sale of intoxicating liquors an election "upon a sale of intoxicating liquor by defendant to James Carson," is insufficient when from the evidence it appears that several sales were made to such person and of different kinds of liquors. *State v. O'Connell*, 31 Kan. 383, 2 Pac. 579. See also *State v. Moulton*, 52 Kan. 69, 34 Pac. 412; *State v. Lund*, 49 Kan. 663, 31 Pac. 309; *State v. Guettler*, 34 Kan. 582, 9 Pac. 200.

[d] In a prosecution for statutory rape, where the prosecutor stated that he would rely upon an offense committed between the 19th day of January and the 26th day of January, 1909, and the evidence showed that the defendant and prosecutrix had occupied the same room between those dates, held that a sufficient election had been made, without the state specifying a specific act occurring on a specific date. *State v. Biggs*, 57 Wash. 514, 107 Pac. 374.

[e] An election "For first count the state elects to rely on the first sale of beer to U. G. Clayton." "For ninth count state relies on the second sale of beer made to W. G. Clayton," testified to by Clayton; held sufficient. *State v. Webb*, 7 Kan. App. 423, 53 Pac. 276.

81. *State v. Guettler*, 34 Kan. 582, 9 Pac. 200; *State v. O'Connell*, 31 Kan. 383, 2 Pac. 579.

82. *State v. Moss*, 73 Wash. 430, 131 Pac. 1132. See *State v. Hasty*, 121 Iowa 507, 96 N. W. 1115.

83. *Ala.*—*Pope v. State*, 137 Ala. 56, 34 So. 840; *McPherson v. State*, 54 Ala. 221. *Cal.*—*People v. Williams*, 133 Cal. 168, 65 Pac. 323. *Conn.*—*State v. Bates*, 10 Conn. 372. *Ind.*—*Richardson v. State*, 63 Ind. 192. *Me.*—*State v. Acheson*, 91 Me. 240, 39 Atl. 370. *Mich.*—*People v. Bressler*, 131 Mich. 390, 91

N. W. 639; *People v. Clark*, 33 Mich. 112; *People v. Jenness*, 5 Mich. 305. See, however, *People v. Nichols*, 159 Mich. 355, 124 N. W. 25. *R. I.*—*State v. Nagle*, 14 R. I. 331. *Utah.*—*State v. Hansen*, 40 Utah 418, 122 Pac. 375; *State v. Hilberg*, 22 Utah 27, 61 Pac. 215. See *State v. Hoben*, 36 Utah 186, 102 Pac. 1000. *Wyo.*—*Fields v. Territory*, 1 Wyo. 78.

[a] "The term *elect* implies a knowledge of facts which go to make up two or more offenses. And while a solicitor may, by his own acts and questions, involuntarily effect an election; yet, to hold him to have elected to proceed for a certain offense, he must have learned enough to enable him to individualize the transaction, and then pursue his inquiry with a view of learning the details and particulars of the act or transaction thus individualized. To hold him to an election without going this far, would, in many cases, amount to a denial of justice." *Jackson v. State*, 95 Ala. 17, 10 So. 657.

[b] If prosecutor does not elect at the commencement of the trial, the first evidence tending to prove an offense shall be deemed a selection. *People v. Williams*, 133 Cal. 168, 65 Pac. 323.

[c] Where the state, in a prosecution for gaming, attempts to prove a particular instance of gaming by the defendant, by one witness, and fails, she may call another witness and prove another and different instance of gaming by the defendant, within the period of limitation. *State v. Czarnikow*, 20 Ark. 160.

[d] Where the prosecutor in his opening statement stated that he would elect to stand on an offense committed during the week of July 18th, and on evidence first being offered of an offense occurring in June immediately disavowed that this was the offense upon which he elected to stand, and consistently claimed conviction for the

courts decline to recognize this rule.⁸⁴ But the one offense must be identified, and the mere asking of preliminary questions will not amount to an election.⁸⁵

c. *Election by Court.*—Where the election may be deferred to the end of the trial, there is no error in overruling defendant's motion to require an election where the court in its instructions selects the act charged in the indictment as the only one the jury may consider,⁸⁶ or the court confines the consideration of the jury to one particular alleged offense.⁸⁷

6. **Effect of Election.**—a. *Generally.*—An election once made is binding throughout that trial and the prosecution will not be permitted to abandon an election once made and elect anew.⁸⁸

later act, held, that a proper election had been made and a reversal would not be had because evidence of the offense had first appeared. *People v. Nichols*, 159 Mich. 355, 124 N. W. 25, *distinguishing* *People v. Jenness*, 5 Mich. 305. See also *Hughes v. State*, 35 Ala. 351.

[e] Where evidence has been introduced for the purpose of proving, and tending directly to prove, an act of seduction at the time alleged in the information, the state will be deemed to have elected that date, and the jury will not be allowed to convict on evidence of an offense committed on a prior date. *People v. Bressler*, 131 Mich. 390, 91 N. W. 639.

[f] Where the prosecution examined the prosecutrix at length as to an offense committed on the date charged in the information and later upon discovery that at this date she was of the age of consent introduced evidence of intercourse several months before when she was not of age of consent, it was held that the state not having made an election of any prior or other offense must be held to have elected to stand on the offense occurring on the date charged in the information, and a conviction could only be had on that offense. *State v. Hoben*, 36 Utah 186, 102 Pac. 1000.

[g] Where the indictment charges the offense to have been committed on a given day and the prosecutor wishes to introduce evidence of its commission on another day, he should specify beforehand the day to which his proof will apply, otherwise, he will by introducing evidence referring the offense to one day be confined to that day. *State v. Nagle*, 14 R. I. 331.

84. See *Chenoweth v. Com.*, 7 Ky. L. Rep. 827; *State v. Palmberg*, 199 Mo. 233, 97 S. W. 566.

[a] In a prosecution for sale of intoxicating liquor, by giving evidence to show one sale the state has not made a final election to rely on that sale which will preclude it from proving another to sustain the indictment; and it is not error for the court to allow evidence of another sale. *State v. Chisnell*, 36 W. Va. 659, 15 S. E. 412.

85. *State v. Brunker*, 46 Conn. 327.

86. *Cooper v. State*, 72 Tex. Crim. 266, 162 S. W. 364.

87. *Wells v. State*, 52 Tex. Crim. 153, 105 S. W. 820; *Williams v. State* (Tex. Crim.), 105 S. W. 1024; *Cox v. State* (Tex. Crim.), 86 S. W. 1021. See generally the title "Instructions."

[a] Where the court instructs that a conviction can only be had on the first offense shown, the defendant cannot complain. *Knight v. State*, 64 Tex. Crim. 541, 144 S. W. 967.

88. Ala.—*Peacher v. State*, 61 Ala.

22. Conn.—*State v. Bates*, 10 Conn.

372. Ga.—See *Tompkins v. State*, 17

Ga. 356. Ind.—*Richardson v. State*, 63

Ind. 192. Kan.—*City of Hutchinson v.*

Holland, 52 Kan. 596, 35 Pac. 221;

State v. Falk, 46 Kan. 498, 26 Pac.

1023. Mich.—See *People v. Bressler*,

131 Mich. 390, 91 N. W. 639.

[a] When an election is made in writing at the close of the evidence upon the part of the state, it cannot modify such election after all the evidence is admitted. *State v. Falk*, 46 Kan. 498, 26 Pac. 1023.

[b] An election improperly made on motion of the defendant cannot be complained of by him. *Memmler v. State*, 75 Ga. 576.

b. *On Subsequent Trial.*—It has been held that an election once made holds through all future stages of the case, on the second trial as well as the first.⁸⁹ But there is authority to the contrary.⁹⁰

c. *As Abandonment of Offenses Not Elected.*—An election to stand upon a particular transaction does not bar the state on a subsequent prosecution from proving an offense which might have been proven on the first prosecution.⁹¹

Where an indictment charges but one substantive offense, an election to rely upon such offense is a nullity, and does not eliminate from the case any lesser offense necessarily included in such substantive offense.⁹²

7. *Misdemeanors.*—a. *General Statement.*—The doctrine of “election” does not apply with the same force to prosecutions for a misdemeanor as it does to felony indictments.⁹³

b. *Under Several Counts.*—While in a felony case an election will be required if separate and distinct offenses are disclosed by the testimony,⁹⁴ yet in a misdemeanor case separate and distinct offenses may be proved under different counts and no election will be required,⁹⁵ the matter resting in the discretion of the court.⁹⁶

c. *Under a Single Count.*—However, if the indictment contains but one count it is error not to require the state to elect upon which offense it will ask a conviction,⁹⁷ but if the charge be for a continuous offense

89. *Elam v. State*, 26 Ala. 48.

90. *State v. Peak*, 9 Kan. App. 436, 58 Pac. 1034.

[a] Where the state duly elected to stand on a certain designated transaction, and at a subsequent trial the defendant again files a motion to compel the state to elect on which of several transactions it will rely, he cannot complain when the state elects a different transaction from that relied on at the first trial. *State v. Hibbard*, 76 Kan. 376, 92 Pac. 304.

As to effect of election between counts, made at one trial, on a subsequent trial see *supra*, XVI, B, 2, e, (II).

91. *Bainbridge v. State*, 30 Ohio St. 264.

92. The indictment charging but one substantive offense, rape, an election to place the defendant on trial for a rape, with the order requiring such, is a nullity, and does not take out of the case the charge of assault and battery embraced within the charge of rape. *Mills v. State*, 52 Ind. 187.

93. See the following cases: *Vickers v. State*, 170 Ala. 75, 54 So. 496; *Brogdon v. State*, 63 Tex. Crim. 475, 140 S. W. 352; *Stebbins v. State*, 31 Tex. Crim. 294, 20 S. W. 552; *Alexander v. State*, 27 Tex. App. 533, 11 S. W. 628;

Day v. State, 14 Tex. App. 26; *Gage v. State*, 9 Tex. App. 259; *Waddell v. State*, 1 Tex. App. 720.

94. See *supra*, XVI, C, 1.

95. *Golden v. State*, 72 Tex. Crim. 19, 160 S. W. 957; *Williams v. State* (Tex. Crim.), 97 S. W. 498; *United States v. Groesbeck*, 4 Utah 487, 11 Pac. 542.

[a] *Contra*, in Arkansas, an election will be required in misdemeanor cases. *State v. Morris*, 45 Ark. 62.

[b] *Contra*, on a prosecution for gaming. *Smith v. State*, 52 Ala. 384.

96. *Minn.*—*State v. Mueller*, 38 Minn. 497, 38 N. W. 691. *N. C.*—*State v. Freeman*, 162 N. C. 594, 77 S. E. 780. *Vt.*—*State v. White*, 70 Vt. 225, 39 Atl. 1085.

97. *Ala.*—*Scruggs v. State*, 111 Ala. 60, 20 So. 642; *Moss v. State*, 3 Ala. App. 189, 58 So. 62. *Mass.*—*Com. v. Coyne*, 207 Mass. 21, 92 N. E. 1028. *Ohio.*—*Stick v. State*, 3 Ohio C. C. (N. S.) 611. *Tenn.*—*Payne v. State*, 112 Tenn. 587, 79 S. W. 1025; *Holt v. State*, 107 Tenn. 539, 64 S. W. 473. *Tex.*—*Golden v. State*, 72 Tex. Crim. 19, 160 S. W. 957; *Thweatt v. State*, 49 Tex. Crim. 617, 95 S. W. 517; *Seales v. State*, 46 Tex. Crim. 296, 81 S. W. 947; *Williams v. State*, 44 Tex. Crim. 316, 70

an election is not necessary.⁹⁸ It is held that in case of a prosecution for illegal sale of liquor the defendant is entitled to have the state elect on which of several sales it will rely.⁹⁹

D. ELECTION BETWEEN DIFFERENT CHARGES IN THE SAME COUNT. Duplicity in an indictment may be taken advantage of by motion to compel an election on the part of the prosecutor;¹ if the duplicity is not apparent on the face of the indictment the motion to elect is properly denied,² unless the duplicity is later made apparent, when the defendant should ask and the court compel an election.³

Where the same count charges several offenses the fault is cured by the state electing to proceed upon one charge and entering a nolle prosequi as to the others.⁴ Where the count contains several violations of a statute alleged in the conjunctive an election will not be required.⁵

S. W. 957; Larned v. State, 41 Tex. Crim. 509, 55 S. W. 826.

[a] Where the defendant was charged in a single count for a sale of liquor to a minor, and the evidence tended to prove two distinct sales on separate days, it was error not to require an election as to which of the two would be relied on for conviction. **Com. v. Coyne, 207 Mass. 21, 92 N. E. 1028.**

[b] *Contra*, in case of illegal sale of intoxicating liquor. **State v. Stephens, 70 Mo. App. 554; State v. Heinze, 45 Mo. App. 403.**

[c] **In a prosecution for gambling**, where several acts are shown an election will be required. **Nuckols v. State, 169 Ala. 2, 19 So. 504.**

98. Ala.—Etness v. State, 88 Ala. 191, 7 So. 49. Mich.—People v. Elmer, 109 Mich. 493, 67 N. W. 550. R. I. State v. Smith, 35 R. I. 285, 86 Atl. 887. Tex.—Golden v. State, 72 Tex. Crim. 19, 160 S. W. 957.

[a] There is no error in overruling a motion to require the state to elect as to whether it was prosecuting defendant for cursing on the railroad track, or on the platform of the station house, where the obscene language was all one continuous conversation. **Hamilton v. State, 153 Ala. 63, 44 So. 968.**

99. Ind.—Lebkovitz v. State, 113 Ind. 26, 14 N. E. 363, 597. Kan.—State v. Moulton, 52 Kan. 69, 34 Pac. 412. Ohio.—Stockwell v. State, 27 Ohio St. 503; Nickel v. State, 6 Ohio C. C. 601. S. D.—State v. Valentine, 7 S. D. 98, 63 N. W. 541. Tenn.—Murphy v. State, 9 Lea 373. Va.—Hatcher & Shaw v.

Com., 106 Va. 827, 55 S. E. 677; Jones v. Com., 106 Va. 833, 55 S. E. 679.

See the title “**Intoxicating Liquors.**”

1. Ia.—State v. Von Kutzleben, 136 Iowa 89, 113 N. W. 484; State v. Fident, 35 Iowa 541; State v. McPherson, 9 Iowa 53. Minn.—State v. Henn, 39 Minn. 464, 40 N. W. 564. Mo.—State v. Armstrong, 106 Mo. 395, 16 S. W. 604, 27 Am. St. Rep. 361, 13 L. R. A. 419. Mont.—State v. Mjelde, 29 Mont. 490, 75 Pac. 87. Neb.—Aiken v. State, 41 Neb. 263, 59 N. W. 888. Wis.—Cornell v. State, 104 Wis. 527, 80 N. W. 745.

[a] Where an indictment for illegal sale of intoxicating liquor charges the offense to have been committed within “two years last past,” a motion to require the state to elect on what day within two years, the offense was committed for which it would prosecute, was properly denied. **White v. Com., 107 Va. 901, 59 S. E. 1101.**

2. Cornell v. State, 104 Wis. 527, 80 N. W. 745. See Jackson v. Com., 13 Ky. L. Rep. 393, 17 S. W. 215.

3. Cornell v. State, 104 Wis. 527, 80 N. W. 745.

4. Com. v. Holmes, 119 Mass. 195; Com. v. Tuch, 20 Pick. (Mass.) 356; State v. Cooper, 101 N. C. 684, 8 S. E. 134. But see Wood v. State, 47 Tex. Crim. 543, 84 S. W. 1058 (holding that if an indictment be vicious as charging several distinct offenses in the same count, this is not cured by confining the prosecution to one offense); Scales v. State, 46 Tex. Crim. 296, 81 S. W. 947.

5. Schultz v. State, 135 Wis. 644, 114 N. W. 505, 116 N. W. 259, 571. See

Distinct ways of doing the same offense, not antagonistic to each other, may be set forth conjunctively in the same count and in such case there can be no election, but the prosecution proceeds on all the means alleged in the count.⁶

Where a single count sets out two separate and distinct transactions but alleges that it was the combined effect of these two transactions in co-operation which constituted the means or cause of the crime, an election as to which transaction the state will ask a conviction, will not be required, as in legal effect the count states but one transaction produced by two co-operating causes.⁷

E. ELECTION AS TO WHICH OF SEVERAL STATUTES THE STATE WILL PROCEED UNDER.—Where the indictment or information may be filed under one of several statutes the state cannot be required to elect and designate under which statute it will proceed,⁸ though the penalty prescribed in each may be different.⁹

An election made by the prosecutor in framing the indictment under a certain statute, is matter of which the defendant cannot complain.¹⁰

XVII. AIDER BY VERDICT.—**A. GENERAL RULE.—1. Generally.**—The rule that the verdict will cure defects of form as contradistinguished from those of substance¹¹ is based upon the proposition

City of Liberty v. Moran, 121 Mo. App. 682, 97 S. W. 948.

[a] Where the indictment charged that defendant "unlawfully and feloniously did carnally know and abuse" prosecutrix, held that there was but a single offense charged, "carnal abuse" and "carnal knowledge" being synonymous terms, therefore no election was required. *Curtis v. State*, 89 Ark. 394, 117 S. W. 521.

6. *Moore v. State*, 37 Tex. Crim. 552, 40 S. W. 287; *Willis v. State*, 34 Tex. Crim. 148, 29 S. W. 787.

[a] In a prosecution for embezzlement where there is but one count the fact that several offenses arising out of the same transaction may be proved under that count will not necessitate an election. *State v. Pratt*, 98 Mo. 482, 11 S. W. 977.

[b] An election will not be required between averments of the same count charging rape by means of force and threats. *Sharp v. State*, 15 Tex. App. 171.

7. *State v. Vance*, 38 Utah 1, 110 Pac. 434.

[a] "The purpose to be conserved by an election for which offense the state will seek a conviction is to protect the defendant from his prosecution

for two or more like offenses (misdemeanors) under one count of an indictment." *Burt v. State*, 159 Ala. 134, 48 So. 851.

8. *State v. Leonard*, 56 Wash. 83, 105 Pac. 163. See *State v. Isensee*, 12 Wash. 254, 40 Pac. 985.

[a] "Where the criminal act is single, and the counts of the indictment charge the violation of two or more statutes by that single act, or where the proof discovers that condition, the office of election is not present." *Burt v. State*, 159 Ala. 134, 48 So. 851.

[b] "We know of no rule of law which requires the county attorney to state the particular section of the code, under which the defendant is being tried." *State v. Newman*, 34 Mont. 434, 87 Pac. 462.

[c] Where evidence is offered under but one clause of a section of a statute, the state need not elect what particular offense under that section the defendant must answer. *Leonard v. People*, 81 Ill. 308.

9. *State v. Leonard*, 56 Wash. 83, 105 Pac. 163.

10. *Conner v. State*, 6 Tex. App. 455.

11. *State v. Green*, 129 Tenn. 619, 167 S. W. 867. See note to *Stennel v.*

that in support of a verdict the court will presume to have been proved on trial any fact the existence of which must have been involved in or inferable from the proof of those facts which are alleged and which the verdict has found.¹²

2. Application of Rule to Criminal Cases Generally.—Because of the fact that none of the statutes of amendments and jeofails extended to criminal proceedings,¹³ defective indictments were not, as pleadings in civil cases, aided by verdict.¹⁴ But the rule has nevertheless been applied to criminal cases,¹⁵ and there are many statutes limiting the right to raise belated objections to formal defects.¹⁶

The result of its operation is to prevent the defendant from urging after verdict merely formal or technical defects in the indictment. But defects which are so substantial that the accusation is absolutely void may be raised on motion in arrest of judgment.¹⁷

Hogg, 1 Wm. Saund. 226, 85 Eng. Re-print 244.

[a] **Defects of Substance Are Not Cured by Verdict.**—**N. Y.**—Fellinger v. People, 15 Abb. Pr. 128. **Pa.**—Lutz v. Com., 29 Pa. 441. **Tenn.**—Hite v. State, 9 Yerg. 198.

12. Conn.—State v. Ryan, 68 Conn. 512, 37 Atl. 377. **Ind.**—Woodworth v. State, 145 Ind. 276, 43 N. E. 933; Baker v. State, 134 Ind. 657, 34 N. E. 441; Henning v. State, 106 Ind. 386, 6 N. E. 803, 7 N. E. 4, 55 Am. Rep. 756; Dennis v. State, 103 Ind. 142, 2 N. E. 349. **La.**—State v. Stringfellow, 126 La. 720, 52 So. 1002. **Pa.**—Com. v. Kolb, 13 Pa. Super. 347, 353. See Quick v. Miller, 103 Pa. 67. **Tenn.**—Whim v. State, 117 Tenn. 94, 94 S. W. 674. **Vt.**—State v. Barr, 78 Vt. 97, 101, 102, 62 Atl. 43; State v. Freeman, 63 Vt. 496, 22 Atl. 621. **Eng.**—Heymann v. Reg., 12 Cox C. C. 383; Reg. v. Goldsmith, 12 Cox C. C. 479, 486. For English authorities see 1 Wm. Saund. 260, note 1 (last ed.).

See also Gould's Pl., ch. 10, §20.

13. Ind.—Boos v. State, 181 Ind. 562, 105 N. E. 117. **Mass.**—Com. v. Tuck, 20 Pick. 356; Com. v. Child, 13 Pick. 198; Brown v. Com., 8 Mass. 59. **N. C.**—State v. Sexton, 10 N. C. 184, 14 Am. Dec. 584.

See 4 Bl. Com. 375; Chitty Crim. Law 662; 2 Bishop's New Crim. Proc., §707.

14. U. S.—See *Ex parte* Bain, 121 U. S. 1, 7 Sup. Ct. 781, 30 L. ed. 849. **Ind.**—Boos v. State, 181 Ind. 562, 105 N. E. 117. **Mass.**—Com. v. Tuck, 20 Pick. 356; Com. v. Child, 13 Pick. 198;

Brown v. Com., 8 Mass. 59. **N. Y.**—People v. Wright, 9 Wend. 193; Reed v. People, 1 Park. Crim. 481, 489. **Wash.**—State v. Hall, 54 Wash. 142, 102 Pac. 888.

See 4 Bl. Com. 375; Chitty Crim. Law 662; 2 Bishop's New Crim. Proc., §707.

[a] **A general verdict of guilty is a finding** only of the facts sufficiently pleaded. **Com. v. Moore**, 99 Pa. 570, 576. But see Lutz v. Com., 29 Pa. 441.

15. Conn.—State v. McGee, 81 Conn. 696, 72 Atl. 141; State v. Ryan, 68 Conn. 512, 37 Atl. 377; State v. Keena, 63 Conn. 329, 331, 28 Atl. 522; State v. Stebbins, 29 Conn. 463, 79 Am. Dec. 223. **La.**—State v. Stringfellow, 126 La. 720, 52 So. 1002. **Vt.**—State v. Freeman, 63 Vt. 496, 22 Atl. 621. **Eng.**—Heymann v. Reg., L. R. 8 Q. B. 102, 12 Cox C. C. 383, 28 L. T. 162.

16. See *supra*, XIII and XIV.

17. U. S.—Hardesty v. United States, 168 Fed. 25. **Ariz.**—Downing v. United States, 8 Ariz. 31, 68 Pac. 555. **Conn.**—State v. McGee, 81 Conn. 696, 72 Atl. 141. **D. C.**—Pfeiffer v. United States, 31 App. Cas. 109; Lorenz v. United States, 24 App. Cas. 337, 363. **Fla.**—Thalheim v. State, 38 Fla. 169, 20 So. 938; Anderson v. State, 38 Fla. 3, 20 So. 765; Stevens v. State, 18 Fla. 903. **Ga.**—Walker v. State, 12 Ga. App. 91, 76 S. E. 762; Gazaway v. State, 9 Ga. App. 194, 70 S. E. 978; Isaacs v. State, 7 Ga. App. 799, 68 S. E. 338; Livingston v. State, 6 Ga. App. 208, 64 S. E. 709; Lanier v. State, 5 Ga. App. 472, 63 S. E. 536. **Ill.**—People v. Weber, 152 Ill. App. 102; People v. Zlotineke, 152 Ill.

B. PARTICULAR APPLICATION. — 1. Insufficient or Defective Charge.

a. *Statement of Offense.* — A failure to state sufficient facts to constitute an offense,¹⁸ or a failure to negative exceptions when necessary,¹⁹ or the omission of those phrases whose use is sanctioned by immemorial usage,²⁰ in the absence of special statute,²¹ are defects of substance not cured by the verdict. But defects in the statement of the offense²² which

App. 363. **Ind.**—*Woodsmall v. State*, 179 Ind. 697, 102 N. E. 130. **Kan.** *State v. Knowles*, 34 Kan. 393, 8 Pac. 861. **Ky.**—*Wilson v. Com.*, 22 Ky. L. Rep. 1251, 60 S. W. 400. **La.**—*State v. Drummond*, 132 La. 749, 61 So. 778; *State v. Stringfellow*, 126 La. 720, 52 So. 1002; *State v. Hauser*, 112 La. 313, 36 So. 396. **Mo.**—*State v. Niesman*, 101 Mo. App. 507, 74 S. W. 638; *State v. Patton*, 94 Mo. App. 32, 67 S. W. 970. **N. M.**—*Territory v. Eaton*, 13 N. M. 79, 79 Pac. 713; *Haynes v. United States*, 9 N. M. 519, 56 Pac. 282. But see *Territory v. Cortez*, 15 N. M. 92, 103 Pac. 264. **N. C.**—*State v. Dunn*, 109 N. C. 839, 13 S. E. 881. **Tenn.** *Deberry v. State*, 99 Tenn. 207, 42 S. W. 31; *State v. Smith*, Peck 165. **Wash.**—*State v. Smith*, 31 Wash. 245, 71 Pac. 767.

18. **Ark.**—*Roberts v. State*, 85 Ark. 435, 108 S. W. 842, false pretenses. **Cal.**—*People v. Wallace*, 9 Cal. 30; *People v. Cox*, 9 Cal. 32; *People v. Lloyd*, 9 Cal. 54; *People v. Aro*, 6 Cal. 207, 65 Am. Dec. 503. **Fla.**—*Reyes v. State*, 34 Fla. 181, 15 So. 875, insufficient description of obscene paper mailed. **Me.** *State v. Godfrey*, 24 Me. 232, 41 Am. Dec. 382. **Wash.**—*State v. Hall*, 54 Wash. 142, 102 Pac. 888, robbery case, in which it was not alleged that the property was taken from the possession of the witness.

[a] In an arson case, failure to allege the name of the occupier of the house or to show that house was that of another, is such a defect that it will not be cured by verdict. *State v. Keena*, 63 Conn. 329, 28 Atl. 522.

19. *Crandall v. State*, 10 Conn. 339.

[a] A failure to negative that the fishing by seine was for use on defendant's own table is cured by a verdict convicting of fishing with a seine. *Freeman v. State*, 118 Tenn. 95, 100 S. W. 723.

20. *Lutz v. Com.*, 29 Pa. 441. See also *Stroud v. Com.*, 14 Ky. L. Rep. 179, 19 S. W. 976; *Baker v. Com.*, 2 Va. Cas. 122.

21. By statute the omission of such words as "forcibly" or "feloniously" and the like is not fatal after verdict. **U. S.**—*Rosen v. United States*, 161 U. S. 29, 16 Sup. Ct. 434, 480, 40 L. ed. 606. **Ariz.**—*Downing v. United States*, 8 Ariz. 31, 68 Pac. 555. **Mich.**—*Durand v. People*, 47 Mich. 332, 11 N. W. 184, under Comp. Laws, §7912, omission of feloniously. **N. C.**—*State v. Peak*, 130 N. C. 711, 41 S. E. 887, omission of "forcibly" in charge of assault with intent to commit rape. **Wash.**—*State v. Smith*, 31 Wash. 245, 71 Pac. 767, omission of "feloniously."

22. **Ariz.**—*Downing v. United States*, 8 Ariz. 31, 68 Pac. 555. **Conn.**—*State v. Ryan*, 68 Conn. 512, 37 Atl. 377. **Ind.**—*Woodworth v. State*, 145 Ind. 276, 280, 43 N. E. 933; *Baker v. State*, 134 Ind. 657, 34 N. E. 441. **Kan.**—*State v. Knowles*, 34 Kan. 393, 8 Pac. 861; *State v. Marshall*, 2 Kan. App. 792, 44 Pac. 49. **Pa.**—*Com. v. Williams*, 149 Pa. 54, 24 Atl. 158; *Gorman v. Com.*, 124 Pa. 536, 543, 17 Atl. 26; *Staeger v. Com.*, 103 Pa. 469; *Com. v. Jessup*, 63 Pa. 34; *Campbell v. Com.*, 59 Pa. 266; *Com. v. Shields*, 50 Pa. Super. 194; *Com. v. Kolb*, 13 Pa. Super. 347, failure to allege butter to be a food in prosecution for sale of imitation of articles of food. **Vt.**—*State v. Barr*, 78 Vt. 97, 62 Atl. 43; *State v. Freeman*, 63 Vt. 496, 22 Atl. 621. **Va.**—*Com. v. Ervin*, 2 Va. Cas. 337. **Wash.**—*State v. Anderson*, 30 Wash. 14, 70 Pac. 104.

[a] In a charge of assaulting an infant child, throwing her upon a dust heap and leaving her exposed to the cold air thereby causing death, the absence of an averment that the child is of such tender years or so feeble it could not take care of herself is not fatal after verdict, for then such will be presumed as a fact. *Queen v. Waters*, 1 Den. Cr. Cas. (Eng.) 356.

[b] Failure to allege the weapon used in an assault with intent to do great bodily harm less than murder, is immaterial after verdict. *People v.*

are not defects of substance, such as the use of a very general allegation,²³ or the failure to use a conjunction²⁴ are cured.

b. *Accrment of Place.* — A defective charge of place,²⁵ or the failure to charge the particular place within the county²⁶ is cured by the verdict.

c. *Accrment of Time.* — An imperfect allegation of the time of the commission of the offense,²⁷ or the allegation of an impossible date,²⁸ or even the absence of an allegation of the date,²⁹ where time is not of the essence of the crime,³⁰ are defects cured by verdict.

d. *Names and Description of Persons Involved.* — An error in or insufficiency of the allegation of the name of the defendant is cured by verdict.³¹ Likewise an omission³² or a defective allegation of the name

Ochotski, 115 Mich. 601, 73 N. W. 889, 4 Det. Leg. N. 985.

[c] **Pasting a label in an information** instead of alleging it according to its tenor in a prosecution for selling cigars from boxes bearing counterfeit label is cured after verdict. *State v. Niesman*, 101 Mo. App. 507, 74 S. W. 638.

[d] **The use of "heretofore"** instead of "theretofore" in the allegation of the creation and organization of a bank under the laws of the United States is not a fatal defect for the allegation is but an imperfect statement of what is implied after verdict. *Coffin v. United States*, 162 U. S. 664, 686, 16 Sup. Ct. 943, 40 L. ed. 1109.

23. **Kan.**—*State v. Knowles*, 34 Kan. 393, 8 Pac. 861. **Vt.**—*State v. Freeman*, 63 Vt. 496, 22 Atl. 621. **Wash.** *State v. Anderson*, 30 Wash. 14, 70 Pac. 104.

[a] **Allegation as to character of "place of business"** burglarized was not sufficiently specific but it is a defect curable by verdict. *Keenan v. State*, 10 Ga. App. 792, 74 S. E. 297.

24. *Lutz v. Com.*, 29 Pa. 441.

25. *State v. Green*, 129 Tenn. 619, 167 S. W. 867.

26. **U. S.**—*Ledbetter v. United States*, 170 U. S. 606, 18 Sup. Ct. 774, 42 L. ed. 1162. **Fla.**—*Thalheim v. State*, 38 Fla. 169, 20 So. 938. **Ind.** *Nichols v. State*, 127 Ind. 406, 26 N. E. 839, omission to charge the particular house or place in the city to which the female was enticed for purposes of prostitution is a formal defect. **W. Va.**—*State v. Cain*, 9 W. Va. 559, 566.

[a] **The omission to charge the place of a former conviction is cured**

by verdict. *People v. Butler*, 122 Mich. 35, 80 N. W. 883.

27. **Ga.**—*Walker v. State*, 12 Ga. App. 91, 76 S. E. 762. **Ind.**—*Boos v. State*, 181 Ind. 562, 105 N. E. 117, 120. **Mo.**—*State v. Hurley*, 242 Mo. 452, 146 S. W. 1154.

28. *Poole v. People*, 24 Colo. 510, 52 Pac. 1025, 65 Am. St. Rep. 245; *Conner v. State*, 25 Ga. 515, 71 Am. Dec. 184. *Compare Com. v. Nailor*, 29 Pa. Super. 271, holding the charge of an offense consisting of a single act as occurring on different days, or the charge of a future date is a defect fatal after verdict.

29. *Perkins v. State*, 8 Baxt. (Tenn.) 559. See *King v. State*, 3 Heisk. (Tenn.) 148.

[a] **The omission to charge the time of a former conviction is cured by verdict, if a defect.** *People v. Butler*, 122 Mich. 35, 80 N. W. 883.

30. In *Lewis v. State*, 16 Conn. 32, an information for burglary which did not allege that the acts were done at night or state the hour was held fatal even after verdict. See *Com. v. Nailor*, 29 Pa. Super. 271.

31. **Ala.**—*Verberg v. State*, 137 Ala. 73, 34 So. 848, 97 Am. St. Rep. 17; *Taylor v. State*, 100 Ala. 68, 14 So. 875; *Wells v. State*, 88 Ala. 239, 7 So. 272. **Ind.**—*Uterburgh v. State*, 8 Blackf. 202. **Mass.**—*Com. v. Butler*, 1 Allen 4; *Turns v. Com.*, 6 Mete. 224; *Com. v. Dedham*, 16 Mass. 141. **N. H.**—*State v. McGregor*, 41 N. H. 408; *State v. Thompson*, 20 N. H. 250. **Ohio.**—*Smith v. State*, 8 Ohio 294. **S. C.**—*State v. Thompson*, Cheves 31. **Tex.**—*Wilcox v. State*, 31 Tex. 586.

32. *Anderson v. State*, 38 Fla. 3, 20

of a person injured,³³ is a defect which is cured by the verdict.

e. *Duplicity and Misjoinder*.—Duplicity,³⁴ and a misjoinder of counts,³⁵ are defects of form which are cured by verdict.

2. **Defects in the Formal Parts.**—a. *Conclusion*.—The verdict does not cure a conclusion defective in failing to follow the language prescribed by the constitution.³⁶

b. *Endorsements*.—The absence of an endorsement of the names of witnesses is cured by verdict.³⁷

C. VERDICT ON GOOD AND BAD COUNTS.—1. **General Verdict.**—a.

So. 765; *Frasher v. State*, 3 Tex. App. 263, 30 Am. Rep. 131.

33. **D. C.**—*Trometer v. District of Columbia*, 24 App. Cas. 242. **Ind.**—*Laycock v. State*, 136 Ind. 217, 36 N. E. 137. **Kan.**—*State v. Rook*, 42 Kan. 419, 22 Pac. 626. **Mass.**—*Com. v. Desmarteau*, 16 Gray 1. **Pa.**—*Evans v. Com.*, 5 Pa. Co. Ct. 362. **S. C.**—*State v. Rudolph*, 3 Hill 257; *State v. Crank*, 2 Bailey 66, 23 Am. Dec. 117.

34. **U. S.**—*Wiborg v. United States*, 163 U. S. 632, 648, 16 Sup. Ct. 1127, 1197, 41 L. ed. 289; *Crain v. United States*, 162 U. S. 625, 636, 16 Sup. Ct. 952, 40 L. ed. 1097; *Durland v. United States*, 161 U. S. 306, 16 Sup. Ct. 508, 40 L. ed. 709; *Connors v. United States*, 158 U. S. 408, 411, 15 Sup. Ct. 951, 39 L. ed. 1033; *Morgan v. United States*, 148 Fed. 189, 78 C. C. A. 323; *Babcock v. United States*, 34 Fed. 873. **Conn.**—*State v. Holmes*, 28 Conn. 230; *State v. Miller*, 24 Conn. 522. **Fla.**—*Irvin v. State*, 52 Fla. 51, 41 So. 785. **Ga.**—*Williams v. State*, 60 Ga. 88. **Ind.**—*Reed v. State*, 147 Ind. 41, 46 N. E. 135; *Naanes v. State*, 143 Ind. 299, 42 N. E. 609; *Barnett v. State*, 141 Ind. 149, 40 N. E. 666; *Myers v. State*, 92 Ind. 390; *Simons v. State*, 25 Ind. 331. **Ia.**—*State v. Callahan*, 96 Iowa 304, 65 N. W. 150. **Ky.**—*Sturgeon v. Com.*, 18 Ky. L. Rep. 668, 37 S. W. 679; *Scalf v. Com.*, 9 Ky. L. Rep. 412, 5 S. W. 361. **Miss.**—*Randle v. State*, 105 Miss. 561, 62 So. 428; *Wilkinson v. State*, 77 Miss. 705, 27 So. 639; *Wash v. State*, 14 Smed. & M. 120, 125. **Mo.**—*State v. Flynn*, 258 Mo. 211, 167 S. W. 516; *State v. Davis*, 237 Mo. 237, 140 S. W. 902; *State v. Nieuhaus*, 217 Mo. 332, 117 S. W. 73; *State v. Fox*, 143 Mo. 517, 50 S. W. 98; *State v. Nagel*, 136 Mo. 45, 37 S. W. 821; *State v. Armstrong*, 106 Mo. 395, 16 S. W. 604, 27 Am. St. Rep. 361, 13 L. R. A. 419; *State v. Har-*

rison, 62 Mo. App. 112. See *State v. Miller*, 255 Mo. 223, 164 S. W. 482. **Neb.**—*Aiken v. State*, 41 Neb. 264, 59 N. W. 888; *Thompson v. People*, 4 Neb. 524. **N. H.**—*State v. Merrill*, 44 N. H. 624. **N. M.**—*Tomlinson v. Territory*, 7 N. M. 195, 33 Pac. 950. **N. C.**—*State v. Hart*, 116 N. C. 976, 20 S. E. 1014; *State v. Perdue*, 107 N. C. 853, 12 S. E. 253; *State v. Cooper*, 101 N. C. 684, 8 S. E. 134; *State v. Simons*, 70 N. C. 336; *State v. Hart*, 26 N. C. 246. **Ore.**—*State v. Morris*, 58 Ore. 397, 114 Pac. 476; *State v. Reyner*, 50 Ore. 224, 91 Pac. 301; *State v. Carlson*, 39 Ore. 19, 62 Pac. 1016, 1119; *State v. Lee*, 33 Ore. 506, 56 Pac. 415. **Tex.**—*Massey v. State* (Tex. Crim.), 65 S. W. 911; *Matt v. State* (Tex. Crim.), 58 S. W. 101; *Shuman v. State*, 34 Tex. Crim. 69, 29 S. W. 160; *Tucker v. State*, 6 Tex. App. 251; *Berliner v. State*, 6 Tex. App. 181. But see *Wood v. State*, 47 Tex. Crim. 543, 84 S. W. 1058. **Wis.**—See *Miller v. State*, 25 Wis. 384; *Newman v. State*, 14 Wis. 393; *Ketchingham v. State*, 6 Wis. 426.

But see *People v. Wright*, 9 Wend. (N. Y.) 193, 196; *Reed v. People*, 1 Park. Crim. (N. Y.) 481, 489.

35. **Com. v. Adams, 127 Mass. 15; **Com. v. Chase, 127 Mass. 7; **Com. v. Cain, 102 Mass. 487 (nolle pros. entered as to other counts); **Com. v. McLaughlin**, 12 Cush. (Mass.) 612; **Com. v. Hope**, 22 Pick. (Mass.) 1; **Com. v. Tuck**, 20 Pick. (Mass.) 356, nolle pros. entered as to other counts. But see *White v. People*, 8 Colo. App. 289, 45 Pac. 539.******

36. **Tenn.**—*Rice v. State*, 3 Heisk. 215, 221. **Tex.**—*Cox v. State*, 8 Tex. App. 254, 34 Am. Rep. 746. **W. Va.**—*Lemons v. State*, 4 W. Va. 755, 6 Am. Rep. 293.

37. *De Berry v. State*, 99 Tenn. 207, 42 S. W. 31, amended indictment.

Generally.—Where an indictment contains several counts, some of which are insufficient, a judgment based on a general verdict of guilty will be sustained if there is one good and sufficient count.³⁸ The rule is

38. **U. S.**—*Powers v. United States*, 223 U. S. 303, 32 Sup. Ct. 281, 56 L. ed. 443; *Billingsley v. United States*, 178 Fed. 653; *Bartholomew v. United States*, 177 Fed. 902; *Ex parte Gouyet*, 175 Fed. 230; *Hardesty v. United States*, 168 Fed. 25; *Harvey v. United States*, 159 Fed. 419; *Lehman v. United States*, 127 Fed. 42; *Milby v. United States*, 120 Fed. 1; *United States v. Clarke*, 40 Fed. 325. **Ala.**—*White v. State*, 39 So. 570; *Shelton v. State*, 143 Ala. 98, 39 So. 377; *Handy v. State*, 121 Ala. 13, 15, 25 So. 1023; *Owens v. State*, 104 Ala. 18, 16 So. 575; *May v. State*, 85 Ala. 14, 5 So. 14. **Ark.**—*Cooper v. State*, 37 Ark. 412; *Howard v. State*, 34 Ark. 433; *Brown v. State*, 10 Ark. 607. **Conn.**—*State v. Stebbins*, 29 Conn. 463, 79 Am. Dec. 223. **D. C.**—*Lehman v. District of Columbia*, 19 App. Cas. 217. **Fla.**—*Jordan v. State*, 22 Fla. 528. **Ga.**—*Bullock v. State*, 10 Ga. 47, 54 Am. Dec. 369. **Ill.**—*People v. Darr*, 262 Ill. 202, 104 N. E. 389; *People v. Jones*, 242 Ill. 138, 89 N. E. 711; *Chicago, etc. Coal Co. v. People*, 214 Ill. 421, 73 N. E. 770; *Gallagher v. People*, 211 Ill. 158, 71 N. E. 842; *McElroy v. People*, 202 Ill. 473, 66 N. E. 1058; *Ochs v. People*, 124 Ill. 399, 16 N. E. 662. **Ind.**—*Dean v. State*, 147 Ind. 215, 46 N. E. 528; *Powers v. State*, 87 Ind. 97, 102, 103; *Dukes v. State*, 11 Ind. 557, 71 Am. Dec. 370. **Ia.**—*State v. Shelledy*, 8 Iowa 477. **Kan.**—*State v. Ricksecker*, 73 Kan. 495, 85 Pac. 547. **Ky.**—*Buford v. Com.*, 14 B. Mon. 24; *Parker v. Com.*, 8 B. Mon. 30. **La.**—*State v. Dubord*, 2 La. Ann. 732. **Me.**—*State v. Tibbetts*, 86 Me. 189, 29 Atl. 979; *State v. Mayberry*, 48 Me. 218; *State v. Hadlock*, 43 Me. 282. **Md.**—*Manly v. State*, 7 Md. 135; *Burk v. State*, 2 Har. & J. 426. **Mass.**—*Com. v. Storti*, 177 Mass. 339, 58 N. E. 1021; *Com. v. Boston & M. R. Co.*, 133 Mass. 383, 391; *Com. v. Howe*, 13 Gray 26; *Com. v. Hawkins*, 3 Gray 463; *Larned v. Com.*, 12 Mete. 240; *Jennings v. Com.*, 17 Pick. 80. **Mich.**—*People v. Bird*, 126 Mich. 631, 86 N. W. 127; *People v. Haley*, 48 Mich. 495, 12 N. W. 671. See *Shannon v. People*, 5 Mich. 71. **Miss.**—*Gates v. State*, 71 Miss. 874, 16 So. 342; *Scott v. State*, 31 Miss. 473; *Wash v. State*, 4 Smed. & M. 120; *Miller v. State*, 5 How. 250; *Friar v. State*, 3 How. 422. **Mo.**—*State v. Clark*, 147 Mo. 20, 47 S. W. 886; *State v. Blan*, 69 Mo. 317; *State v. Testerman*, 68 Mo. 408; *State v. Pitts*, 58 Mo. 556; *State v. McCue*, 39 Mo. 112; *State v. Hindman*, 4 Mo. App. 582. **N. H.**—*State v. Canterbury*, 28 N. H. 195; *Arlen v. State*, 18 N. H. 563. **N. J.**—*Mead v. State*, 53 N. J. L. 601, 23 Atl. 264; *Hunter v. State*, 40 N. J. L. 495; *Johnson v. State*, 29 N. J. L. 453; *West v. State*, 22 N. J. L. 212; *Stone v. State*, 20 N. J. L. 404. **N. Y.**—*Hope v. People*, 83 N. Y. 418, 38 Am. Rep. 460; *Pontius v. People*, 82 N. Y. 339; *People v. Mills*, 91 App. Div. 331, 18 N. Y. Crim. 125, 86 N. Y. Supp. 529, *affirmed*, 178 N. Y. 274, 70 N. E. 786, 67 L. R. A. 131; *People v. Levoy*, 72 App. Div. 55, 16 N. Y. Crim. 496, 76 N. Y. Supp. 783; *People v. Goslin*, 67 App. Div. 16, 16 N. Y. Crim. 255, 73 N. Y. Supp. 520, *affirmed*, 171 N. Y. 627, 63 N. E. 1120. **N. C.**—*State v. Sprouse*, 150 N. C. 860, 64 S. E. 900; *State v. Sheppard*, 142 N. C. 586, 55 S. E. 146; *State v. Lee*, 114 N. C. 844, 19 S. E. 375; *State v. Carter*, 113 N. C. 639, 18 S. E. 517; *State v. Toole*, 106 N. C. 736, 11 S. E. 168; *State v. Smiley*, 101 N. C. 709, 7 S. E. 904. **Ohio.**—*Robbins v. State*, 8 Ohio St. 131; *Bailey v. State*, 4 Ohio St. 440; *Stoughton v. State*, 2 Ohio St. 562; *Turk v. State*, 7 Ohio (part 2) 240. **Pa.**—*Com. v. Prickett*, 132 Pa. St. 371, 19 Atl. 218; *Hazen v. Com.*, 23 Pa. 355; *Com. v. Church*, 17 Pa. Super. 39; *Com. v. Bradley*, 16 Pa. Super. 561. **S. C.**—See *State v. Banks*, 84 S. C. 543, 66 S. E. 999; *State v. Pace*, 9 Rich. 355; *State v. Posey*, 7 Rich. 484; *Poole v. State*, 3 Brev. 416; *State v. Turner*, McMull. 399; *State v. Brown*, 3 Strobb. 508. **Tenn.**—*McTigue v. State*, 4 Baxt. 313; *Isham v. State*, 1 Sneed 111; *Taylor v. State*, 3 Heisk. 460; *Rice v. State*, 3 Heisk. 215. **Tex.**—*Noodleman v. State* (Tex. Crim.), 170 S. W. 210; *Stuart v. State*, 57 Tex. Crim. 592, 124 S. W. 656; *McKinney v. State*, 43 Tex. Crim. 387, 66 S. W. 769; *Lafferty v. State*, 41 Tex. Crim.

based upon the presumption that the general verdict is responsive to the good count.³⁹ But if the evidence relevant to the bad count is submitted to the jury with the rest, over the objection of the defendant, a general verdict of guilty will not stand.⁴⁰

Likewise when a count is in the alternative, with some of the averments good and others bad, and no objection is taken, a general verdict will be referred to the good averments and a judgment of conviction sustained.⁴¹

Offenses With Different Punishments.—An indictment which in separate counts, some of which are defective, charges offenses with different degrees of punishment, will not sustain a general verdict of guilty because the court cannot know upon which count to pass judgment.⁴²

Where the jury fixes the punishment it cannot be ascertained upon which count the punishment was based, and the verdict cannot be sustained.⁴³

b. Effect of Objection.—The general rule of *aider*, heretofore stated, is applicable, however, only where an objection to the defect is interposed for the first time after verdict,⁴⁴ or where the objection though timely, is too general, covering the good as well as the bad counts.⁴⁵ Where a demurrer to the bad count is erroneously overruled,

606, 56 S. W. 623; *Looman v. State*, 37 Tex. Crim. 276, 39 S. W. 571; *Pitner v. State*, 37 Tex. Crim. 268, 39 S. W. 662; *Fry v. State*, 36 Tex. Crim. 582, 37 S. W. 741, 38 S. W. 168. **Vt.**—*State v. Davidson*, 12 Vt. 300. **Va.**—*Mowbray v. Com.*, 11 Leigh 643, 649; *Kirk v. Com.*, 9 Leigh 627. **Wash.**—*Leschi v. Territory*, 1 Wash. Ter. 13. **Wis.**—*State v. Kube*, 20 Wis. 217, 229, 91 Am. Dec. 390.

Effect of objection, see *supra*, XVI, C, 1, b.

[a] **Upon the evidence sustaining one count**, a general verdict of guilty is proper. *Com. v. Nichols*, 134 Mass. 531.

39. **Ala.**—*State v. Coleman*, 5 Port. 284. **Ga.**—*Sutton v. State*, 122 Ga. 158, 50 S. E. 60. **Tenn.**—*Rice v. State*, 3 Heisk. 215.

See also *Whart. Crim. Pl. & Pr.*, §738; *Bates v. State*, 124 Wis. 612, 103 N. W. 251.

40. 2 *Bishop's New Crim. Proc.*, §1015; *Whart. Crim. Pl. & Pr.*, §738; *Com. v. Boston & M. R.*, 133 Mass. 383, 391.

Effect of objection, see *supra*, XVI, C, 1, b.

[a] **If there is an element of aggravation** in the bad count which may have influenced the verdict, a general

verdict will not be sustained. *Arlen v. State*, 18 N. H. 563.

41. **Ala.**—*Hornsby v. State*, 94 Ala. 55, 10 So. 522. **La.**—*State v. Brown*, 35 La. Ann. 1058; *State v. Vanderlip*, 4 La. Ann. 444. **Me.**—*State v. Bartlett*, 55 Me. 200, 213. **Mass.**—*Com. v. Johns*, 6 Gray 274. **N. C.**—*State v. Morrison*, 24 N. C. 9.

But see *State v. Hinckley*, 4 Minn. 345, holding the error is not cured by a general verdict of guilty "for the only evidence which was received, so far as the case shows, was that received under those defective allegations. And even had it appeared that evidence was introduced to sustain that part of the charge well laid in the indictment, it would be impossible for the court to say, whether the jury would have found their verdict upon that alone, without also considering the improper evidence."

42. *State v. Anderson*, 1 Strobh. (S. C.) 455, 460.

43. *Richards v. Com.*, 81 Va. 110; *Mowbray v. Com.*, 11 Leigh (Va.) 643.

44. *State v. Wolfarth*, 42 Conn. 155; *McMurtry v. State*, 38 Tex. Crim. 521, 43 S. W. 1010. See also *Com. v. Boston & M. R. Co.*, 133 Mass. 383, 391.

45. **U. S.**—*United States v. Clarke*, 40 Fed. 325. **Ala.**—*Ingram v. State*, 39

the presumption that the verdict is based on the good count loses its force and the verdict will not be sustained.⁴⁶

2. Special Verdict.—A special verdict based on a good count will be sustained although the indictment contains other counts which are insufficient,⁴⁷ but it is otherwise if the verdict is based on counts some of which are good and some bad.⁴⁸

XVIII. INFORMATIONS IN CIVIL CASES.—A. **INFORMATIONS AT LAW.**—**GENERALLY.**—At common law a civil information could be filed on behalf of the crown or state, for certain purposes.⁴⁹ Examples of such informations are informations of intrusions,⁵⁰ informations of debt to recover money due the state upon contract or penalties and forfeitures,⁵¹ informations in rem,⁵² and informations in the nature of quo warranto,⁵³ the more important of which will be found treated elsewhere in this work.⁵⁴

Statutes sometimes provide for the filing of an information for the recovery of property of the state.⁵⁵

B. **INFORMATIONS IN EQUITY.**—**1. Generally.**—An information in chancery filed by the attorney general or other proper officer ex officio, or on relation of a private person on behalf of the crown or government

Ala. 247. **Ind.**—State *v.* Faurote, 104 Ind. 287, 4 N. E. 19; State *v.* Powers, 87 Ind. 97, motion to quash. **N. Y.** People *v.* Willett, 102 N. Y. 251, 6 N. E. 301. **Ohio.**—Robbins *v.* State, 8 Ohio St. 131, 162, 163.

46. Ga.—Sutton *v.* State, 122 Ga. 158, 50 S. E. 60. **Md.**—Avirett *v.* State, 76 Md. 510, 25 Atl. 676, 987. This case overrules Gibson *v.* State, 54 Md. 447, and distinguishes Robbins *v.* State, 8 Ohio St. 131. **Mass.**—See also Com. *v.* B. & M. R. Co., 133 Mass. 383, 391. **Va.**—Jones *v.* Com., 86 Va. 950, 12 S. E. 950; Mowbray *v.* Com., 11 Leigh 674, where there was a motion to quash. See Clere *v.* Com., 3 Gratt. 586. **Eng.**—O'Connell *v.* Reg., 11 Cl. & F. 155, 1 Cox C. C. 413, 9 Jur. 25.

47. Ga.—Roberts *v.* State, 14 Ga. 8, 58 Am. Dec. 528. **Ohio.**—Ridenour *v.* State, 38 Ohio St. 272. **Va.**—Early *v.* Com., 86 Va. 921, 11 S. E. 795.

48. Enwright *v.* State, 58 Ind. 567.

49. An information, (1) on behalf of the crown, filed in the exchequer by the king's attorney general, is a method of suit for recovering money or other chattels, or for obtaining satisfaction in damages for any personal wrong committed in the lands or other possessions of the king. 3 Bl. Com. 261. (2) Such an information would not lie to try a civil right, as the title

to land. Nanng *v.* Rowland, Cro. Jac. 212, 79 Eng. Reprint 184.

50. S. C.—State *v.* Pacific Guano Co., 22 S. C. 50. See State *v.* Corbin, 16 S. C. 533. **Va.**—Com. *v.* Hite, 6 Leigh 588, 29 Am. Dec. 226. **Can.**—See Queen *v.* Sinnott, 27 U. C. Q. B. 539; Attorney General *v.* Perry, 15 U. C. C. P. 329; Attorney General *v.* Stanley, 9 U. C. Q. B. 84; Doe Fitzgerald *v.* Finn, 1 U. C. Q. B. 70, information unnecessary under facts.

See 3 Bl. Com. 261, for any trespass committed on the lands of the crown.

[a] **The writ of intrusion lies in every case in which a trespass is committed upon the lands of the crown, or a person enters on the same without title.** Reg. *v.* Hughes, L. R. 1, P. C. 81, 12 J. R. N. S. 195, 35 L. J. C. P. 23, 14 L. T. 808, 14 W. R. 441.

51. 3 Bl. Com. 261. See the title "**Penalties, Forfeitures and Fines.**"

52. 3 Bl. Com. 261, when any goods are supposed to become the property of the king and no man appears to claim them or dispute the title of the king.

53. 3 Bl. Com. 264. See the title "**Quo Warranto.**"

54. See appropriate titles, such as "**Customs Duties;**" "**Escheat;**" "**Internal Revenue;**" "**Penalties, Forfeitures and Fines;**" "**Proceedings in Rem;**" "**Quo Warranto.**"

55. The state's money in the hands

or those who partake of its prerogative, such as idiots and lunatics, or whose rights are under its particular protection as objects of public charity,⁵⁶ is in the nature of a bill in equity,⁵⁷ and to which the same rules are generally applicable.⁵⁸

When a relator has some individual interest to be protected, he may join his personal complaint with the information, forming an information and bill in equity.⁵⁹ But except for the purposes of costs, there

of a person who refuses to deliver, may be recovered by information because the defendants may be regarded as having intruded themselves on the state's property within the meaning of the statute. *State v. Corbin*, 16 S. C. 533.

56. **Ill.**—*People v. Burns*, 212 Ill. 227, 72 N. E. 374. **Mich.**—*Attorney General v. Moliter*, 26 Mich. 444. **Ore.** *State v. Lord*, 28 Ore. 498, 43 Pac. 471.

See Shortt on Informations, p. 2; Story's Eq. Pl., §8; Mit. & T. Pl. & Pr. in Eq., p. 117.

[a] An information filed solely to subvert private interests (1) will not be sustained. *People ex rel. Moloney v. General Elec. Ry. Co.*, 172 Ill. 129, 50 N. E. 158. See *Attorney General v. Tudor Ice Co.*, 104 Mass. 239, 6 Am. Rep. 227; *Attorney General v. Salem*, 103 Mass. 138; *State v. Shively*, 10 Ore. 267. (2) Compare *People v. Decatur, S. & St. L. R. Co.*, 120 Ill. App. 229, in which the court said: "We are unable to perceive how the actions of the state's attorney can be impugned because he was thus moved to act, or that there was any impropriety in his accepting the assistance of private counsel, who were acting also for certain property owners. Any citizen has a right to call upon the state's attorney to redress a public wrong. The fact that private rights may also be involved and that through the acts of the state's attorney in the interests of the public, private wrongs, as well, may directly or indirectly, be redressed is immaterial."

[b] "The practice of proceeding by information or by bill filed in a court of equity has arisen from the difficulties attending the process by writ." *Attorney General v. Mayor of Dublin*, 1 Bligh N. S. 312, 337, 4 Eng. Reprint 888.

[c] The administration of charities may be had on information alone. *Attorney General v. Compton*, 1 Y. & C. C. 417, 62 Eng. Reprint 951. See the title "Public Charities."

[d] **Present Practice in England.** "All suits which were formerly commenced by bill or information in the court of chancery, are instituted in the high court of justice by a proceeding called an action and are commenced by a writ of summons." Dan. Ch. Pr. (8th ed.), p. 256; Shortt on Information, p. 2.

[e] The term "information" should no longer be used in an action by the attorney general at the relation of a plaintiff, for the reason that the term is either obsolete or it is comprised in the term action. *Attorney General v. Shrewsbury Bridge Co.*, 42 L. T. N. S. (Eng.) 79.

57. Mit. & T. Pl. & Pr. in Eq., p. 196; *People v. Stratton*, 25 Cal. 242, except as to style.

[a] The information of the attorney general, ex officio, is equivalent to a bill in chancery verified on information and belief. *Attorney General v. Chicago & N. W. R. Co.*, 35 Wis. 425, 493.

58. Story's Eq. Pl., §8.

[a] Informations respecting charities constitute an exception to this rule for the same strictness is not required in such informations. Story's Eq. Pl., §8.

59. **Cal.**—*People v. Stratton*, 25 Cal. 242. **Mass.**—*Attorney General v. Parker*, 126 Mass. 216, quoting *Ld. Redesdale*. **N. J.**—*Attorney General v. Central R. Co.*, 61 N. J. Eq. 259, 48 Atl. 347. **Ore.**—*State ex rel. Taylor v. Lord*, 28 Ore. 498, 43 Pac. 471, 31 L. R. A. 473. See *State v. Shively*, 10 Ore. 267, 276. **Wis.**—*State v. Cunningham*, 81 Wis. 440, 488, 51 N. W. 724, 15 L. R. A. 561. **Eng.**—*Attorney General v. Vivian*, 1 Russ. 226, 236, 38 Eng. Reprint 88. See *Daniell's Ch. Pr.* (8th ed.), p. 41; Mit. & T. Pl. & Pr. in Eq., p. 118.

[a] But where a matter of private right in which the state has no interest and which can be settled by a suit between the individuals is involved, an

is no difference between ex-officio informations and informations filed at the relation of a private individual.⁶⁰

2. When Information Will Lie.—Equity has original jurisdiction of informations on behalf of the state in the nature of an injunction bill in chancery, in all cases coming within the scope of the original jurisdiction conferred upon the court.⁶¹ Thus the proceeding by information is proper to assert the Crown's or state's rights to property,⁶² to protect property of lunatics and others incompetent to act for themselves,⁶³ to establish⁶⁴ and administer or regulate a charity,⁶⁵ to pre-

information and bill will not lie. *State v. Shively*, 10 Ore. 267.

60. *Attorney General v. Logan* (1891), 2 Q. B. (Eng.) 100; *Attorney General v. Cockermouth Local Board*, L. R. 18 Eq. (Eng.) 172; in both cases the sovereign, as *parens patriae*, sues by the attorney general.

61. *Attorney General v. Chicago & N. W. R. Co.*, 35 Wis. 425, 523.

[a] **Ministerial acts of the secretary of state** in issuing and publishing notices of an election of members of the legislature under an alleged invalid apportionment act may be restrained upon information. *State v. Cunningham*, 81 Wis. 440, 51 N. W. 724, 15 L. R. A. 561.

62. *Mass.*—Rev. Laws, ch. 188, §1; *Attorney General v. Jamaica Pond Aqueduct*, 133 Mass. 361. *N. Y.*—See *People v. Miner*, 2 Lans. 396. *Eng.* Reg. v. Hughes, 14 W. R. 441, 444, L. R. 1 P. C. 81, 12 Jur. (N. S.) 195, 35 L. J. C. P. 23, 14 L. T. N. S. 808; *Attorney General v. Chambers*, 4 D., M. & G. 206, 2 W. R. 636.

[a] **To annul a patent or land** (1) granted by the state to an individual. *People v. Stratton*, 25 Cal. 242. See *Com. v. Fowler*, 10 Mass. 293. (2) But where the object of the suit is not to reinvest the title in the state, but to vacate the patent and declare the fee in the relators an information will not lie. *State v. Shively*, 10 Ore. 267.

[b] But the lands of the United States, lying within the states are held and sold as lands held and sold by individual owners. Consequently the same remedies may be availed of. But the suit begun by information instead of by bill, will not on that account be dismissed. *United States v. Hughes*, 11 How. (U. S.) 552, 568, 13 L. ed. 809.

[c] **To restrain mining gold on private property** (gold belonging to the Crown). *Attorney General v. Scholes*,

5 Wyatt, W. & A'B. (Victoria) 164; *Attorney General v. Rogers*, 1 Australasian Jur. Rep. 120, may institute such suit without waiting until the metal sought is reached.

[d] **To Recover and Obtain an Accounting of Public Moneys.**—*Attorney General v. Compton*, 1 Y. & C. C. C. 417, 62 Eng. Reprint 951 (to compel restitution of money improperly applied out of funds raised for relief of poor by rates and assessments); *Attorney General v. Mayor of Dublin*, 1 Bligh N. S. 312, 341, 4 Eng. Reprint 888, 899.

[e] **Recovery of Money or Other Valuable Thing Drawn as Prize in Lottery.**—Mass. Rev. Laws, ch. 214, §14.

63. *People v. Miner*, 2 Lans. (N. Y.) 396; *Attorney General v. Mayor of Dublin*, 1 Bligh N. S. 312, 348, 4 Eng. Reprint 888, 902, where the custody thereof has not been granted to a person such as a committee who may proceed on behalf of such incompetent.

64. See *Attorney General v. Proprietors of Meeting House*, 3 Gray (Mass.) 1; *Attorney General v. Brereton*, 2 Ves. Sen. 425, 28 Eng. Reprint 272; *Attorney General v. Talbot*, 1 Ves. Sen. 78, 27 Eng. Reprint 903.

65. *Attorney General v. Butler*, 123 Mass. 304 (no ground for information shown); *Attorney General v. Tudor Ice Co.*, 104 Mass. 239. See *Attorney General v. Proprietors of Meeting House*, 3 Gray (Mass.) 1; *Attorney General v. Eastlake*, 11 Hare 205, 68 Eng. Reprint 1249; *Governors of Christ's Hospital v. Attorney General*, 5 Hare 257, 67 Eng. Reprint 909; *Attorney General v. Mayor*, 1 Hare 395, 66 Eng. Reprint 1086; *Attorney General v. Guardians of the Poor*, 17 Sim. 6, 60 Eng. Reprint 1028 (restraining defendants from paying out of poor rates expenses incurred in unsuccessfully applying to Parliament for an act authorizing certain things); *Attorney General v. Sturge*, 19 Beav.

vent and abate nuisances,⁶⁶ to enforce a public trust,⁶⁷ to prevent abuse

597, 52 Eng. Reprint 482 (but not to administer a foreign charity); *In re* Masters of Bedford Charity, 2 Swanst. 470, 523, 36 Eng. Reprint 696; Attorney General v. Brown, 1 Swanst. 265, 36 Eng. Reprint 384; Attorney General v. College, 1 Ves. Jr. 243, 30 Eng. Reprint 323. See generally the title "Public Charities."

[a] The criterion by which the charitable use is to be determined is the purpose to which the funds were dedicated. *State ex rel. Taylor v. Lord*, 28 Ore. 498, 513, 43 Pac. 471, 31 L. R. A. 473.

[b] Calling colleges to account as to elections of members or the application of profits cannot be done by information. Attorney General v. Talbot, 1 Ves. Sen. 78, 27 Eng. Reprint 903.

[c] A lease of a charity estate may be set aside for undervalue, if considerable, upon information. Attorney General v. Magwood, 18 Ves. Jun. 315, 34 Eng. Reprint 336.

66. U. S.—Mayor, etc. of Georgetown v. Alexandria Canal Co., 12 Pet. 91, 9 L. ed. 1012. Cal.—People v. Davidson, 30 Cal. 379. Conn.—See Bigelow v. Hartford Bridge Co., 14 Conn. 565, 578, 36 Am. Dec. 502, but which case does not decide whether such an information would lie in Connecticut. Ill. Doane v. Lake Street El. R. Co., 165 Ill. 510, 46 N. E. 520, 56 Am. St. Rep. 265, 36 L. R. A. 97; Hunt v. Chicago H. & D. R. Co., 121 Ill. 638, 13 N. E. 176, affirming Hunt v. Chicago, H. & D. R. Co., 20 Ill. App. 282; Stead v. Fortner, 171 Ill. App. 161. Mass.—Rev. Laws, ch. 101, §8; Attorney General v. Williams, 174 Mass. 484, 55 N. E. 77 (citing local and English cases); Attorney General v. Tarr, 148 Mass. 309, 19 N. E. 358, 2 L. R. A. 87; Kenney v. Consumers' Gas Co., 142 Mass. 417, 8 N. E. 138; Attorney General v. Jamaica Pond Aqueduct, 133 Mass. 361; Attorney General v. Boston & Lowell R. Co., 118 Mass. 345; Attorney General v. Woods, 108 Mass. 436, 11 Am. Rep. 380; Attorney General v. Tudor Ice Co., 104 Mass. 239, 6 Am. Rep. 227. N. H. Laws, 1887, ch. 77. N. J.—See Newark Plank Road Co. v. Elmer, 9 N. J. Eq. 754. N. Y.—See People v. Vanderbilt, 26 N. Y. 287; Davis v. Mayor, 14

N. Y. 506, 526, 67 Am. Dec. 186; People v. Miner, 2 Lans. 396. Ohio.—State v. Dayton & S. E. R. Co., 36 Ohio St. 434; State v. Hobart, 11 Ohio Dec. C. P. 166, 210 (citing numerous cases); Trumbull Co. v. Pennsylvania Co., 14 Ohio C. D. 550, prior to the code. Ore.—State ex rel. Taylor v. Lord, 28 Ore. 498, 513, 43 Pac. 471, 31 L. R. A. 473. Wis. State ex rel. Hartung v. Milwaukee, 102 Wis. 509, 78 N. W. 756. Eng.—See Tottenham Urban Dist. Council v. Williamson (1896), 2 Q. B. 353; Attorney General v. Cambridge Consumers Gas Co., 6 L. R. Eq. 282; Attorney General v. Forbes, 2 M. & C. 123; Anonymous, 3 Atk. 750, 26 Eng. Reprint 1230. Can.—Attorney General v. Toronto St. R. Co., 14 Gr. 673 (to enforce restriction that rails of street railway be kept flush with the street); Attorney General v. Harrison, 12 Gr. 466; Attorney General v. Weston Plank Road Co., 4 Gr. 211.

Compare Attorney General v. Hane, 50 Mich. 447, 15 N. W. 549, except in extraordinary cases an attorney general cannot ex officio by information sue a private person to abate a mill-dam.

See the title "Nuisance."

[a] Carrying on banking operations contrary to statute is not such a public nuisance that can be restrained by information. Attorney General v. Utica Ins. Co., 2 Johns. Ch. (N. Y.) 371.

[b] Where the use of a street in a municipality has not been legally authorized, an information by the attorney general affords complete remedy. People v. Decatur, S. & St. L. R. Co., 120 Ill. App. 229.

[c] The removal of a nuisance already in existence by information praying an injunction is not within the court's jurisdiction. Attorney General v. Weston Plank Road Co., 4 Gr. (Can.) 211. Compare Attorney General v. Toronto St. R. Co., 14 Gr. (Can.) 673. 67. Mass.—Attorney General v. Clark, 167 Mass. 201, 145 N. E. 183. N. Y.—See People v. Miner, 2 Lans. 396. Ore.—State ex rel. Taylor v. Lord, 28 Ore. 498, 513, 43 Pac. 471, 31 L. R. A. 473. Eng.—Evan v. Corporation of Avon, 29 Beav. 144, 54 Eng. Reprint 581.

[a] Such trusts include trusts for the whole public, or for some part of

of trust powers,⁶⁸ to prevent usurpation or destruction of franchises of a public nature,⁶⁹ but not to obtain a decision on an academic ques-

the public, or for an indefinite class of persons. *Attorney General v. Clark*, 167 Mass. 201, 145 N. E. 183.

[b] Equity jurisdiction extends to public trusts involving all funds raised by taxation or otherwise for public purposes. *State ex rel. Taylor v. Lord*, 28 Ore. 498, 513, 43 Pac. 471, 31 L. R. A. 73.

68. *People v. Miner*, 2 Lans. (N. Y.) 396; *State ex rel. Taylor v. Lord*, 28 Ore. 498, 513, 43 Pac. 471, 31 L. R. A. 473.

[a] **To Restrain the Misapplication of Funds.**—*Mass.*—*Attorney General v. Parker*, 126 Mass. 216. *Mich.*—*Attorney General v. Detroit*, 55 Mich. 181, 20 N. W. 894. See *Attorney General v. Detroit*, 26 Mich. 263. *N. Y.*—See *People v. Ballard*, 134 N. Y. 269, 32 N. E. 54, 17 L. R. A. 737. *Eng.*—*Attorney General v. Corporation of Norwich*, 16 Sim. 225, 60 Eng. Reprint 860; *Attorney General v. Wigan*, 5 De G. M. & G. 52.

[b] **To restrain corporation from acting in excess of their powers in a proper case.** *Mass.*—*Supp. to Rev. Laws*, ch. 111, §§106, 137 (prevent illegal railroad crossings and abandonment of railroad stations); *Supp. to Rev. Laws*, ch. 137 (1906), §377 (restraining unauthorized banking); *Supp. to Rev. Laws*, ch. 109 (1906), §373, p. 907; *Supp. to Rev. Laws*, ch. 99, §2, dissolution of domestic corporation and restraining foreign corporation from doing business within the state upon conviction of a second offense of keeping a bucket shop. See *Attorney General v. New York, N. H. & H. R. Co.*, 198 Mass. 413, 84 N. E. 737. *Mich.*—*Harting v. Bay Circuit Judge*, 176 Mich. 289, 142 N. W. 585, Ann. Cas. 1915B, 520; *Attorney General ex rel. McRae v. Thompson*, 167 Mich. 507, 133 N. W. 532; *McMullen v. Ingham Circuit Judge*, 102 Mich. 608, 61 N. W. 260. See *Attorney General v. Detroit*, 26 Mich. 263. *Mo.*—*State v. Curators State University*, 57 Mo. 178, *affirming State v. Saline Co. Court*, 51 Mo. 350, 11 Am. Rep. 454. *N. Y.*—See *People v. Ballard*, 134 N. Y. 269, 32 N. E. 54, 17 L. R. A. 737; *People v. Fields*, 58 N. Y. 491, 514; *People v. Ingersoll*, 58 N. Y. 1, 16, 17 Am. Rep. 178; *People v. Metropolitan*

Bank, 7 How. Pr. 144. *Compare People v. Miner*, 2 Lans. 396. *Wis.*—*Attorney General v. Railroad Co.*, 35 Wis. 425, 529, 550, citing numerous English cases. *Eng.*—*Attorney General v. Great Northern R. Co.*, 1 Dr. & Sm. 154, *quoted in Attorney General v. Railroad Co.*, *supra*. See *Attorney General v. Great Eastern R. Co.*, 11 L. R. Ch. Div. 449.

[a] **Breach of trust by a railroad in omitting to maintain its road as a thoroughfare for the use and benefit of the public upon payment of a reasonable charge.** *State v. Boston & M. R. R.*, 75 N. H. 327, 74 Atl. 542.

[b] **Character of Abuse of Power To Warrant Filing Information.**—"Where, however, the attorney general is to intervene in corporate affairs on behalf of the state, the abuse should be one of a substantial nature, and not of a character merely technical or unimportant. It should appear that the public has a substantial interest in the question; the right involved should be a public right, or at least not a private right merely; the wrong done or attempted, if it consist solely in a misuse or misappropriation of funds, should be either one involving questions of public policy, or, where that is not the case, the amount involved should be something more than merely nominal; something that is not beneath the dignity of the state to take notice of and protect by such proceeding." *Attorney General v. Detroit*, 26 Mich. 263, *quoted in Attorney General v. Detroit*, 55 Mich. 181, 20 N. W. 894.

[c] **The mere fact that the proceedings are not warranted by the act of incorporation is insufficient to warrant an information by the attorney general.** *Attorney General v. Tudor Ice Co.*, 104 Mass. 239, 6 Am. Rep. 227.

[d] **But commissioners appointed by the legislature are not a corporation and cannot be restrained from issuing bonds without compliance with conditions precedent.** *People v. Miner*, 2 Lans. (N. Y.) 396.

69. *Attorney General v. Detroit*, 71 Mich. 92, 38 N. W. 714; *Attorney General v. Detroit*, 55 Mich. 181, 20 N. W. 894. See the title "*Quo Warranto*." But see *Attorney General v. Utica Ins. Co.*, 2 Johns. Ch. (N. Y.) 371.

tion,⁷⁰ or to force municipal officers to repay money unlawfully taken.⁷¹

3. Power of Attorney General.—a. *To File Information.*—The attorney general has a prerogative right to file informations in cases affecting the public interest,⁷² even though there be an adequate remedy at law.⁷³

Leave of Court.—Where an injunction is regarded as a quasi prerogative writ it has been held that leave of court must be first obtained⁷⁴ by the attorney general or under his authority.⁷⁵

b. *Over Subsequent Proceedings.*—Even though there be a relation the suit is still the suit of the attorney general⁷⁶ who has absolute

70. Attorney General *ex rel.* McRae v. Thompson, 167 Mich. 507, 133 N. W. 532.

71. Attorney General v. Detroit, 107 Mich. 92, 64 N. W. 1057 (this claim of local corporate interest is cognizable in an action of money had and received by the county); Attorney General v. Moliter, 26 Mich. 444.

72. Mich.—Attorney General v. Bd. of Auditors, 73 Mich. 53, 40 N. W. 852. N. J.—Attorney General v. Delaware & B. B. R. Co., 27 N. J. L. 631. Eng.—Attorney General v. Mayor of Dublin, 1 Bligh N. S. 312, 347, 4 Eng. Reprint 888, 902.

[a] The jurisdiction of the attorney general to decide in what cases it is proper for him to sue on behalf of relators is obsolete. London County Council v. Attorney General, App. Cas. (1902) 165.

[b] The attorney general having had this power at common law still retains it in addition to the powers conferred by statute. Hunt v. Chicago & Dummy R. Co., 20 Ill. App. 282; People v. Miner, 2 Lans. (N. Y.) 396.

[c] Filing an information in equity is a power incident to the office of public prosecutor whether attorney general or solicitor general. It was not a duty required to be done personally within the meaning of a statute conferring all duties of the attorney general, except such as were done personally, upon the district attorney. Parker v. May, 5 Cush. (Mass.) 336.

[d] Requisition by the governor, is not essential to the validity of an information, but a recitation of such authority does not affect the validity of the information. Parker v. May, 5 Cush. (Mass.) 336.

73. Attorney General v. Railroad Co., 35 Wis. 425, 547; Attorney General v. Mid-Kent R. Co., 3 L. R. Ch. 100. But

see Attorney General v. Tudor Ice Co., 104 Mass. 239, 6 Am. Rep. 227.

[a] The attorney general has a right to elect his forum legal or equitable. To deny him such an election is only another way of denying jurisdiction. Attorney General v. Railroad Co., 35 Wis. 425; Attorney General v. Mayor of Galway, 1 Moll. (Irish) 103. See generally the title "Legal Remedy."

[b] The jurisdiction to maintain these informations (1) is wholly independent of an adequate remedy at law (Attorney General v. Railroad Co., 35 Wis. 425, 524), (2) although some courts have denied relief when the object sought could be attained as well in ordinary tribunals. Attorney General v. New Jersey R. & T. Co., 3 N. J. Eq. 136; Attorney General v. Utica Ins. Co., 2 Johns. Ch. (N. Y.) 371.

[c] The pending of an information in the nature of quo warranto is not a bar to an information in equity. But before granting the injunction prayed for, the court in Attorney General v. Chicago & N. W. R. Co., 35 Wis. 425, 595, required the attorney general to file a stipulation approved by the court that the state would not proceed by way of quo warranto for forfeiture or for contempt in violating the injunction to issue against the defendants.

74. Anderson v. Gordon, 9 N. D. 480, 83 N. W. 993, 52 L. R. A. 134; State v. Nelson County, 1 N. D. 88, 45 N. W. 33, 26 Am. St. Rep. 609, 8 L. R. A. 283.

75. Anderson v. Gordon, 9 N. D. 480, 83 N. W. 993, 52 L. R. A. 134.

76. Mass.—Parker v. May, 5 Cush. 336. Mich.—Attorney General v. Moliter, 26 Mich. 444. Eng.—Attorney General v. Ironmongers' Co., 2 Beav. 313, 330, 48 Eng. Reprint 1201.

[a] The fact that the attorney gen-

control over it;⁷⁷ the relator has no power or authority to direct or control the proceeding in any particular whatever.⁷⁸ Consequently all applications should be made on behalf of the attorney general.⁷⁹

c. *Appearance of Attorney General.*—The attorney general may appear either in person or by his attorney.⁸⁰ He may appear as counsel for defendants to an information filed by relator in his own name,⁸¹

eral permits the relator to select the solicitor to conduct the case does not make him the solicitor of the relator, but he is still the solicitor of the attorney general. *Attorney General v. Governors of Erasmus Smith's Schools* (1910), 1 Ir. Rep. 325.

77. *Attorney General v. Bd. of Auditors*, 73 Mich. 53, 40 N. W. 852; *Attorney General v. Moliter*, 26 Mich. 444; *Castgrain v. Atlantic & N. W. R. Co.* (1895), App. Cas. (Eng.) 282; *Attorney General v. Haberdashers' Co.*, 15 Beav. 397, 51 Eng. Reprint 591; *Attorney General v. Ironmongers' Co.*, 2 Beav. 313, 48 Eng. Reprint 1201.

[a] **Counsel Not of Record Not Heard.**—Where the attorney general and relators join in the proceedings and appear by the same counsel on record, the court will hear him only and will not hear another who claims to have been instructed by the attorney general to appear adversely to the relators, and who is not so instructed by the counsel of record. *Attorney General v. Bentley*, 6 Wyatt, W. & A' B. (Victoria) 175.

[b] **A dismissal of the suit cannot be prevented** by the relator as against the attorney general. *Hesing v. Attorney General*, 104 Ill. 292.

[c] **Withdrawal of Consent.**—An attorney general having given his consent to the suit cannot withdraw it to the prejudice of the relators. *People ex rel. Garrison v. Clark*, 72 Cal. 289, 13 Pac. 858. See also *People ex rel. Rondel v. North San Francisco, etc. Assn.*, 38 Cal. 564.

78. *State ex rel. Taylor v. Lord*, 28 Ore. 498, 43 Pac. 471, 31 L. R. A. 473; *Attorney General v. Governors of Erasmus Smith's School* (1910), 1 Ir. Rep. 325.

[a] **The relator will not be heard in person** on behalf of the attorney general, nor will the information be distinguished from the bill so as to hear him as plaintiff of the bill. *Attorney General v. Barker*, 4 Myl. & Cr. 262,

41 Eng. Reprint 103. See *Hesing v. Attorney General*, 104 Ill. 292; *Attorney General v. Parker*, 126 Mass. 216.

79. *Parker v. May*, 5 Cush. (Mass.) 336; *Attorney General v. Wakeman*, 15 Sim. 358, 60 Eng. Reprint 657 (affidavit on special application to amend); *Attorney General v. Wright*, 3 Beav. 447, 49 Eng. Reprint 176. See note to *Attorney General v. Mayor, etc.*, 1 Moil. (Irish) 95, 97, "the petition of appeal should be the petition of the attorney general at the relation of the relators."

[a] **Application for a new relator** on death of the relator cannot be made by the defendant. *Attorney General v. Plumtree*, 5 Madd. 452, 56 Eng. Reprint 968. *Compare Attorney General v. Harvey*, 1 Jur. N. S. 1062, 3 W. R. 636. See *infra*, XVIII, B, 5.

[b] **The writ of summons** endorsed by the relator is a nullity. *Attorney General v. Governors of Erasmus Smith's School* (1910), 1 Ir. Rep. 325.

80. *Parker v. May*, 5 Cush. (Mass.) 336.

[a] **Employment of special counsel**, see *Attorney General v. Continental Life Ins. Co.*, 88 N. Y. 571; *People v. Metropolitan Tel. & Tel. Co.*, 11 Abb. N. C. (N. Y.) 304.

81. *Shore v. Attorney General*, 9 Cl. & F. 355, 8 Eng. Reprint 450. But see *Attorney General v. Governors of the Sherborne Grammar School*, 18 Beav. 256, 52 Eng. Reprint 256, holding the attorney general and relator cannot be allowed to take opposite views on an information.

[a] Where an owner of private property has been mining for gold with the consent of the attorney general, he may join him as plaintiff in an information and bill against trespassers; but not where he has been mining without such consent. *Attorney General v. Scholes*, 5 Wyatt, W. & A' B. Eq. (Victoria) 164, *distinguishing Attorney General v. Gee*, 2 W. & W. Eq. 122.

although upon the most obvious considerations of fitness and propriety, he ought not to do so.⁸²

4. In Whose Name Filed.—The only person authorized to institute proceedings of this nature, where the state's rights only are interested, is the attorney general.⁸³ The suit is usually in the name of the attorney general as informant,⁸⁴ although it may be brought in the name of the state on relation of the attorney general.⁸⁵

When the suit concerns the rights of the government only, the suit is usually brought by the attorney general alone without a relator, though a relator is sometimes named.⁸⁶ But if the suit does not im-

82. *Parker v. May*, 5 Cush. (Mass.) 336.

83. **N. D.**—*Anderson v. Gordon*, 9 N. D. 480, 83 N. W. 993, 52 L. R. A. 134. **Ore.**—*State ex rel. Taylor v. Lord*, 28 Ore. 498, 43 Pac. 471, 31 L. R. A. 473. **Wis.**—See *State ex rel. Hartung v. Milwaukee*, 102 Wis. 509, 78 N. W. 756.

[a] The mere affixing of the attorney general's signature to a bill of a private relator is not believed, says the court in *State v. Lord*, 28 Ore. 493, 529, 43 Pac. 471, to be "sufficient to impress it with the functions and capacity of an information competent to put in motion the machinery of the courts, whereby they will take cognizance of questions pertaining to the high prerogative powers of the state, or affecting the whole people in their sovereign capacity."

[b] When it is said that the information may be filed by the attorney general ex officio or on the relation of a private person it is not meant that a private relator may prosecute alone without the presence of a proper law officer, but it is meant that the private person may make a sworn relation upon which the attorney general founds his action. *State ex rel. Hartung v. City of Milwaukee*, 102 Wis. 509, 78 N. W. 756.

[c] In Canada, whether filed by provincial attorney general or attorney general of the dominion, see *Attorney General v. International B. Co.*, 27 Gr. 37; *Attorney General v. Niagara Falls Bridge Co.*, 20 Gr. 34.

84. **Cal.**—*People v. Stratton*, 25 Cal. 242. **Ohio.**—*State v. Dayton & S. E. R. Co.*, 36 Ohio St. 434 (or in the name of the government); *Trumbull Co. v. Pennsylvania Co.*, 14 Ohio C. D. 550. **Ore.**—*State ex rel. Taylor v. Lord*, 28 Ore. 498, 529, 43 Pac. 471, 31 L. R. A.

473. **Can.**—*Queen v. Burnham*, 1 U. C. Q. B. 413. See *Attorney General v. M'Lachlin*, 5 Pr. Rep. 63.

But see *Mit. & T. Pl. & Pr. in Eq.*, pp. 119, 196; *Attorney General v. Rumford Chemical Wks.*, 22 Fed. 608.

85. **N. D.**—*Anderson v. Gordon*, 9 N. D. 480, 83 N. W. 993, 52 L. R. A. 134. **Ohio.**—See *Elyria v. Lake Shore & M. S. R. Co.*, 12 Ohio Dec. (N. P.) 609; *Trumbull Co. v. Pennsylvania Co.*, 14 Ohio C. D. 550. **Ore.**—*State ex rel. Taylor v. Lord*, 28 Ore. 498, 529, 43 Pac. 471, 31 L. R. A. 473. **Wis.**—*State ex rel. Hartung v. Milwaukee*, 102 Wis. 509, 78 N. W. 756. **Can.**—*Queen v. Burnham*, 1 U. C. Q. B. 413.

[a] If permissible to bring the suit in the name of the state alone, the information should show upon its face that the appropriate law officer brings the same for or on behalf of the state. *State ex rel. Taylor v. Lord*, 28 Ore. 498, 529, 43 Pac. 471, 31 L. R. A. 473.

[b] In the United States courts, for uniformity the suit should be in the name of the United States instead of the attorney general although the latter is not invalid. *Benton v. Woolsey*, 12 Pet. (U. S.) 27, 9 L. ed. 987. See also *Attorney General v. Rumford Chemical Wks.*, 32 Fed. 608, dismissing an information because in the name of the attorney general.

86. **Cal.**—*People v. Stratton*, 25 Cal. 242. **Mass.**—*Kenney v. Consumers' Gas Co.*, 142 Mass. 417, 8 N. E. 138; *District Attorney v. Lynn & Boston R. Co.*, 16 Gray 242. **Mich.**—*Attorney General v. Moliter*, 26 Mich. 444, he is named only in order to supply some one to be subject to costs. **N. J.**—*Attorney General v. Delaware & B. B. R. Co.*, 27 N. J. Eq. 1. **N. Y.**—See *People v. Ballard*, 134 N. Y. 269, 32 N. E. 54, 17 L. R. A. 737. **Ohio.**—*State v. Hobart*, 11 Ohio Dec. C. P. 166, 211. **Ore.**—*State ex rel.*

mediately concern the government as in a case where the rights of those who are under the protection of the government are involved, the information is generally filed at the relation of such person.⁸⁷

5. Effect of Death of Relator or Refusal To Act.—The death of a relator does not abate the suit,⁸⁸ but a new relator should be appointed in place of the deceased;⁸⁹ but in a suit by bill and information the

Taylor v. Lord, 28 Ore. 498, 43 Pac. 471, 31 L. R. A. 473. See State v. Shively, 10 Ore. 267, 276. Wis.—State v. Cunningham, 81 Wis. 440, 487, 51 N. W. 724, 15 L. R. A. 561. Eng. Attorney General v. Logan (1891), 2 Q. B. 100; Attorney General v. Mayor of Dublin, 1 Bligh (N. S.) 312, 337, 4 Eng. Reprint 888, 898; Attorney General v. Scholes, 5 Wyatt, W. & A' B. Eq. 164; Dan. Ch. Pr. (8th ed.), p. 41; Mit. & T. Pl. & Pr. in Eq., p. 196.

[a] An information to restrain and prevent a nuisance may be filed either ex officio by the attorney general or on the relation of persons having an interest in the subject-matter of the bill. District Attorney v. Lynn & Boston R. Co., 16 Gray (Mass.) 242.

87. Cal.—People v. Stratton, 25 Cal. 242. Mass.—Kenney v. Consumers' Gas Co., 142 Mass. 417, 8 N. E. 138. Ohio. State v. Dayton & S. E. R. Co., 36 Ohio St. 434; Trumbull Co. v. Pennsylvania Co., 14 Ohio C. D. 550. Ore.—State ex rel. Taylor v. Lord, 28 Ore. 498, 43 Pac. 471, 31 L. R. A. 473. See also State v. Shively, 10 Ore. 267, 276. Wis. State v. Cunningham, 81 Wis. 440, 488, 51 N. W. 724, 15 L. R. A. 561. Eng. Attorney General v. Vivian, 1 Russ. 226, 236, 38 Eng. Reprint 88, quoting Ld. Redesdale; Attorney General v. Oglander, 1 Ves. Jur. 246, 30 Eng. Reprint 324.

See Dan. Ch. Pr. (8th ed.), p. 41; Mit. & T. Pl. & Pr. in Eq., p. 118; Shortt on Informations, p. 2; Story Eq. Pl., §8; Attorney General v. Scholes, 5 Wyatt, W. & A' B. Eq. (Victoria) 164.

[a] **Necessity for Relator.**—(1) A relator is not indispensable, and the attorney general may, if he pleases, proceed without one. Ohio.—State v. Dayton & S. E. R. Co., 36 Ohio St. 434; Trumbull Co. v. Pennsylvania Co., 14 Ohio C. D. 550. Wis.—State v. Cunningham, 81 Wis. 440, 488, 51 N. W. 724, 15 L. R. A. 561. Eng.—In re Masters of Bedford Charity, 2 Swanst. 470, 520, 36 Eng. Reprint 696; Attorney General v. Municipal Council, 13 N. S. W. L.

R. Eq. 139, 149; Shortt on Information, p. 2. (2) But in People v. Stratton, 25 Cal. 242, the court said, that "If the state had no interest in the subject-matter of the proceeding . . ., it is difficult to understand upon what principle the information, as an information purely on behalf of the state, could be sustained. It is like a complaint that fails to state facts sufficient to constitute a cause of action, for the reason that it does not appear that the plaintiff has any interest in the subject-matter of the action."

[b] "The main object of having a relator is to secure the defendants the costs of the information in case it should turn out that the information was improperly filed." Attorney General v. Vivian, 1 Russ. 226, 236, 38 Eng. Reprint 88. See: Mass.—Attorney General v. Parker, 126 Mass. 216. Mich.—Attorney General v. Bd. of Auditors, 73 Mich. 53, 40 N. W. 852. Eng.—1 Dan. Ch. Pr. (8th ed.), p. 44; Attorney General v. Mayor of Dublin, 1 Bligh N. S. 312, 351, 4 Eng. Reprint 888, 903; Attorney General v. Municipal Council, 13 N. S. W. L. R. Eq. 139, 149.

[c] **A charity information.** (1) by virtue of statute of 59 G. 3, ch. 91, §1, may be filed by the attorney general without a relator. Attorney General v. Compton, 1 Y. & C. C. C. 417, 62 Eng. Reprint 591; Attorney General v. Earl of Ashburnham, 1 Sim. & St. 394, 57 Eng. Reprint 157. (2) But if the case depends upon a contest of evidence, a relator should always be appointed, in order that the court may be able to make the costs follow the result. Attorney General v. Boucherett, 25 Beav. 116, 53 Eng. Reprint 580.

88. Waller v. Hanger, 2 Bulst. 134, 80 Eng. Reprint 1011; Attorney General v. Ironmongers Co., 2 Beav. 313, 329, 48 Eng. Reprint 1201 (quoting note from Attorney General v. Mayor, etc., 1 Moll. [Irish] 95, 97).

89. Attorney General v. Haberdashers' Co., 15 Beav. 397, 51 Eng. Reprint 591. See Attorney General v.

relator sustains the character of plaintiff as well as relator, so that on his death no further proceedings can be had until a new relator is made a party.⁹⁰

Likewise if a relator refuses to act, a new relator may be appointed in his stead.⁹¹

6. Parties. — a. *Generally.* — All persons interested in the subject matter of the suit should be made parties thereto.⁹² The attorney general alone⁹³ or the state which he represents,⁹⁴ is regarded as the real party plaintiff, rather than the relator, who is not a party to the suit,⁹⁵ unless his bill is incorporated with the information.⁹⁶

b. *Who May Be a Relator.*⁹⁷ — Any person not under a legal disability may be made a relator⁹⁸ if he consents.⁹⁹ A corporation is a

Powel, Dick. 355, 21 Eng. Reprint 306.

[a] **By Whom Application Is Made.** Where the relator dies after decree, an order for the substitution of a new relator with liberty to him to carry on the proceedings will be made on the application of the proposed new relator with the consent of the attorney general, but not on the application of the attorney general himself. *Attorney General v. Harvey*, 1 Jur. N. S. 1062, 3 W. R. 636. *Compare Attorney General v. Plumptree*, 5 Madd. 452, 56 Eng. Reprint 968.

90. *People v. Stratton*, 25 Cal. 242.

91. *Attorney General v. Corporation of Cashel, San & Sc. (Irish)* 333.

[a] **A motion by the relators to strike out a portion of their number** will not be granted unless it is established that the defendants will not be prejudiced by the alteration, and that either justice would not be done or the suit cannot be so conveniently prosecuted. *Attorney General v. Cooper*, 3 Myl. & C. 258, 40 Eng. Reprint 923.

92. **Person Indirectly Benefited.** Where a fund was given to aid in educating the children of a town without distinction, although the town is not directly benefited, it being benefited indirectly through the partial relieving from taxes, is a proper if not a necessary party to the suit. *Attorney General v. Parker*, 126 Mass. 216.

[a] **A stranger in possession of charity property** (1) who refuses to deliver it up is a proper party to the suit to compel an accounting and delivery of the property (*Attorney General v. Earl of Chesterfield*, 18 Beav. 596, 52 Eng. Reprint 234), (2) but an agent of a trustee is not. *Attorney General v. Earl of Chesterfield*, 18 Beav. 596, 52

Eng. Reprint 234, he being liable to account to his principal only.

[b] **Purchasers of Charity Property.** Where a charity is entitled to a particular sum as a first charge on an estate given to certain persons, and a portion of it was sold improperly, it was charged, the purchasers must be included as parties to the information. *Mayor of Southmolton v. Attorney General*, 5 H. L. Cas. 1, 10 Eng. Reprint 796.

[c] **Where the tenant in common in possession** is properly a defendant to a suit claiming the property for the charity, the other is also a proper party. *Attorney General v. Flint*, 4 Hare 147, 67 Eng. Reprint 597.

93. *Attorney General v. Governors of Erasmus Smith's Schools* (1910), 1 Ir. Rep. 325.

94. *State v. Cunningham*, 81 Wis. 440, 489, 51 N. W. 724, 15 L. R. A. 561.

95. **U. S.**—*Attorney General v. Rumford Chemical Wks.*, 32 Fed. 608. See *United States v. Doughty*, 7 Blatchf. 424, 25 Fed. Cas. No. 14,986. **Mass.** *Attorney General v. Parker*, 126 Mass. 216. **Eng.**—*Attorney General v. Logan* (1891), 2 Q. B. 100; *Attorney General v. Wright*, 3 Beav. 447, 49 Eng. Reprint 176 (and they have no right of their own authority to make any application to the court); *Attorney General v. Ironmongers Co.*, 2 Beav. 313, 48 Eng. Reprint 1201. **Irish.**—See note to *Attorney General v. Mayor, etc.*, 1 Moll. 95, 97.

96. *Attorney General v. Parker*, 126 Mass. 216.

97. *Compare supra*, XVIII, B, 6.

98. *Dan. Ch. Pr.*, p. 43.

99. **To make persons relators with-**

person within this rule.¹ Lunatics² and infants³ cannot be relators.

It is not required that the relator in the case of an information have any special personal interest in the relief sought,⁴ but to an information and bill some individual interest is necessary.⁵

7. Pleadings.—*a. Generally.*—The pleadings in a proceeding by information in equity, are governed by the general rules of equity procedure, the information being substantially similar to the bill though differing in the style and the form of its averments.⁶

out their sanction or authority is improper. *Attorney General v. Maryatt*, 2 Jur. (Eng.) 1060.

[a] **Authorization by relator** where necessary may be dispensed with in cases of urgent necessity. *Attorney General v. Murray*, 13 W. R. 65, 11 L. T. 332.

1. *Attorney General v. Logan* (1891), 2 Q. B. 100, "local board."

2. *Attorney General v. Tyler*, 2 Eden. 230, 28 Eng. Reprint 886; *Attorney General v. Tiler*, Dick. 378, 21 Eng. Reprint 316; *Attorney General v. Scholes*, 5 Wyatt, W. & A' B. Eq. (Victoria) 164.

3. *Attorney General v. Scholes*, 5 Wyatt, W. & A' B. Eq. (Victoria) 164.

[a] **An information on relation of an infant with a next friend** is demurrable. *Attorney General v. Scholes*, 5 Wyatt, W. & A' B. Eq. (Victoria) 164, 173.

4. **Mass.**—*Attorney General v. Parker*, 126 Mass. 216. **Wis.**—*State v. Cunningham*, 81 Wis. 440, 488, 51 N. W. 724, 15 L. R. A. 561, except that which he has in common with other citizens. **Eng.**—*Attorney General v. Logan* (1891), 2 Q. B. 100; *Attorney General v. Vivian*, 1 Russ. 226, 286, 38 Eng. Reprint 88. *Compare* *Attorney General v. Oglender*, 1 Ves. Jr. 246, 30 Eng. Reprint 324 (in which the court said: "The consequence of dismissing the information appears to be, that the relator had no title"); and *Attorney General v. Green*, 2 Bro. C. C. 492, 29 Eng. Reprint 270, *distinguishing* *Attorney General v. Bucknall*, 2 Atk. 328, 26 Eng. Reprint 600, as laying down the rule that the relator need not be the nearest person interested. Any person though the most remote in the contemplation of the charity may be a relator. See also *Mayor of Southmolton v. Attorney General*, 5 H. L. Cas. 1, 10 Eng. Reprint 796.

5. **Mass.**—*Attorney General v. Parker*, 126 Mass. 216. **N. J.**—*Attorney General v. Central R. Co.*, 61 N. J. Eq. 259, 48 Atl. 347. **Eng.**—*Dan. Ch. Pr.* (8th ed.), p. 42; *Attorney General v. East India Co.*, 11 Sim. 380, 59 Eng. Reprint 920; *Attorney General v. Vivian*, 1 Russ. 226, 237, 38 Eng. Reprint 88; *Attorney General v. College*, 1 Ves. Jr. 243, 30 Eng. Reprint 323.

[a] **If the relator has no interest**, the bill will be dismissed but the suit may remain as an information. **Mass.** *Attorney General v. Parker*, 126 Mass. 216. **Wis.**—*State v. Cunningham*, 81 Wis. 440, 488, 51 N. W. 724, 15 L. R. A. 561. **Eng.**—*Attorney General v. Vivian*, 1 Russ. 226, 237, 38 Eng. Reprint 88.

6. "Informations in every respect follow the nature of bills, except in their style. When they concern only rights of the crown, or of those whose rights the crown takes under its particular protection they are exhibited in the name of the king's attorney or solicitor general as the informant; and . . . in the latter always, and in the former sometimes, a relator is named, who in reality sustains and directs the suit. It may happen that this person has an interest in the matter in dispute, and sustains the character of plaintiff as well as of relator; and in this case the pleading is styled an information and bill. . . . The difference in form between an information and a bill consists merely in offering the subject-matter as the information of the officer in whose name it is exhibited, at the relation of the person who suggests the suit in those cases where a relator is named, and in stating the acts of the defendant to be injurious to the crown, or to those whose rights the crown thus endeavors to protect. When the pleading is at the same time an information and bill it is a compound of the forms used for each when separate-

Venue. — In an information of intrusion, the venue may be laid in any county without regard to the location of the premises.⁷

Specific injury to the public need not be alleged.⁸

b. *Prayer of Relief.* — A prayer for wrong or improper relief is not fatal to the information.⁹ Nor is the absence of a prayer for the issuance of process fatal.¹⁰

c. *Signature of Attorney General.* — The information should be signed by the attorney general.¹¹

d. *Amendment.* — An information may be amended,¹² but not with-

ly exhibited." Mit. & T. Pl. & Pr. in Eq., p. 196.

[a] "The matter of complaint is offered to the court by way of information, given by the proper officers of the crown or government . . . , and not by way of petition. When the suit immediately concerns the rights of the crown or government alone, those officers proceed purely by way of information. When the suit does not immediately concern the rights of the crown or government, its officers depend upon the relation of some person, whose name is inserted in the information, and who is termed the relator. . . . Informations, however, differ from bills little more than in name and form, and therefore the same rules are generally applicable to both. Informations respecting charities constitute the most striking exception; for in those the court will not require the same strictness, either as to parties, or to pleadings, as is ordinarily required in bills." Story's Eq. Pl., ch. II, §8, p. 8. See generally the titles "Bills and Answers;" "Equity Jurisdiction and Procedure."

7. *Attorney General v. Dockstader*, 5 U. C. Q. B. (O. S.) 341.

8. *Attorney General v. Chicago & N. W. R. Co.*, 35 Wis. 425, 552, which was an information for an injunction against the defendant's exactment of illegal tolls, in which it was said: "It is not the averment of the pleader but the nature of the acts pleaded which is material on the question of public injury."

[a] **Pecuniary damage to the public** need not be alleged in an information for restraining a nuisance. *Stead v. Fortner*, 171 Ill. App. 161.

9. *Attorney General v. Vivian*, 1 Russ. 226, 38 Eng. Reprint 88, quoting *Attorney General v. Scott*, 1 Ves. Sen. 413, 27 Eng. Reprint 1113 (if the char-

ity wants any direction); *Attorney General v. Smart*, 1 Ves. Sen. 72, 27 Eng. Reprint 898; *Attorney General v. Jeanes*, 1 Atk. 355, 26 Eng. Reprint 227. See generally the title "Prayer."

[a] **If an information brought to establish a charity** (1) prays the wrong relief, the information will not be dismissed but charity will be decreed established "where it is a charity at large, or in its nature, before the statute of charitable uses," but the rule is otherwise in the case of charities established by charter. *Attorney General v. Middleton*, 2 Ves. Sen. 327, 28 Eng. Reprint 210. (2) This rule holds only in private charities. *Attorney General v. Smart*, 1 Ves. Sen. 72, 27 Eng. Reprint 898.

10. *Attorney General v. M'Lachlin*, 5 Pr. Rep. (Can.) 63.

11. *Attorney General v. Toronto St. R. Co.*, 2 Ch. Cham. Rep. (Can.) 321.

[a] An information in the name of the attorney general not signed by him but on which was indorsed a fiat, "Let the within information be filed," signed by the solicitor general, is irregular. *Attorney General v. Toronto St. R. Co.*, 13 Gr. (Can.) 441.

[b] **Signature on Amended Information.** — Where the original information signed by the attorney general was amended by adding a party, a motion to strike the amended information from the files because it did not bear the signature of the attorney general was refused. *Attorney General v. Toronto St. R. Co.*, 2 Ch. Cham. Rep. (Can.) 321.

[c] **The replication** when it is only a joinder of issue need not be signed by the attorney general. *Attorney General v. Municipal Council*, 13 N. S. W. L. R. Eq. 139, but it was not decided whether such would be necessary if the replication raised a new case.

12. *Attorney General v. Corp. of*

out the sanction of the attorney general.¹³ An information may be amended so as to make it a bill.¹⁴ An information and bill may be amended to make it an information only.¹⁵

8. Dismissal for Want of Prosecution.—Because the attorney general has absolute control over the manner of conducting the proceedings, an information exhibited solely in his name cannot be dismissed by the defendant for want of prosecution,¹⁶ but this rule has no application to informations on the relation of a private person.¹⁷

9. Costs.—In the absence of statute the attorney general cannot, in a court of equity, be made to pay costs,¹⁸ but a relator is usually named so that if the suit be improperly brought and the information be dismissed, costs may be awarded against him.¹⁹ The attorney general may receive costs, however.²⁰ Since costs rest in the court's discretion,²¹

London, 13 Beav. 313, 51 Eng. Reprint 121.

[a] **An irregular or improper amendment** is not a ground for taking the information from the files. *Attorney General v. Cooper*, 3 Myl. & C. 258, 40 Eng. Reprint 923.

13. *Attorney General v. Fellows*, 1 Jac. & W. 254, 37 Eng. Reprint 372.

14. *Thompson v. Thompson*, 6 Houst. (Del.) 225, and a private person as next friend was substituted for the attorney general acting ex relatione.

15. *Attorney General v. East India Co.*, 11 Sim. 380, 59 Eng. Reprint 920 (but the chancellor required the persons named as plaintiffs remain on the record as relators); *Attorney General v. Scholes*, 5 Wyatt, W. & A' B. Eq. (Victoria) 164, 173.

16. *Dan. Ch. Pr.*, p. 45; *Attorney General v. Williamson*, 60 L. T. N. S. 930, this rule applies to suits upon informations in revenue.

As to dismissal generally, see the title "**Dismissal, Discontinuance and Non-suit.**"

17. *Dan. Ch. Pr.*, p. 45; *Attorney General v. Williamson*, 60 L. T. N. S. (Eng.) 930.

18. **Ore.**—*State ex rel. Taylor v. Lord*, 28 Ore. 498, 43 Pac. 471, 31 L. R. A. 473. **Eng.**—*Attorney General v. Earl of Ashburnham*, 1 Sim. & St. 394, 57 Eng. Reprint 157. **Can.**—*Reg. v. Mainwaring*, 5 U. C. Q. B. (O. S.) 670.

But see *Mass. Rev. Laws*, ch. 188, §12.

[a] **The costs in attorney general's suits** are directed to be paid by one defendant to another. *Attorney General v. Corporation of Chester*, 14 Beav. 338, 51 Eng. Reprint 316.

19. **Cal.**—*People v. Stratton*, 25 Cal. 242. **Mass.**—*Attorney General v. Butler*, 123 Mass. 304. **Ore.**—*State ex rel. Taylor v. Lord*, 28 Ore. 498, 43 Pac. 471, 31 L. R. A. 473. **Wis.**—See *State v. Cunningham*, 81 Wis. 440, 488, 51 N. W. 724, 15 L. R. A. 561. **Eng.** *Dan. Ch. Pr.* (8th ed.), p. 42; *Attorney General v. Smart*, 1 Ves. Sen. 72, 27 Eng. Reprint 898; *Attorney General v. Mayor of Dublin*, 1 Bligh N. S. 312, 337, 4 Eng. Reprint 888, 898. See *Attorney General v. Conservators of the Thames*, 1 H. & M. 1, 71 Eng. Reprint 1, where the bill was dismissed without costs because the questions were such as might reasonably be brought up and substantial injury was suffered.

[a] **Security for Costs.**—Where on an information and bill, the same individual who is named as relator, is also the plaintiff suing in his own right, the court will not dismiss the information and bill upon the ground that the relator, having been required by the attorney general to give security for costs has failed to do so. *Attorney General v. Knight*, 3 Myl. & C. 154, 40 Eng. Reprint 883.

20. *Attorney General v. Earl of Ashburnham*, 1 Sim. & St. 394, 57 Eng. Reprint 157.

21. *Attorney General v. Berry*, 11 Jur. (Eng.) 114 (simpler proceeding under the Charity Petition Act would have accomplished the same result without the expense of an information, the relators were refused their costs); *Attorney General v. Fishmongers*, 1 Keen 492, 48 Eng. Reprint 396, the information not substantially benefiting the charity, the defendants were directed to pay costs as between party and

they do not always abide the event of the suit;²² but in the absence of particular circumstances justifying a special order, the relator of a charity information, upon obtaining a decree for the charity is entitled to his costs as between solicitor and client.²³

10. Appeals. — A relator, not being a party to the suit, cannot take an appeal.²⁴ On the other hand, it has been held that in a suit by the attorney general without a relator who may be held for costs, the attorney general cannot appeal.²⁵

C. IN ADMIRALTY. — Informations in admiralty are treated elsewhere in this work.²⁶

party; extra costs out of charity fund refused relators. See also *Attorney General v. Cockermouth Local Board*, 18 L. R. Eq. (Eng.) 172.

[a] **Costs Where Suit Still Pending.** But where the attorney general refuses either to prosecute or discontinue the suit, the suit is not yet determined and costs cannot be allowed the defendant. *Attorney General v. Williamson*, 60 L. T. N. S. 930.

22. Attorney General v. Brewers Company, 1 P. Wms. 376, 24 Eng. Reprint 432, in which the defendants though successful were not awarded costs for they would have overcharged the charity £620 and the plaintiffs having been of such service to the charity were allowed their costs. But see *Mass. Rev. Laws*, ch. 188, §12.

[a] **Suit having been instituted without previous remonstrance**, it is proper that costs should not be awarded against the defendant. *Attorney General v. Rogers*, 1 Australian Jur. Rep. 120.

23. Attorney General v. Kerr, 4 Beav. 297, 49 Eng. Reprint 353 (and

the difference between the amount of such costs and the amount which he may recover of the defendant is to be paid out of the charity estate); *Attorney general v. Carte*, 1 Dick. 113, 21 Eng. Reprint 211.

[a] **Out of What Fund Payable.** Costs should be ordered paid out of the fund recovered by the information or out of the charity estate which is the subject of the suit, but when circumstances require it, a different provision may be made. *Attorney General v. Kerr*, 4 Beav. 297, 49 Eng. Reprint 353. See also *Attorney General v. Tyler*, 1 C. P. Coop. 358, 47 Eng. Reprint 544, relator changed before the cause is at issue receives his costs under the circumstances out of the charity fund.

24. Hesing v. Attorney General, 104 Ill. 292.

25. Attorney General v. Hane, 50 Mich. 447, 15 N. W. 549.

26. See the title "Admiralty," and related titles such as "Collision;" "Salvage;" "Seamen;" "Ships and Shipping."

INDORSEMENTS. — See Bills and Notes; Filing; Indictment and Information; Process; Returns.

INDUCEMENT

By the Editorial Staff.

I. DEFINITION, 718

II. WHEN NECESSARY OR PROPER, 718

- A. *In General*, 718
- B. *Judicial Notice*, 719
- C. *Presumptions*, 719
- D. *Personal or Contractual Relations*, 719
- E. *Title and Ownership*, 720

III. HOW PLEADED, 720

- A. *Generally*, 720
- B. *Certainty in Pleading*, 721
 - 1. *In General*, 721
 - 2. *Description*, 723

IV. DUPLICITY, 723

V. DENIALS AND PROOF, 723

VI. IN PLEAS, 725

VII. IN CRIMINAL CASES, 725

CROSS-REFERENCES:

Indictment and Information; Libel and Slander.

For further references and cross-references, see the index to this work.

I. DEFINITION.—Inducement, in pleading, is the statement of matter, which is introductory to the principal subject of the declaration or plea, and which is necessary to explain or elucidate it.¹

II. WHEN NECESSARY OR PROPER.—A. **IN GENERAL.** When the fact which constitutes the cause of actions does not depend on any peculiar transaction or circumstance, to give it effect, no inducement is necessary.² But where the right of action depends on personal or contractual relations,³ or the injury affects plaintiff in

1. **III.**—Consolidated Coal Co. v. Peers, 97 Ill. App. 188, 194. **Mass.** Lord v. Tyler, 14 Pick. 156. **Mo.** Armelio v. Whitman, 127 Mo. App. 698, 106 S. W. 1113.

See Bouv. L. Dict.; 1 Chitty Pl. 259. See 6 STANDARD PROC. 668.

[a] "Such matter as is not introductory to, or necessary to elucidate

the substance or gist of the declaration, plea, etc., or is collaterally applicable to it, is surplusage." Consolidated Coal Co. v. Peers, 97 Ill. App. 188, 194; Bouv. L. Dict.; 1 Chitty Pl. 259.

2. McGough v. Rhodes, 12 Ark. 625, 629; Langton v. Hagerty, 35 Wis. 150.

3. Abendroth v. Boardley, 27 Wis. 555; 1 Chitty Pl. 280. See *infra*, II, D.

his professional capacity and damage is claimed therefor,⁴ or the wrong is against goods owned or in possession of the plaintiff,⁵ or consists of an intrusion upon property of which he has the title or possession,⁶ or where defamatory words are innocent in their meaning, when not connected with extrinsic circumstances,⁷ the introductory matter is an essential part of the pleading, though not of the gist of the action.⁸

B. JUDICIAL NOTICE. — An exception to the rule that a foundation for the action in extrinsic circumstances must be laid, as an inducement, or otherwise, in the pleading, exists as to matter of which the courts take *judicial notice*, for example, the duty of a public officer.⁹ The general rule of pleading, that it is not necessary to plead¹⁰ matters of which the court takes judicial notice, applies to matter of inducement.¹¹

C. PRESUMPTIONS. — That which the law presumes need not be alleged by way of inducement,¹² and the unnecessary allegation of such matters does not justify or require evidence in support of them.¹³

D. PERSONAL OR CONTRACTUAL RELATIONS. — It is the proper office of the inducement to set out the personal relations of one person to another, when those relations are the foundation for the action, as that of husband and wife, in actions by the husband for damages, for personal injury to the wife, for alienating affections or for criminal conversation;¹⁴ or that of parent and child in an action by the parent

4. 1 Chitty Pl. 379.

5. 1 Chitty Pl. 380. See *infra*, II, E.

6. 1 Chitty Pl. 379. See *infra*, II, E.

7. Cal.—Grand v. Dreyfus, 122 Cal. 58, 61, 54 Pac. 389. Ind.—Garnett v. Bissell, etc., Works, 154 Ind. 319, 56 N. E. 667. Mass.—Brettun v. Anthony, 103 Mass. 37; Carter v. Andrews, 16 Pick. 1, 6. Minn.—Traynor v. Sielaff, 62 Minn. 420, 64 N. W. 915; Stewart v. Wilson, 23 Minn. 449. Mo.—Ukman v. Daily Record Co., 189 Mo. 378, 393, 88 S. W. 60. N. Y.—Emery v. Miller, 1 Denio 208. Wash.—Wright v. Daniel, 40 Wash. 6, 82 Pac. 139. Wis.—Pandow v. Eichsted, 90 Wis. 298, 63 N. W. 284; Benz v. Wiedehoeft, 83 Wis. 397, 53 N. W. 686; Weil v. Schmidt, 28 Wis. 137; Curtis v. Moore, 15 Wis. 134. Eng.—Rex v. Greepe, 2 Salk. 513, 91 Eng. Reprint 437.

See the title "Libel and Slander."

8. "The averments that the plaintiffs are husband and wife and that the defendants are husband and wife, are clearly matters of inducement, and are not of the *gravamen* of the action." Abendroth v. Boardley, 27 Wis. 555.

9. State v. Hageman, 13 N. J. L.

314; State v. Haddonfield & C. Tpk. Co., 65 N. J. L. 97, 46 Atl. 700. See the title "Judicial Notice," and also the "ENCY. OF EV."

10. See the title "Judicial Notice."

11. Brown v. Piper, 91 U. S. 37, 23 L. ed. 200; Quirolo v. Ardito, 17 Blatchf. (U. S.) 400, 1 Fed. 610.

12. 1 Chitty Pl. 400. See 6 STANDARD PROC. 680, and *supra*, this volume, the title "Indictment and Information," IX, D, 4.

13. Jones v. Stevens, 11 Price (Eng.) 235, 272. But see 9 ENCY. OF EV. 890.

14. Forms, 9 STANDARD PROC. 50, 51. See the title "Husband and Wife;" also the titles "Alienating Affections;" "Criminal Conversation."

[a] "Now the averments that the plaintiffs are husband and wife, and that the defendants are husband and wife, are clearly matters of inducement, and are not of the *gravamen* of the action, and a repetition of these averments should be avoided. 1 Chit. Pl. 413; Id. 280." Abendroth v. Boardley, 27 Wis. 555.

[b] "In an action for an injury to the relative right of persons, the relation of husband, or master in respect

for seduction or personal injury;¹⁵ or the reason for joinder of parties, as in actions against married women.¹⁶ So in an action *ex delicto* for breach of duties growing out of a contractual relation, the contract is matter of inducement.¹⁷

E. TITLE AND OWNERSHIP.—In actions for injury to real or personal property,¹⁸ or in actions on contracts by personal representatives, or assignees of personal interests,¹⁹ and in actions generally where title or ownership is only incidentally involved and not the gist of the action, for the purpose of laying the foundation for the action by the plaintiff, it is the proper function of the inducement to set up *title* or *ownership* of the plaintiff of the property, real or personal, or of the subject of the controversy.²⁰

III. HOW PLEADED.—A. GENERALLY.—A formal inducement

of which the plaintiff was injured, must be stated." 1 Chitty Pl. 379.

15. Forms, 9 STANDARD PROC. 910, 911. See the titles "Parent and Child;" "Seduction."

16. Forms, 9 STANDARD PROC. 588, 590. See the title "Husband and Wife."

17. *Reeves v. Lutz*, 179 Mo. App. 61, 162 S. W. 280 (physician and patient); *Armelio v. Whitman*, 127 Mo. App. 698, 106 S. W. 1113. See 4 STANDARD PROC. 651; 10 STANDARD PROC. 223; and the titles "Inns and Innkeepers;" "Master and Servant;" "Passengers;" "Physicians and Surgeons;" "Principal and Agent;" "Warehousemen."

18. See 1 Chitty Pl. 379.

[a] "In trespass, trover, detinue, case or replevin, for an injury to or taking away, etc., goods, the plaintiff's right to or interest in the goods, either as absolute owner, or as having a limited right therein, is not otherwise described in the declaration than by the averment that they were the goods 'of the plaintiff' or 'that he was lawfully possessed of them as of his own property.'" 1 Chitty Pl. 380.

19. See Steph. Pl. 309; 1 Chitty Pl. 363. See the titles "Executors and Administrators;" "Guardian and Ward."

20. See 1 Chitty Pl. 379, 380; Steph. Pl. 309, and more fully the title "Title."

[a] In personal actions title is mere inducement, at least in a pleading point of view, as regards the declaration. 1 Chitty Pl. 379.

[b] "To the rule, that the commencement of particular estates must be

shown, there is this exception, that it need not be shown where the title is alleged by way of *inducement* only." Steph. Pl. 309.

[c] In an action in debt on a lease the title of the lessor "is usually shown by way of *inducement* preceding the statement of the lease, as when the action is at the suit of an heir, by alleging that the lessor was seized of the premises in his demesne as of fee." 1 Chitty Pl. 364; Forms, 9 STANDARD PROC. 1206, I, A.

[d] Form.—Title by Devise.—"And the said E. F. being so seized as aforesaid, he the said E. F. afterwards, to-wit, on, etc., at, etc. (*venue*) aforesaid, duly made and published his last will and testament in writing bearing date, etc., and attested and subscribed in the presence of the said E. F. by three credible witnesses, according to the form of the statute in such case made and provided, and thereby (amongst other things) gave and devised the said demised premises, with the appurtenances, unto the said plaintiff, to hold unto and to the use of the said plaintiff, and his heirs and assigns forever. And the said E. F. afterwards, to-wit, on, etc., at, etc. (*venue*) aforesaid, died so seized of the reversion of and in the said demised premises, with the appurtenances as aforesaid, without altering his said will, as to his said devise of the said demised premises, with the appurtenances. Whereupon and whereby the said plaintiff then and there became and was seized of the said reversion of his demesne as of fee. And being so seized, etc." 2 Chitty Pl. *591. And see form of

is never a necessity. The matter usually stated in the inducement may appear in any part of the pleading.²¹ It may appear parenthetically,²² but logically and for the purpose of perspicuity the matter of inducement should precede the statement of the gist of the action,²³ where it may be conveniently referred to in subsequent counts without unnecessary repetition.²⁴ This reference to general facts applying to all counts does not conflict with the code provisions that each cause of action shall be separately stated, at least where such preliminary facts are incorporated in subsequent counts by reference.²⁵ A defect in matter of inducement may be supplied by the defendant's plea or answer.²⁶

B. CERTAINTY IN PLEADING. — 1. In General. — One of the rules of pleading laid down by Stephen is: "Less particularity is necessary in the statement of matter of inducement or aggravation, than in

inducement in *covenant by heir, etc.*, 9 STANDARD PROC. 1206.

21. 1 Chitty Pl. 290.

22. 1 Chitty Pl. 290.

[a] **Form of parenthetical statement**
"then and there, and still being the wife of him, the said plaintiff." 9 STANDARD PROC. 314; *Houck v. Grant-ham*, 22 Ind. 53.

23. *Grand v. Dreyfus*, 122 Cal. 58, 63, 54 Pac. 389.

[a] "Where a variety of facts preceded the contract, and are so connected with it that the statement of them is necessary to render the count intelligible, it is obviously better to adopt a formal inducement, than in the description of the consideration or of the contract to show those facts by one continued sentence of great length." 1 Chitty Pl. 290.

[b] "The inducement, or averment by way of introductory allegation, is peculiarly proper where a party is charged upon, or in respect of, the breach of a contract or implied duty, resulting from any particular character or capacity of the defendant. Thus, in a declaration against an attorney for negligence, or a carrier, . . . for the loss of goods, etc., it is usual and proper to show, by way of inducement, or at least by other averments in the declaration, that the defendant followed the occupation in respect of which the plaintiff employed him. If no such allegation be contained in the declaration, the defendant cannot be charged thereon for the breach of a duty which results only from the particular character which he held." 1 Chitty Pl. 291. See *Dartnall v. How-*

ard, 4 Barn. & C. 345, 107 Eng. Reprint 1088.

24. *Sinclair v. Fitch*, 3 E. D. Smith (N. Y.) 677, 689; *Curtis v. Moore*, 15 Wis. 134.

25. *Hefferlin v. Karlman*, 29 Mont. 139, 74 Pac. 201, partnership sufficiently alleged in second count—"being partners as aforesaid."

[a] In *Sinclair v. Fitch*, 3 E. D. Smith (N. Y.) 677, 689, in construing the code provision requiring the separate statement of each cause of action and holding that the *first* cause of action stated could not be aided by statements of the *second*, the court added: "I do not intend to be understood as saying that a plaintiff may not, preliminarily to a statement of the causes of action, make those general averments as to the case, which are applicable to both statements, so that each one with the preliminary averments would be perfect in itself."

[b] "It is not only allowable, but correct practice requires, to avoid unnecessary repetition of the same matter, that in the subsequent counts reference should be made to the first, where the inducement is the same, in which case it is considered as if it were repeated in each count. 1 Chitty Pl. 473. The first count may, therefore, fail as to the cause of action stated in it, and yet stand good as to the inducement in aid of the others." *Curtis v. Moore*, 15 Wis. 134.

26. "Most certainly was it (the complaint) sufficient after the answer was interposed, which supplied both *inducement* and *colloquium* by the statements that the plaintiff killed Nehill

the main allegations."²⁷ The same rule applies to indictments.²⁸ In alleging matters of inducement it is not necessary to state with certainty, time,²⁹ place,³⁰ or names,³¹ and in some instances they may be omitted;³² but there must not be a misdescription.³³ In alleging title by way of inducement, a general statement is sufficient,³⁴ or mere possession.³⁵ If a contract is alleged as the *consideration* for a promise

and that the slanderous words (if spoken at all) were spoken of and concerning such killing." *Langton v. Hagerty*, 35 Wis. 150. See *Hefferlin v. Karlman*, 29 Mont. 139, 74 Pac. 201.

27. *Steph. Pl.* 371. See *Stoddart v. Palmer*, 3 Barn. & C. 2, 5, 107 Eng. Reprint 636. As to matters of description, see *infra*, III, B, 2.

[a] "It is said that as the office of an inducement is explanatory, it does not in general require exact certainty." 1 Chitty Pl. 291.

[b] Matter of inducement not being of the gist of the action is less likely to become the subject of controversy than the principal allegations; nevertheless it may be material and may be controverted, as where a person brings an action for injury to property of which he has no ownership, then, though the injury is the gist of the action, the material issue might be on ownership alleged in the inducement. See 1 Chitty Pl. 299, 401; *Steph. Pl.* 243; *Phoenix Mut. L. Ins. Co. v. Walrath*, 53 Wis. 669, 10 N. W. 151; *McGregor v. Gregory*, 11 Mees. & W. (Eng.) 287; *Winter v. White*, 3 Moore (Eng.) 674, 695, 696.

28. *Reg. v. Goddard*, 2 Ld. Raym. 920, 92 Eng. Reprint 114; s. c., 3 Salk. 171, 91 Eng. Reprint 758; *Archb. Crim. Pl.* 44, citing *Rex v. Wright*, 1 Vent. (Eng.) 170; *Com. Dig. Indictment*, G. 5. See *infra*, VII.

Manner of pleading in indictment, see *supra*, the title "Indictment and Information," IX, C, 4, a.

29. *Thorwarth v. Blanchard*, 86 Vt. 296, 85 Atl. 6.

[a] "The necessity of laying a time extends to *traversable* facts only, and, therefore, no time need be alleged to matters of inducement of aggravation." *Steph. Pl.* 292.

[b] "In declaring upon a promise to pay money in consideration of the forbearance of a preceding debt, though some causes of action must be alleged, it was not necessary to state the particular cause or subject-matter of the

debt, or the time when or place where it was contracted." 1 Chitty Pl. 291.

30. *Thorwarth v. Blanchard*, 86 Vt. 296, 85 Atl. 6; *Cox v. Jennings*, Yelv. 17, 80 Eng. Reprint 12; 1 Chitty Pl. 291.

31. "Thus, where an agreement, with a third person, is stated only as inducement to the defendant's promise, which is the principal cause of the action, it was considered in general sufficient to state such agreement without certainty of name, place or person." 1 Chitty Pl. 291; *Cox v. Jennings*, Yelv. 17, 80 Eng. Reprint 12.

32. *Steph. Pl.* 372.

33. *Bristow v. Wright*, 1 Smith's L. C. *737 (Hare & Wall., 8th Am. ed.) 1417, 2 Dougl. 665, 99 Eng. Reprint 421. See *infra*, V.

[a] The hardships resulting from the rule laid down in *Bristow v. Wright*, *supra*, have been greatly relieved by statutes of amendments and jeofails. See 1 STANDARD PROC. 912, note 24.

[b] "But as the inducement in such case relates to a material matter, there will be a fatal variance, if, instead of relying on the general statement of his title, interest or right, the plaintiff enter into a more particular and detailed statement thereof, and there be a misdescription." 1 Chitty Pl. 385.

34. See 1 Chitty Pl. 384.

[a] "It will be sufficient to state the substance and legal effect. This is shorter and not liable to misrecitals and literal mistakes." *Bristow v. Wright*, 2 Dougl. 665, 99 Eng. Reprint 421, 1 Smith's L. C. *737 (Hare & Wall., 8th Am. ed.) 1417. See generally the title "Title."

[b] "This rule is exemplified in the case of the derivation of title, where, though it is a general rule that the commencement of a particular estate must be shown, yet an exception is allowed if the title be alleged by way of inducement only." *Steph. Pl.* 372.

35. *Emerson v. Thompson*, 59 Wis. 619, 18 N. W. 503.

which constitutes the gist of the action, the contract may be stated in general terms.³⁶ It is sufficient by way of inducement to allege an act *duly* done,³⁷ or according to its legal effect.³⁸

2. Description.—The rule permitting matters of inducement to be stated in a general way and by way of recital has an exception where the fact constituting the gist of the action depends on the very *terms* of the matter in the inducement. Such matter in an inducement must be stated with directness and certainty.³⁹

. IV. DUPLICITY.—The statement of matter by way of inducement does not render a pleading double though by itself it constitutes a cause of action or a defense.⁴⁰

V. DENIALS AND PROOF.—Matters of inducement merely introductory are not proper subjects of denial;⁴¹ but the inducement may contain matter not of the gist of the action, but nevertheless necessary as a foundation of the plaintiff's right to bring an action for the wrong, and therefore traversable.⁴² The former practice of permitting matters of inducement to be controverted under the general issue was changed by rule of court in England, which required matter not of

[a] A tenancy at will is sufficient. *Bristow v. Wright*, 2 Dougl. 665, 99 Eng. Reprint 421, 1 Smith's L. C. *737 (Hare & Wall., 8th Am. ed.) 1417.

36. 1 Chitty Pl. 291.

[a] An executory consideration requires a greater degree of certainty than an executed consideration. 1 Chitty Pl. 296.

37. Indictment for Conspiracy To Conceal Assets From Trustee in Bankruptcy.—"The allegation is simply that the person named therein as trustee was 'duly appointed trustee.' These words, of course, cover in a popular sense everything necessary to complete the appointment. It is true that, under some circumstances, and, indeed, under many circumstances, it is not sufficient to allege in a general way that a thing was 'duly' done; but details must be stated to such an extent that court can judge whether what was done in law 'duly' done. This rule, however, would be too burdensome if applied to everything which is merely incidental, or which only leads up to the real substance of the offense. Therefore, it is not ordinarily required, except as to what is really a vital element of the crime." *Kerch v. United States*, 171 Fed. 366, 96 C. C. A. 258. Compare 5 STANDARD PROC. 212.

38. *Bristow v. Wright*, 1 Smith's L. C. *737 (Hare & Wall., 8th Am. ed.) 1417, 2 Dougl. 665, 99 Eng. Reprint 421.

[a] It is sufficient "if the *introductory* matter or inducement be stated according to its legal effect." 1 Chitty Pl. 292.

39. "It is also a rule that if a necessary inducement of the plaintiff's right, etc., even in actions for torts, relate to and describe and be founded on a matter of *contract*, it is necessary to be strictly correct in stating such contract, it being matter of *description*." 1 Chitty Pl. 385.

40. 7 STANDARD PROC. 943.

[a] "Thus, it may be pleaded without duplicity, that after the cause of action accrued, the plaintiff (a woman) took a husband, and that the husband afterwards released the defendant; for though the coverture is itself a defense, as well as the release, yet the averment of the coverture is a necessary introduction to that of the release." Steph. Pl. 262.

41. *Thorwarth v. Blanchard*, 86 Vt. 296, 85 Atl. 6; Steph. Pl. 243. See 7 STANDARD PROC. 34.

[a] "Matter of inducement is not traversable, unless essential to make out the case." *Thorwarth v. Blanchard*, 86 Vt. 296, 85 Atl. 6.

42. See *Reeves v. Lutz*, 179 Mo. App. 61, 162 S. W. 280.

[a] "It is laid down that in general, traverse is not to be taken on matter of *inducement*, that is, matter brought forward only by way of explanatory introduction to the main al-

the gist of the action to be specially traversed.⁴³ A rule that matters of inducement are not required to be proved under general issue has been established in some states by judicial decision,⁴⁴ in others by rule.⁴⁵ A matter of inducement may be a "material allegation" under a code and may be controverted under a general denial.⁴⁶ The material allegations in an inducement should be proved if properly denied.⁴⁷ It is not necessary to prove immaterial matters.⁴⁸ During the period of strict rules as to variance, some distinctions were made as to strictness of proof between matters of inducement and the main issues,⁴⁹

legations; but this is open to many exceptions, for it often happens that introductory matter is in itself essential, and of the substance of the case, and in such instances, though in the nature of inducement, it may nevertheless be traversed." Steph. Pl. 243.

43. 1 Chitty Pl. 401. See Rules, 1 Chitty Pl., Appendix (11th Am. ed.) 742, 745.

[a] "Under the new rules, the inducement, when properly pleaded, must be traversed, if it is intended to deny it, and not guilty puts in issue only the publication of the libel maliciously, and in the sense imputed in the innuendo." *McGregor v. Gregory*, 11 Mees. & W. (Eng.) 287, 295.

44. *Brunhild v. Chicago Union Trac. Co.*, 239 Ill. 621, 88 N. E. 199; *Chicago Union Trac. Co. v. Jerka*, 227 Ill. 95, 81 N. E. 7; *Pennsylvania Co. v. Chapman*, 220 Ill. 428, 77 N. E. 248; *McNulta v. Lockridge*, 137 Ill. 270, 27 N. E. 452, 31 Am. St. Rep. 362. See *Ricket v. Stanley*, 6 Blackf. (Ind.) 169; and 7 STANDARD PROC. 70.

[a] "Whether the rule above laid down is in strict accord with the principles of common law pleading as they existed prior to the adoption of the rule of the court of the Hilary Term, 1834, is a matter of little practical concern, since the rule of stare decisis requires us to enforce the law as we find it, unless considerations of a very controlling character were presented." *Chicago Union Trac. Co. v. Jerka*, 227 Ill. 95, 100, 81 N. E. 7.

45. *Atlantic C. L. R. Co. v. Partridge*, 58 Fla. 153, 159, 50 So. 634. Rule 71 prefixed to 14 Fla., substantially and sometimes literally the rules of Hilary term.

[a] "The defendant's plea was 'not guilty,' which, under the rules of court operated only 'as a denial of the breach of duty, or wrongful act alleged to have

been committed by the defendant, and not of the facts stated in the inducement (corporate existence, ownership and operation of railroad, and employment of deceased, husband of defendant)." *Somerset & C. R. Co. v. Galbraith*, 109 Pa. 32, 38, 1 Atl. 371.

46. See *Reeves v. Lutz*, 179 Mo. App. 61, 162 S. W. 280.

[a] "It seems to be well settled that, in an action for the wrongful conversion of personal property, under the general denial the defendant is entitled to give in evidence any facts which disprove the plaintiff's title to the property." *Phoenix Mut. Life Ins. Co. v. Walrath*, 53 Wis. 669, 675, 10 N. W. 151.

[b] Ownership may be controverted under general denial. *Emerson v. Thompson*, 59 Wis. 619, 18 N. W. 503.

47. "In general, however, every allegation in an inducement, which is material and not impertinent and foreign to the cause, and which consequently cannot be rejected as surplusage, must be proved as alleged, and a variance would be fatal." 1 Chitty Pl. 292.

48. A contract alleged merely by way of inducement to an action for negligence in doing the work need not be proved. "There are no terms of a contract stated and no attempt to state a case under a contract. It is only mentioned at all as a mere incident by way of inducement showing why defendants came to be engaged at the work." (*Raising the house injured.*) *Armelio v. Whitman*, 127 Mo. App. 698, 106 S. W. 1113.

49. See *Winter v. White*, 3 Moore (Eng.) 674, 695, 696.

[a] "And the first part of the rule, that allegations of matter of substance may be substantially proved, but allegations of matter of description must be literally proved, applies peculiarly

but the distinctions were not clearly established,⁵⁰ and under statutes or amendments and jeofails would now probably not be important.⁵¹

VI. IN PLEAS.—An inducement is used in certain specific denials to set out the pleader's version of the transaction, as explaining and qualifying his specific denial following in the *absque hoc*.⁵² The requirements of such inducement are that the facts be sufficient in substance to defeat the cause of action, though stated only in the manner and with the certainty of inducements in general.⁵³ The inducement being necessarily an indirect, argumentative denial, by affirmative matter, to comply with rules of pleading, the specific denial, in negative form, known as the *absque hoc*, becomes necessary.⁵⁴ The inducement must not contain a direct denial.⁵⁵ The method of pleading to the special traverse was merely to join issue on the *absque hoc*, no traverse of the inducement was proper.⁵⁶

VII. IN CRIMINAL CASES.—Where the offense charged depends on special circumstances or extrinsic facts the existence of which

to averments in an inducement." 1 Chitty Pl. 292.

50. 1 Greenl. Ev. (13th ed.), §63, n. 1.

[a] In the leading case of *Bristow v. Wright*, 1 Smith's L. C. *737 (Hare & Wall., 8th Am. ed.) 1417, 2 Dougl. 665, 99 Eng. Reprint 421, which had so much to do with the enactment of statutes of amendment, the matter of inducement, a lease, was stated with unnecessary particularity and misstated. In this case, on review Lord Mansfield reversed his holding at the trial and held the variance fatal.

51. See 1 STANDARD PROC. 912.

52. Steph. Pl. 183. See also 2 STANDARD PROC. 21.

[a] Stephen suggests objections to this form of traverse, from the pleader's standpoint, on grounds of legal strategy, not the most conducive to furtherance of justice. He says: "That the inducement tends to open the real nature of the party's case, by giving notice to his adversary of the precise grounds on which the denial proceeds; and thus facilitates to the latter the preparation of his proofs or otherwise guides him in his further proceedings." He adds: "But where allowable, it should still be occasionally adopted, in a view to the various grounds of necessity or convenience by which it was originally suggested." Steph. Pl. 183.

53. *State v. Chrisman*, 2 Ind. 126; 1 Chitty Pl. 620.

[a] "It is a rule, that the inducement should be such as in itself amounts to a sufficient answer in substance to the last pleading. For (as has been shown) it is the use and object of the inducement to give an explained or qualified denial; that is, to state such circumstances as tend to show that the last pleading is not true; the *absque hoc* being added merely to put that denial in positive form, which had previously been made in an indirect one. Now an indirect denial amounts in substance to an answer; and it follows, therefore, that an inducement, if properly framed must always in itself contain without the aid of the *absque hoc*, an answer, in substance, to the last pleading." Steph. Pl. 183.

[b] "Where the defendant states his right only as inducement or conveyance, so much certainty is not required. Thus, it is sufficient to allege in a plea to a declaration in trespass, that the defendant was possessed of a close, from which his cattle escaped into the close of the plaintiff, in consequence of the defect of a fence which the latter ought to have repaired." 1 Chitty Pl. 534.

54. Steph. Pl. 184. See preceding note.

[a] "The affirmative part of the special traverse is called its *inducement*; the negative is called *absque hoc*." 1 Steph. Pl. 169.

55. Steph. Pl. 184, 189.

56. Steph. Pl. 174, 180. See 1 Chitty Pl. 620.

the court does not judicially notice, and which make the act in question criminal, such facts or circumstances are proper and necessary matters of inducement.⁵⁷ Such inducements are subject to the same rules as to manner of pleading, that apply in civil actions.⁵⁸

57. *State v. Allgor*, 78 N. J. L. 313, 73 Atl. 76. See generally the title "**Indictment and Information**," and titles dealing with particular crimes.

[a] **Perjury**.—*Hutchins v. State*, 28 Ind. 34; *State v. La Bore*, 26 Vt. 765. See the title "**Perjury**."

[b] "**Where an offense consists in an omission to do some act**, the indictment must show how the defendant's obligation to perform that act arises, unless it is a duty connected by law to the office which the defendant sustains." *State v. Haddonfield & C. Tpk. Co.*, 65 N. J. L. 97, 46 Atl. 700; *State v. Hageman*, 13 N. J. L. 314.

[c] "The first count in each indictment, charging only neglect to repair (the highway), is bad, for while it alleges that it was the legal duty of the defendant to keep the highway in repair, and that by reason of its neglect the highway was ruinous, yet it does not set forth the facts out of which such a duty would arise. As there is no law of which the court takes judicial cognizance, imposing that duty on the defendant, the special circumstances creating the duty must be distinctly alleged before the defendant can be required to answer for neglect." 2 Bish. New Cr. Prac., sec. 1044; *State v. Hageman*, 13 N. J. Law 314; *State v. New Jersey Turnpike Co.*, 16 N. J. Law 222; *State v. Haddonfield & C. Turnpike Co.*, 65 N. J. Law 97, 46 Atl. 700." *State v. Middlesex & S. Trac. Co.*, 67 N. J. L. 14, 50 Atl. 354. See 11 STANDARD PROC. 119; and the title "**Indictment and Information**."

[d] **Facts showing that local option law is in effect in certain territory**. *Cook v. State*, 25 Fla. 698, 6 So. 451; *Butler v. State*, 25 Fla. 347, 6 So. 67. See the title "**Intoxicating Liquors**."

58. See *supra*, I, D; and *Kerch v.*

United States, 171 Fed. 366, 96 C. C. A. 258; *Rex v. Lawley*, 2 Str. 904, 93 Eng. Reprint 930; *Rex v. Wright*, 1 Vent. 169, 86 Eng. Reprint 115; Com. Dig. Indictment, G, 5, *539.

[a] In a case of indictment for conspiracy to defraud, the court said: "There are several objections suggested, which are common to all the counts in the indictment, such as the imperfect description of the estate which William Mayberry pretended to own in Gray, and promised to sell and convey to Pennell; the omission to describe Pennell, by addition or otherwise, and the failure to describe the bonds and notes, the cancellation of which the defendants conspired to obtain, which alleged defects the counsel for the defendants contends are fatal to the indictment. These several matters are introduced into the indictment by way of inducement. They do not constitute the material allegation in the indictment, and it is not necessary that they should be described with that degree of minuteness and particularity which is requisite in setting out the material allegations which constitute and give character to the offense charged." *State v. Mayberry*, 48 Me. 218, 237.

[b] "Under the strict rules of common law pleading, as well as under the more liberal rules of the code, matters of inducement need not be set out in detail or by direct charge, but may be in general terms." *Mason v. State*, 55 Ark. 529, 18 S. W. 827.

[c] In bigamy the first marriage, being matter of inducement, may be stated generally. Fla.—*Cathron v. State*, 40 Fla. 468, 24 So. 496. Ind.—*Hutchins v. State*, 28 Ind. 34. Ky.—*Com. v. Whaley*, 6 Bush 266, "having a wife then living." See also 4 STANDARD PROC. 92.

INDUSTRIAL SCHOOL.—See **Reformatories**.

INEBRIATES.—See **Incompetents**.

INFANTS

By the Editorial Staff.

I. ACTIONS BY AND AGAINST INFANTS, 735

- A. *Parties*, 735
- B. *Process and Service of Process and Papers*, 737
 - 1. *Requisites of Process*, 737
 - 2. *Service of Process*, 737
 - a. *Purpose of Service*, 737
 - b. *Necessity for Service*, 737
 - (I.) *Generally*, 737
 - (II.) *Effect of Failure To Serve*, 740
 - c. *Manner of Service*, 741
 - (I.) *General Rule*, 741
 - (II.) *Who Must Be Served*, 742
 - (A.) *In Absence of Statute*, 742
 - (B.) *Under Statute*, 742
 - (1.) *When Minor Is Over Given Age*, 742
 - (2.) *Where Infant Is of Tender Years*, 743
 - (III.) *Number of Copies Served*, 746
 - (IV.) *Where Infant Is Absent or Whereabouts Unknown*, 746
 - (V.) *Waiver and Acceptance of Service*, 748
 - (VI.) *Notices*, 749
 - d. *Return*, 749
 - e. *Record and Presumptions*, 751
 - f. *Cure and Waiver of Defects*, 752
 - g. *Revivor of Action*, 752
- C. *Pleadings*, 753

1. *Actions by Infants*, 753
 - a. *Complaint or Declaration*, 753
 - b. *Demurrer*, 754
 - c. *Plea in Abatement*, 754
 - d. *Motions*, 755
 - e. *Answer*, 755
2. *Actions Against Infants*, 756
 - a. *Declaration, Complaint or Bill*, 756
 - b. *Plea or Answer*, 756
 - (I.) *Generally*, 756
 - (II.) *Infancy as a Defense*, 758
 - c. *Replication*, 759
3. *Verification of Infant's Pleadings*, 759
4. *Time To Plead*, 760
5. *Amendment of Pleadings*, 760
6. *Admissions in Pleadings*, 760
7. *Parol Demurrer*, 760
8. *Aider by Verdict*, 761
- D. *Appearance*, 761
 1. *By Guardian*, 761
 2. *By Attorney*, 761
- E. *Dismissal and Discontinuance*, 761
- F. *Trial*, 762
 1. *Generally*, 762
 2. *Trial by Jury*, 762
 3. *Questions of Law and Fact*, 762
 4. *Reference*, 764
 - a. *Who May Consent Thereto*, 764
 - b. *When Cause Should Be Referred*, 764
 - c. *Notice*, 764
 5. *Variance*, 765
 6. *Verdict and Findings*, 765

- G. *Judgment or Decree*, 765
 - 1. *Generally*, 765
 - 2. *Judgment by Default*, 766
 - 3. *Decree Pro Confesso*, 768
 - 4. *Consent Judgments*, 768
 - 5. *Presumptions*, 771
 - 6. *Conclusiveness*, 771
 - 7. *Direct and Collateral Attack*, 774
 - 8. *Infant's Day in Court*, 775
 - 9. *Vacating and Setting Aside*, 779
 - a. *Generally*, 779
 - b. *Grounds*, 781
 - (I.) *Generally*, 781
 - (II.) *Particular Grounds*, 781
 - c. *Method of Proceeding*, 784
 - d. *In What Court Instituted*, 786
 - e. *Leave of Court*, 787
 - f. *When Proceeding Instituted*, 787
 - g. *Parties*, 789
 - h. *Notice to Adverse Parties*, 789
 - i. *Pleadings*, 790
 - j. *Review and Determination*, 790
 - 10. *Enforcement of Judgment*, 791
- H. *New Trial*, 792
- I. *Appeal and Review*, 792
 - 1. *Generally*, 792
 - 2. *Parties*, 794
 - 3. *Time for Instituting*, 795
 - 4. *Bond*, 796
 - 5. *Service of Process and Papers*, 796
 - 6. *Dismissal of Appeal*, 796
 - 7. *Hearing and Determination*, 797
- J. *Costs*, 798

1. *In General*, 798
2. *Security for Costs*, 800
3. *Suit in Forma Pauperis*, 801
4. *Enforcement of Cost Award*, 802
- K. *Effect of Attainment of Majority Pending Action*, 802
 1. *Infant Plaintiff*, 802
 - a. *Where Represented*, 802
 - b. *Where Unrepresented*, 804
 2. *Infant Defendant*, 804

II. JUDICIAL EMANCIPATION, 805

- A. *In General*, 805
- B. *Compliance With Statute*, 805
- C. *By Whom Petition Filed*, 805
- D. *Parties Defendant*, 806
- E. *Petition*, 806
- F. *Notice*, 806
- G. *Hearing*, 806
- H. *Order or Decree*, 806
- I. *Filing of Decree*, 807
- J. *Record of Proceedings*, 807
 1. *Generally*, 807
 2. *Presumptions*, 807

III. SALES, MORTGAGES AND LEASES OF INFANT'S PROPERTY, 807

- A. *Sale of Infant's Real Estate*, 807
 1. *Jurisdiction To Authorize Sale*, 807
 - a. *Inherent Jurisdiction of Courts of Chancery*, 807
 - b. *Jurisdiction Conferred by Statute*, 811

- c. *Power of Legislature To Authorize Sale*, 813
2. *What Property May Be Sold*, 813
3. *Authorization of Sale*, 814
 - a. *Necessity for Order of Court*, 814
 - b. *Proceedings To Obtain Order for Sale*, 815
 - (I.) *Venue*, 815
 - (II.) *Who May Petition for Sale*, 815
 - (III.) *Parties*, 816
 - (IV.) *Appointment of Guardian Ad Litem*, 817
 - (V.) *Petition or Application*, 818
 - (A.) *In General*, 818
 - (B.) *Time of Application*, 818
 - (C.) *Necessary Allegations*, 818
 - (D.) *Verification*, 820
 - (VI.) *Notice of Petition or Application*, 821
 - (A.) *Notice to Minor*, 821
 - (B.) *Notice to Relatives*, 822
 - (VII.) *Hearing*, 822
- c. *Contents of Order or Decree Authorizing Sale*, 823
 - (I.) *Finding of Necessity for Sale*, 823
 - (II.) *Directing Terms of Sale*, 823
 - (III.) *Fixing Time and Place of Sale*, 823
 - (IV.) *Description of Property To Be Sold*, 824
 - (V.) *Directing Investment of Proceeds*, 824
4. *Appraisement*, 824
5. *Bond*, 825
6. *Oath*, 827
7. *The Sale*, 827
 - a. *Notice of Sale*, 827
 - b. *Conduct of Sale*, 828
 - (I.) *In General*, 828
 - (II.) *Sale in Conjunction With Other Property*, 828
 - (III.) *Sale in Parcels*, 828
 - (IV.) *Public or Private Sale*, 829

- (V.) *Sale by Whom Made*, 830
- (VI.) *Time and Place of Sale*, 831
 - (A.) *Time of Sale*, 831
 - (B.) *Place of Sale*, 831
- (VII.) *Reception of Bids*, 832
- (VIII.) *Who May Purchase*, 832
- (IX.) *Terms of Sale*, 834
- c. *Report and Confirmation*, 835
 - (I.) *In General*, 835
 - (II.) *Necessity for Report and Confirmation*, 836
 - (III.) *Time for Confirmation*, 837
 - (A.) *Premature Confirmation*, 837
 - (B.) *Delay in Confirmation*, 837
 - (IV.) *Objections to Confirmation*, 837
 - (V.) *When Sale Subject to Confirmation*, 837
 - (VI.) *Effect of Confirmation*, 839
 - (VII.) *Record*, 840
 - (VIII.) *Appeal and Review*, 840
- d. *The Deed*, 841
- e. *Action for Purchase Money*, 843
- f. *Disposition of Proceeds*, 843
 - (I.) *Generally*, 843
 - (II.) *Under Order of Court*, 843
 - (III.) *Duty of Purchaser*, 844
- 8. *The Record*, 844
- 9. *Setting Sale Aside*, 845
 - a. *Generally*, 845
 - b. *At Whose Instigation Set Aside*, 851
 - c. *Proceedings To Set Aside Sale*, 852
 - (I.) *Generally*, 852
 - (II.) *Pleadings*, 852
 - (III.) *Parties*, 852
 - (IV.) *Limitation of Actions*, 853
 - (V.) *Question of Law and Fact*, 855
 - (VI.) *Judgment*, 855

- g. *Indemnification of Purchaser*, 855
- 10. *Collateral Attack*, 855
- B. *Mortgage of Infant's Real Property*, 857
 - 1. *Jurisdiction*, 857
 - 2. *Necessity for Order of Court*, 857
 - 3. *Proceedings To Obtain Order of Court*, 858
 - a. *Generally*, 858
 - b. *Petition*, 858
 - c. *Notice*, 859
 - d. *Hearing and Determination*, 859
 - e. *Bond*, 859
 - 4. *What Property May Be Mortgaged*, 859
 - 5. *Report and Confirmation of Mortgage*, 859
 - 6. *Collateral Attack*, 859
- C. *Lease of Realty*, 859
- D. *Sale, Mortgage, etc., of Personalty*, 860

IV. CUSTODY OF INFANTS, 861

- A. *Jurisdiction*, 861
- B. *Statutory Proceedings Affecting the Custody of Infants*, 863
 - 1. *Generally*, 863
 - 2. *Jurisdiction and Venue*, 863
 - 3. *Purpose and Construction of Juvenile Acts*, 863
 - 4. *Proceedings How and at Whose Instance Commenced*, 864
 - 5. *Petition, Complaint or Affidavit*, 865
 - 6. *Citation or Summons, Warrant and Notice*, 868
 - a. *Citation or Summons*, 868
 - b. *Warrant*, 869
 - c. *Notice*, 869
 - 7. *Commitment Pending Hearing*, 871
 - a. *Generally*, 871
 - b. *Child To Be Kept Apart From Adults*, 871
 - 8. *Admission to Bail*, 872
 - 9. *Record and Docket*, 872

10. *Trial, Examination or Hearing*, 872
 - a. *Generally*, 872
 - b. *Place and Manner of Hearing*, 873
 - c. *Right to Jury Trial*, 873
11. *Findings and Judgment or Order*, 874
12. *Sentence and Commitment*, 874
 - a. *In General*, 874
 - b. *Form and Contents*, 875
 - c. *Place of*, 876
 - d. *Approval of Higher Court*, 877
13. *Appeal and Review*, 877
14. *Collateral Attack*, 878
15. *Control of Infant After Commitment*, 879
16. *Discharge From Custody*, 879

V. CRIMINAL PROSECUTIONS AGAINST INFANTS, 880

VI. CRIMINAL PROSECUTIONS UNDER STATUTE FOR PROTECTION OF INFANTS, 880

- A. *Under the Juvenile Acts*, 880
 1. *Generally*, 880
 2. *In What Court*, 880
 3. *Indictment, Information or Affidavit*, 880
 - a. *Necessity and Propriety of*, 880
 - b. *Allegations*, 881
 - (I.) *Generally*, 881
 - (II.) *Negating Exceptions*, 882
 4. *Review*, 882
- B. *Cruelty to Child and Failure To Give Medical Attention*, 882
- C. *Permitting Minor To Enter or Frequent Certain Places or Play Certain Games*, 883
- D. *Exhibiting Immoral Publication*, 885

VII. CONCEALMENT OF BIRTH AND DEATH, 885

- A. *Indictment*, 885
- B. *Trial*, 886
- C. *Verdict*, 887

CROSS-REFERENCES:

Abduction;	Kidnaping;
Apprentices;	Parent and Child;
Bastardy Proceedings;	Reformatories;
Guardian Ad Litem;	Schools and School Districts;
Guardian and Ward;	Service of Process and Papers.
Judicial Sales;	

Adoption of, see the title "Parent and Child."

Plea of guilty by, see 2 STANDARD PROC. 893.

For further references and cross-references, see the index to this work.

I. ACTIONS BY AND AGAINST INFANTS.—A. PARTIES. The propriety or necessity of joining infants as parties is governed by general rules elsewhere discussed,¹ as is also the question when the action should be by or against the infant and when by or against his guardian,² and the necessity for the appointment of a next friend or guardian ad litem.³

Affidavit of Right To Sue.—It is sometimes required that a next friend must file an affidavit showing his right to sue.⁴

In an action by an infant the usual and proper course is to entitle the cause in the name of the infant by his guardian or next friend,

1. See the title "Parties," and the titles dealing with the specific subject matter of the action. See also 10 STANDARD PROC. 864.

[a] Infants cannot be made parties for the sake of discovery merely, where they have no interest. *Leggett v. Selton*, 3 Paige (N. Y.) 84.

[b] Co-contractors with the infant are not necessary parties plaintiff to an action by the infant to recover money paid under the contract. *Chiappe v. Devoney*, 185 Ill. App. 422.

2. See 10 STANDARD PROC. 858, 863.
In **bastardy proceedings**, see 4 STANDARD PROC. 61.

3. See the title "Guardian Ad Litem."

Effect of emancipation, see *infra*, II; and 10 STANDARD PROC. 711.

4. Ky. Code, §37; 10 STANDARD PROC. 743.

Appealability of order refusing to dismiss on this ground see *infra*, I, I.

[a] That **affiant is free from disability** must be stated. *Covington & C. B. Co. v. Brennan*, 16 Ky. L. Rep. 126.

[b] **Omission to aver there was no guardian** is a demurrable defect. *Hennings v. Barringer*, 10 Ky. L. Rep. 674, 10 S. W. 136.

naming him,⁵ but it does not necessarily follow that a strict compliance with this rule is indispensable to the validity of the proceeding.⁶ A motion to dismiss,⁷ or strike out the complaint,⁸ or in arrest of judgment,⁹ will not lie for such a defect, although it may be taken advantage of by demurrer,¹⁰ or by answer.¹¹ If not so raised the defect, in some jurisdictions, will be deemed to have been waived.¹²

5. **U. S.**—*Morgan v. Potter*, 157 U. S. 195, 15 Sup. Ct. 590, 39 L. ed. 670. **Ark.**—*Davie v. Padgett*, 176 S. W. 333. **Fla.**—*Toomer v. Fourth Nat. Bank*, 67 So. 225. **Ga.**—*Lasseter v. Simpson*, 78 Ga. 61; 3 S. E. 243; *Oliver v. McDuffie*, 28 Ga. 522. **Ill.**—*Hoare v. Harris*, 11 Ill. 24. **Kan.**—*Wilson v. Me-ne-chas*, 40 Kan. 648, 20 Pac. 468. **Ky.**—*McChord v. Fisher*, 13 B. Mon. 193. **Me.**—*Soule v. Winslow*, 64 Me. 518. **Mass.**—*Guild v. Cranston*, 8 Cush. 506. **Mich.**—*Kees v. Maxim*, 99 Mich. 493, 58 N. W. 473; *Ash v. Mathes*, 52 Mich. 615, 18 N. W. 384. **Miss.**—*Bull v. Dagenhard*, 55 Miss. 602. **Mo.**—*Thomas v. St. Louis, I. M. & S. R. Co.*, 187 Mo. App. 420, 173 S. W. 728; *Higgins v. Hannibal*, 36 Mo. 418. **N. Y.**—*Hartfield v. Roper*, 21 Wend. 615, 34 Am. Dec. 273. **N. D.**—*Willard v. Mohn*, 24 N. D. 390, 139 N. W. 979. **Ore.**—*Everart v. Fischer*, 147 Pac. 189; *Everart v. Fischer*, 145 Pac. 33. **Tex.**—*Gulf, C. & S. F. R. Co. v. Styron*, 66 Tex. 421, 1 S. W. 161. **Va.**—*Lemon v. Hansberger*, 6 Gratt. 301. **W. Va.**—*Burdett v. Cain*, 8 W. Va. 282.

See 8 STANDARD PROC. 452.

The guardian is not a party where he appears merely as the infant party's representative. 10 STANDARD PROC. 858.

[a] The infant's father cannot sue in his own name as the infant's substitute. *Osburn v. Farr*, 42 Mich. 134, 3 N. W. 299.

[b] A parent, although not designating himself as next friend, is assumed to sustain that relationship. *In re Brackey's Estate* (Iowa), 147 N. W. 188. See also *Ferencz v. Greek Catholic Union*, 54 Pa. Super. 642.

[c] The suit or action should be brought in the name of the infant by his next friend or guardian ad litem and not by the next friend or guardian ad litem as the representative of the infant. **U. S.**—*Sandeen v. Tschider*, 205 Fed. 252, 123 C. C. A. 456. **Fla.**—*Paul v. Frierson*, 21 Fla. 529; *Sanderson v. Sanderson*, 17 Fla. 820. **N. D.**—*Willard v. Mohn*, 24 N. D. 390, 139 N. W. 979.

[d] Unnecessary to show why father

did not sue where mother sues as next friend. *Correa v. R. Co.*, 5 Porto Rico 189.

6. *Davie v. Padgett* (Ark.), 176 S. W. 333; *Kees v. Maxim*, 99 Mich. 493, 58 N. W. 473.

Effect of Failure To Appoint Guardian or Next Friend.—See 10 STANDARD PROC. 725, 728, et seq.

As to curing by amendment a defect of this kind, see *infra*, I, C, 5.

[a] If the next friend sue in behalf of the minors it is the same in substance. *Dent v. Merriam*, 113 Ga. 83, 38 S. E. 334; *Van Pelt v. Chattanooga, etc. R. Co.*, 89 Ga. 706, 15 S. E. 622; *Lasseter v. Simpson*, 78 Ga. 61, 3 S. E. 243.

7. *Wilson v. Me-ne-chas*, 40 Kan. 648, 20 Pac. 468.

For failure to appoint guardian or next friend, see 10 STANDARD PROC. 729.

8. *Karpenski v. South River*, 83 N. J. L. 149, 83 Atl. 639.

For failure to appoint guardian or next friend, see 10 STANDARD PROC. 729.

9. *Jones v. Steele*, 36 Mo. 324.

10. **Ark.**—*Davie v. Padgett*, 176 S. W. 333. **Idaho.**—*Trask v. Boise King Placers Co.*, 26 Idaho 290, 142 Pac. 1073. **Ind.**—*Maxedon v. State*, 24 Ind. 370. **Mo.**—*Higgins v. Hannibal*, 36 Mo. 418; *Jones v. Steele*, 36 Mo. 325. **N. D.**—*Willard v. Mohn*, 24 N. D. 390, 139 N. W. 979.

See 10 STANDARD PROC. 729.

11. *Davie v. Padgett* (Ark.), 176 S. W. 333; *Jones v. Steele*, 36 Mo. 324. See 10 STANDARD PROC. 729.

[a] General issue will raise the question whether the parent is the real party in interest. *Everart v. Fischer* (Ore.), 147 Pac. 189.

[b] But where it is apparent who the real party in interest is in the petition, the defect in the caption will be held to be merely formal and cannot be raised by a general denial. *Kyner v. Laubner*, 3 Neb. (Unof.) 370, 91 N. W. 491.

12. **Ark.**—*Davie v. Padgett*, 176 S. W. 333. **Idaho.**—*Trask v. Boise King Placers Co.*, 26 Idaho 290, 142 Pac.

The effect of the infant's attainment of majority is elsewhere discussed.¹³

B. PROCESS AND SERVICE OF PROCESS AND PAPERS. — 1. Requisites of Process. — If the plaintiff is an infant the form of the original writ or summons may be the same as in other cases.¹⁴ If the action is against the infant he should be named in the process as a defendant,¹⁵ and should be directed to appear according to law, that is, by his guardian or guardian ad litem as the case may be.¹⁶ His correct age should be given where it would affect the manner of service.¹⁷ Substantial similarity between the process served on the minor and that served upon his parent or guardian, suffices.¹⁸

2. Service of Process.¹⁹ — *a. Purpose of Service.* — The purpose of serving a minor with process is to attract the attention of his friends or relatives, that a due regard may be had to the infant's rights, and that the mind of the court may be directed to them.²⁰

b. Necessity for Service. — **(I.) Generally.** — To enable the court to exercise jurisdiction over infant defendants they should be served with process in such manner as the statutes or rules of the jurisdiction require,²¹ unless in some legal manner they are already before the

1073. **Okl.**—*Connelley v. Connelley*, 43 Okla. 294, 142 Pac. 1113, that plaintiff did not bring the action by her next friend.

See 10 STANDARD PROC. 748.

13. See *infra*, I, K, and 10 STANDARD PROC. 866.

14. *Bouche v. Ryan*, 3 Blackf. (Ind.) 472.

15. Where the infant must be personally served the process should be directed to him by name. But though the summons does not name him as defendant, if a copy of the summons, directing the guardian to appear as such, is served upon both the infant and his guardian, the failure to name the infant as defendant is amendable and when attacked collaterally will be considered as amended, and the decree based thereon is valid. *Burgett v. Wiliford*, 56 Ark. 187, 19 S. W. 750, 35 Am. St. Rep. 96.

[a] But where the infant need not be served personally (1) it is unnecessary that the process be directed to the infant personally. It is sufficient and proper to direct the guardian ad litem of the infant as such to appear in the action. *Cornell v. Cornell*, 131 Ky. 650, 115 S. W. 795. (2) Where, however, suit is begun by the service of a notice that a petition will be filed and requiring the defendant to appear, the notice is jurisdictional and must be directed to the infant himself rather than to his guardian, even though the latter

only need be personally served. *Sleeper v. Killion* (Iowa), 147 N. W. 314.

16. *Kellett v. Rathbun*, 4 Paige (N. Y.) 102.

Contents of affidavit of publication, see *infra*, I, B, 2, c, (IV).

17. *Keys v. McDonald*, 1 Handy (Ohio) 287, 12 Ohio Dec. (Reprint) 146.

18. *Kalb v. German Sav. & Loan Soc.* 25 Wash. 349, 65 Pac. 559.

19. As to the general rules relating to service of process, see the title "**Service of Process and Papers.**"

20. **Ky.**—*Cheatham v. Whitman*, 86 Ky. 614, 618, 6 S. W. 595. **Ohio.**—*Mas-sie's Heirs v. Donaldson*, 8 Ohio 377. **S. C.**—*Kennedy v. Williams*, 59 S. C. 378, 38 S. E. 8; *Bulow v. Witte*, 3 S. C. 308. **Tenn.**—*Greenlaw v. Kernahan*, 4 Sneed 371, 379.

See 8 STANDARD PROC. 476.

21. **U. S.**—*New York Life Ins. Co. v. Bangs*, 103 U. S. 435, 26 L. ed. 580; *Woolridge v. McKenna*, 8 Fed. 650, 681; *Nelson v. Moon*, 3 McLean 319, 17 Fed. Cas. No. 10,111; *Fitch v. Cornell*, 1 Sawy. 156, 9 Fed. Cas. No. 4,834; *Carrington v. Brents*, 1 McLean 167, 5 Fed. Cas. No. 2,246. **Ala.**—*Gayle v. Johnston*, 80 Ala. 395; *Preston v. Dum*, 25 Ala. 507; *Johnston v. Hainsworth's Heirs*, 6 Ala. 443; *Walker v. Hallett*, 1 Ala. 379. **Ark.**—See *Gannon v. Moore*, 83 Ark. 196, 104 S. W. 139; *Johnson v. Trotter*, 15 S. W. 1025; *Boyd v. Roane*, 49 Ark. 397, 5 S. W. 704; *Freeman v. Russell*, 40 Ark. 56; *Haley v. Taylor*, 39 Ark. 104; *Evans v. Davies*, 39 Ark.

court and under its protection,²² or the failure is cured by statutory

235. Cal.—Campbell *v.* Drais, 125 Cal. 253, 57 Pac. 991; Fanning *v.* Foley, 99 Cal. 336, 33 Pac. 1098; Johnston *v.* San Francisco Sav. Union, 63 Cal. 554; Brown *v.* Lawson, 51 Cal. 615; Gray *v.* Palmer, 9 Cal. 616. Fla.—Terrell *v.* Weymouth, 22 Fla. 255, 13 So. 429, 37 Am. St. Rep. 94; McDermott *v.* Thompson, 29 Fla. 299, 10 So. 584; Gibbons *v.* McDermott, 19 Fla. 852; Brock *v.* Doyle, 18 Fla. 172. Ga.—Miller *v.* Luckey, 132 Ga. 581, 64 S. E. 658; Richards *v.* East Tennessee, etc. R. Co., 106 Ga. 614, 33 S. E. 193; Adams *v.* Franklin, 82 Ga. 168, 8 S. E. 44; Harvey *v.* Cubbedge, 75 Ga. 792; Kilpatrick *v.* Strozler, 67 Ga. 247; Boardman *v.* Taylor, 66 Ga. 638. Ill.—Bonnell *v.* Holt, 89 Ill. 71; Nichols *v.* Mitchell, 70 Ill. 258; Campbell *v.* Campbell, 63 Ill. 502; Hickenbotham *v.* Blackedge, 54 Ill. 316; Fischer *v.* Fischer, 54 Ill. 231; Greenman *v.* Harvey, 53 Ill. 386; Crocker *v.* Smith, 10 Ill. App. 376. Ind.—Roy *v.* Rowe, 90 Ind. 54; Abdil *v.* Abdil, 26 Ind. 287; Alexander *v.* Frary, 9 Ind. 481; Wells *v.* Wells, 6 Ind. 447; Peoples *v.* Stanley, 6 Ind. 410; Harrison *v.* Western Const. Co., 41 Ind. App. 6, 83 N. E. 256. Ia.—Hrdlicka *v.* Evans, 145 N. W. 84; Dohms *v.* Mann, 76 Iowa 723, 39 N. W. 823; Good *v.* Norley, 28 Iowa 188. Ky.—Whalen *v.* Hopper's Guardian, 152 Ky. 727, 154 S. W. 40; Hulsewede *v.* Churchman's Exrx., 111 Ky. 51, 63 S. W. 1; Girty & Frame *v.* Logan, 6 Bush 8; Peak *v.* Percifull, 3 Bush 218; Pond *v.* Doneghy, 18 B. Mon. 558; Chambers *v.* Warren, 6 B. Mon. 244; Shropshire *v.* Reno, 5 Dana 583. Md.—Hunter *v.* Hatton, 4 Gill 115, 45 Am. Dec. 117. Mo.—Westmeyer *v.* Gallenknap, 154 Mo. 28, 55 S. W. 231, 77 Am. St. Rep. 747; Gibson *v.* Chouteau, 39 Mo. 536; Smith *v.* Davis, 27 Mo. 298; Hendricks *v.* McLean, 18 Mo. 32. Neb.—Melcher *v.* Schluter, 5 Neb. (Unof.) 445, 98 N. W. 1082; Boden *v.* Mier, 71 Neb. 191, 98 N. W. 701. N. Y. Potter *v.* Ogden, 136 N. Y. 381, 33 N. E. 228; Ingersoll *v.* Mangan, 84 N. Y. 622, *affirming* 24 Hun 202; Hope *v.* Seaman, 119 N. Y. Supp. 713; In Matter of Greenbalgh, 61 Hun 26, 18 N. Y. Supp. 748; Russek *v.* Tobias, 12 Civ. Proc. 390; Syracuse Sav. Bank *v.* Burton, 6 Civ. Proc. 216. N. C.—Hughes *v.* Pritchard, 153 N. C. 135, 69 S. E. 3, 138 Am. St. Rep. 649; Ward *v.* Lowndes, 96 N. C. 367, 2 S. E. 591; Young *v.* Young, 91 N. C. 359; Larkins *v.* Bullard, 88 N. C. 35; Gulley *v.* Macy, 81 N. C. 356; Turner *v.* Douglass, 72 N. C. 127. Ohio.—Moore *v.* Starks, 1 Ohio St. 369. Okla.—Bolling *v.* Gibson, 36 Okla. 678, 128 Pac. 1093; Bolling *v.* Campbell, 36 Okla. 671, 128 Pac. 1091. Pa.—Swain *v.* Fidelity Ins. Co., 54 Pa. 455. S. C. Hutto *v.* Black, 88 S. C. 1, 70 S. E. 420; Carrigan *v.* Drake, 36 S. C. 354, 15 S. E. 339; Tederal *v.* Bouknight, 25 S. C. 275; Genobles *v.* West, 23 S. C. 154; Sligh *v.* Sligh, 1 Brev. 176. Tenn.—Robertson *v.* Robertson, 2 Swan 197; Tulloss *v.* Pankey, 1 Swan 75; Valentine *v.* Cooley, Meigs 613, 33 Am. Dec. 166; Crutchfield *v.* Stewart's Lessee, 10 Yerg. 237; Hayne *v.* Young, 4 Yerg. 218, 26 Am. Dec. 225. Tex.—Sprague *v.* Haines, 68 Tex. 215, 4 S. W. 371; Kremer *v.* Haynie, 67 Tex. 450, 3 S. W. 676; Wheeler *v.* Ahrenbeak, 54 Tex. 535 (*distinguishing* Kegans *v.* Alleorn, 9 Tex. 25); Taylor *v.* Whitfield, 33 Tex. 181. Wash.—Kalb *v.* German Sav. Soc., 25 Wash. 349, 65 Pac. 559.
- See 6 STANDARD PROC. 810; 8 STANDARD PROC. 476.
- [a] In applying for the assignment of dower to a widow all minor heirs should be notified. Pierson *v.* Hitchner, 25 N. J. Eq. 129. See 7 STANDARD PROC. 878; also p. 871, note 55.
- [b] Where a party dies pending an action for realty, leaving infant heirs and no one to administer, the infant heirs may be made parties by a guardian ad litem appearing in their behalf, and it is unnecessary to serve them. Thomas *v.* Jones, 10 Tex. 52.
- [c] Cross Complaint.—A minor co-defendant must be served with process upon a cross-complaint. Howe *v.* Kern, 63 Ore. 487, 125 Pac. 834, 128 Pac. 818, *Compare* Pillow *v.* Sentelle, 49 Ark. 430, 5 S. W. 783; Johnson *v.* Johnson, 1 Dana (Ky.) 364. See generally the title "Cross-Complaint."
- [d] Infants cannot be brought into court by stipulation of attorneys. McDermaid *v.* Russell, 41 Ill. 489.
- [e] A statute providing that additional defendants may be brought into court by serving on them an order which recites the summons and requires them to answer applies to infants. Markell *v.* Ray, 75 Minn. 138, 77 N. W. 788.
22. D. C.—Cuyler *v.* Cuyler, 5 Mack-

provision.²³ Where service on the infant himself is essential, the answer of a general guardian,²⁴ or the appointment of a guardian ad litem who appears and answers for him,²⁵ or represents him on appeal,²⁶

ey 568. **Ga.**—Palmer Brick Co. v. Woodward, 135 Ga. 450, 69 S. E. 827. **Ind.**—Horner v. Doe, 1 Ind. 130, 48 Am. Dec. 355. **Ia.**—Treiber v. Shafer, 18 Iowa 29 (by answer to cross-complaint of another party). **Ky.**—Cornell v. Cornell, 131 Ky. 650, 115 S. W. 795; Pond v. Doneghy, 18 B. Mon. 558; Gashweller v. M'livoy, 1 A. K. Marsh. 84. **N. Y.**—Gruner v. Ruffner, 59 Misc. 266, 110 N. Y. Supp. 873, by voluntarily filing an answer. **N. C.**—Harris v. Bennett, 160 N. C. 339, 76 S. E. 217. **Tex.**—Deering v. Hurt, 2 S. W. 42, by answer to cross-complaint of another party.

[a] **On Filing Supplemental or Amended Bills.**—If infants are before the court represented by a guardian ad litem, it is not necessary to issue a new summons against them on filing supplemental and amended bills. Packard v. Illinois Tr. & Sav. Bank, 261 Ill. 450, 104 N. E. 451.

[b] **Presumption as to Presence in Court.**—Where the record recites that "on motion" without specifying on whose motion, a guardian ad litem was appointed the appellate court will presume that the infants were personally in court. Horner v. Doe, 1 Ind. 130, 48 Am. Dec. 355.

23. **Curative Statutes.**—N. C. Code, §387, making valid judgments against infant defendants who were not personally served, does not cure the failure to serve the minors, unless they were properly represented. Harrison v. Harrison, 106 N. C. 282, 11 S. E. 356; Gay v. Grant, 101 N. C. 206, 8 S. E. 99, 106; Perry v. Adams, 98 N. C. 167, 3 S. E. 729, 2 Am. St. Rep. 326; Stancill v. Gay, 92 N. C. 462.

24. **Ark.**—Johnson v. Johnson, 84 Ark. 307, 105 S. W. 869; Nunn v. Robertson, 80 Ark. 350, 97 S. W. 293. **Ill.**—Dickison v. Dickison, 124 Ill. 483, 16 N. E. 861. **Ind.**—Peoples v. Stanley, 6 Ind. 410. **Ky.**—Whalen v. Hopper's Guardian, 152 Ky. 727, 154 S. W. 40; Hartman v. East, 145 Ky. 402, 140 S. W. 549; Wooldridge v. Harding, 21 Ky. L. Rep. 205, 51 S. W. 162.

See 8 STANDARD PROC. 476; 6 STANDARD PROC. 810.

Compare Bell v. Smith, 24 Ky. L. Rep.

1328, 71 S. W. 433, 24 Ky. L. Rep. 2095, 72 S. W. 1107; Palmer Brick Co. v. Woodward, 135 Ga. 450, 69 S. E. 827, where minors answered by guardian, the proceedings being in term time and the minors becoming wards of chancery, it was held the absence of process does not vitiate the proceedings.

[a] **A statute providing (1) that a guardian shall "appear for and represent his ward in all legal suits" does not waive the necessity of the service of process upon the minor, nor does it authorize the guardian to enter an appearance for his ward who has not been served.** Dickison v. Dickison, 124 Ill. 483, 16 N. E. 861. (2) And under such a state statute, in an action in the federal courts, there is the same necessity for service. New York Life Ins. Co. v. Bangs, 103 U. S. 435, 26 L. ed. 580.

25. **Cal.**—Johnston v. San Francisco Sav. Union, 63 Cal. 554. **Ill.**—Chambers v. Jones, 72 Ill. 275; Campbell v. Campbell, 63 Ill. 462; Clark v. Thompson, 47 Ill. 25, 95 Am. Dec. 457; Riemensnyder v. Riemensnyder, 179 Ill. App. 209. **Ia.**—Good v. Norley, 28 Iowa 188. **Ky.**—Shaefer v. Gates, 2 B. Mon. 453, 38 Am. Dec. 164; Coleman v. Coleman, 3 Dana 398, 28 Am. Dec. 86. **Mo.**—Westmeyer v. Gallenkamp, 154 Mo. 28, 55 S. W. 231, 77 Am. St. Rep. 747. **N. Y.**—Ingersoll v. Mangam, 84 N. Y. 622 (affirming 24 Hun 202); Hogle v. Hogle, 49 Hun 313, 2 N. Y. Supp. 172. **N. C.**—Harris v. Bennett, 160 N. C. 339, 76 S. E. 217; Hughes v. Pritchard, 153 N. C. 135, 69 S. E. 3, 138 Am. St. Rep. 649; Gulley v. Macy, 81 N. C. 356. **Ore.**—Howe v. Kern, 63 Ore. 487, 125 Pac. 834. **Tenn.**—Robertson v. Robertson, 2 Swan 197. **Tex.**—Moore v. Prince, 5 Tex. Civ. App. 352, 23 S. W. 1113.

Contra.—Ferrell v. Ferrell, 53 W. Va. 515, 44 S. E. 187. See 6 STANDARD PROC. 810.

[a] **Answer of Guardian Appointed Before Service.**—The answer of a guardian ad litem will not operate as an appearance for the infant, when the guardian was appointed before service by publication upon the infant had been perfected. Murphey v. Gato, 52 Fla. 529, 42 So. 387.

26. Freeman v. Russell, 40 Ark. 56.

will not operate as a valid appearance by an infant who has not been served.²⁷ But where minors are made plaintiffs by amendment pending a bill filed by others, if represented by a guardian a copy of the bill need not be served on them.²⁸

(II.) **Effect of Failure To Serve.** — Where legal service has not been made upon an infant defendant, and he is not represented by a person legally authorized to act for him, the court is without jurisdiction, and a judgment rendered by it is void.²⁹ But if the infant is in fact represented in court by someone lawfully authorized thereto, the failure to have him served with process will not render the proceedings absolutely void but merely voidable,³⁰ and consequently the judgment

27. **Appearance generally see *infra*, I, D.**

28. *Wallace v. Jones*, 93 Ga. 419, 21 S. E. 89.

29. **U. S.**—*New York Life Ins. Co. v. Bangs*, 103 U. S. 435, 26 L. ed. 580; *Fitch v. Cornell*, 1 Sawy. 156, 9 Fed. Cas. No. 4,834. **Ala.**—*Gayle v. Johnston*, 80 Ala. 395. **Ark.**—*Boyd v. Roane*, 49 Ark. 397, 5 S. W. 704. **Cal.**—*Campbell v. Davis*, 125 Cal. 253, 57 Pac. 934; *Fanning v. Foley*, 99 Cal. 336, 33 Pac. 1098; *Johnston v. San Francisco Sav. Union*, 63 Cal. 554; *Gray v. Palmer*, 9 Cal. 616. **Fla.**—*Torrell v. Weymouth*, 32 Fla. 255, 13 So. 429, 37 Am. St. Rep. 94. **Ill.**—*Chambers v. Jones*, 72 Ill. 275; *Campbell v. Campbell*, 63 Ill. 462. See also *Bonnell v. Holt*, 89 Ill. 71; *Whitney v. Porter*, 23 Ill. 392. **Ky.**—*Hulsewede v. Churchman's Exx.*, 111 Ky. 51, 3 S. W. 1; *Cox v. Story*, 80 Ky. 64; *Wornack v. Lear*, 11 Ky. L. Rep. 6, 11 S. W. 438. **Mo.**—*McMurtry v. Fairley*, 194 Mo. 502, 21 S. W. 902; *Westmeyer v. Gallenkamp*, 151 Mo. 28, 55 S. W. 231; *Gibson v. Chouteau*, 39 Mo. 536; *Hull v. Cavanaugh*, 6 Mo. App. 113. **Neb.**—*Melcher v. Schluter*, 5 Neb. (Unof.) 445, 98 N. W. 1082. **N. Y.**—*Pinckney v. Smith*, 26 Hun 524. **N. C.**—*Larkins v. Bullard*, 88 N. C. 35. **Ohio.**—*Moore v. Starks*, 1 Ohio St. 369. **S. C.**—*Federal v. Bouknight*, 25 S. C. 275; *Genobles v. West*, 23 S. C. 151. **Tenn.**—*Linnville v. Darby*, 1 Baxt. 296; *Frazier v. Pankey*, 1 Swan 75; *Valentine v. Cooley*, Meigs 613, 33 Am. Dec. 166; *Crutchfield v. Stewart's Lessee*, 10 Yerg. 237; *Combs v. Young*, 1 Yerg. 218, 26 Am. Dec. 225.

[a] A judgment against an infant who has never been served with process, and who has no general guardian, or guardian ad litem, is void. *Stancill v. Gay*, 92 N. C. 455, 462.

[b] Scire facias must be personally

served upon a minor heir and upon his guardian, or a judgment against an heir upon scire facias is void. *Crutchfield v. Stewart's Lessee*, 10 Yerg. (Tenn.) 237; *Combs v. Young*, 4 Yerg. (Tenn.) 218, 26 Am. Dec. 225.

[c] **Validity as to Adult Parties.** The proceedings are void as to the infants but not as to adults properly before the court. *Valentine v. Cooley*, Meigs (Tenn.) 613, 33 Am. Dec. 166.

[d] The decree of a court against an infant based upon the appearance of the infant by his guardian, without any previous service of process upon the infant, is void. *Gibson v. Chouteau*, 39 Mo. 536.

[e] **Not Properly Represented.**—An appearance and answer by a guardian ad litem, who was appointed without service upon the infant, is insufficient to give the court jurisdiction of the infant, and a judgment rendered therein against such infant is void. *Good v. Norley*, 28 Iowa 188.

30. **U. S.**—*Manson v. Duncanson*, 166 U. S. 533, 17 Sup. Ct. 647, 41 L. ed. 1105; *Nelson v. Moon*, 3 McLean 319, 17 Fed. Cas. No. 10,111. **Ala.**—*Preston v. Dunn*, 25 Ala. 507. **Ga.**—*Boardman v. Taylor*, 66 Ga. 638. **Ind.**—*Doe v. Harvey*, 5 Blackf. 487. **Ky.**—*Benningfield v. Reid*, 8 B. Mon. 102; *United States Bank v. Cockran*, 9 Dana 395; *Bustard v. Gates*, 4 Dana 429; *Wooldridge v. Harding*, 21 Ky. L. Rep. 205, 51 S. W. 162. **Miss.**—*Cocks v. Simmons*, 57 Miss. 183. **N. Y.**—*Sloane v. Martin*, 145 N. Y. 524, 40 N. E. 217, 45 Am. St. Rep. 630, 28 L. R. A. 347, *affirming* 77 Hun 249, 28 N. Y. Supp. 322. **N. C.**—*Hughes v. Pritchard*, 153 N. C. 135, 69 S. E. 3; *Sumner v. Sessions*, 94 N. C. 371; *England v. Garner*, 90 N. C. 197; *Larkins v. Bullard*, 88 N. C. 35. **Ohio.**—*Robb v. Irwin's Lessee*, 15 Ohio 689. **S. C.**—*Sibley v.*

can be questioned on such ground only when it is directly attacked.³¹

c. *Manner of Service.*—(I.) *General Rule.*—With the limitations hereinafter stated service may be made in the same manner as upon adults,³² by delivering a copy of the summons or process and otherwise observing the statutory requirements,³³ or by substituted or constructive service in a proper case.³⁴ But the service to be good should

Sibley, 88 S. C. 184, 70 S. E. 615, Ann. Cas. 1912C, 1170. Tex.—Alston v. Emerson, 83 Tex. 231, 18 S. W. 566, 29 Am. St. Rep. 639; Wheeler v. Ahrenbeak, 54 Tex. 535 (*distinguishing* 9 Tex. 25); Taylor v. Whitfield, 33 Tex. 181; Ellis v. Stewart (Tex. Civ. App.), 24 S. W. 585; Moore v. Prince, 5 Tex. Civ. App. 352, 23 S. W. 1113. See also McAnear v. Epperson, 54 Tex. 220, 33 Am. St. Rep. 625.

31. Ala.—McQueen v. Grigsby, 152 Ala. 656, 44 So. 961; Gayle v. Johnston, 80 Ala. 395; Preston v. Dunn, 25 Ala. 507. Ind.—De La Hunt v. Holderbaugh, 58 Ind. 285. Ky.—Bush v. Bush, 2 Duv. 269; Benningfield v. Reed & Sutherland, 8 B. Mon. 102; Shropshire v. Reno, 5 Dana 583; Jones v. McGinty, 3 Dana 425; Coleman v. Coleman, 3 Dana 398, 28 Am. Dec. 86; Bedell v. Lewis, 4 J. J. Marsh. 562. Miss.—Stanton v. Pollard, 24 Miss. 154. Mo.—Fischer v. Siekmann, 125 Mo. 165, 28 S. W. 435; Gibson v. Chouteau, 39 Mo. 536. N. Y. Smith v. Reid, 134 N. Y. 568, 31 N. E. 1082, *affirming* 19 Civ. Proc. 363, 11 N. Y. Supp. 739. Pa.—*In re* Graham's Est., 14 W. N. C. 31. S. C.—Tederall v. Bouknight, 25 S. C. 275. Tex.—Sprague v. Haines, 68 Tex. 215, 4 S. W. 371; Wheeler v. Ahrenbeak, 54 Tex. 535 (*distinguishing* Kegans v. Allecorn, 9 Tex. 25); Taylor v. Whitfield, 33 Tex. 181.

8 STANDARD PROC. 476.

[a] Although the infant is not served with process, "the presence of a next friend or guardian ad litem to represent an infant party, as the case may be, and his recognition by the court, in proceeding with the cause precludes an inquiry into his authority in a collateral proceeding, and requires remedial relief to be sought." The judgment remains in force until declared void by some impeachment proceedings instituted and directed to that end. Preston v. Dunn, 25 Ala. 507; Harris v. Bennett, 160 N. C. 329, 76 S. E. 217.

[b] Where the guardian ad litem accepted service, the judgment obtained

without the required personal service on the infant is voidable only, and cannot be attacked collaterally. Dwyer v. Wright, 14 Pa. Co. Ct. 406. See also Claypoole v. Houston, 12 Kan. 324.

[c] A writ of error by minors after attaining their full age to reverse a judgment made against them without being served with process is a direct, not a collateral attack. Moore v. Prince, 5 Tex. Civ. App. 352, 23 S. W. 1113.

[d] Where Represented by Guardian Ad Litem. — Judgments rendered against resident minor defendants, who have no general guardian, and who have not been personally served, are voidable, even though they are represented by a guardian ad litem. Wheeler v. Ahrenbeak, 54 Tex. 535.

[e] If a statutory guardian has been served with process in a partition suit the judgment is conclusive on the minor. In the absence of any suggestion of fraud a court of equity will not afterwards inquire into it. Dampier v. McCall, 78 Ga. 607.

32. De La Hunt v. Holderbaugh, 58 Ind. 285; Hawkins v. Hawkins, 28 Ind. 66; Pugh v. Pugh, 9 Ind. 132; Martin v. Starr, 7 Ind. 224; Hough v. Canby, 8 Blackf. (Ind.) 301. See 8 STANDARD PROC. 465.

33. Westmeyer v. Gallenkamp, 154 Mo. 28, 55 S. W. 231, 77 Am. St. Rep. 747.

[a] *Personal Service Contemplated.* Where service is required on the guardian or next of kin, the service contemplated is personal. Girard L. Ins., etc. Co. v. Farmers' Nat. Bank, 57 Pa. 388. Compare Wells v. Smith, 44 Miss. 296.

[b] *Service upon the guardian by reading* is sufficient. Nichols v. Mitchell, 70 Ill. 258.

34. See *infra*, I. B. 2, c. (IV); and the title "Service of Process and Papers."

[a] In actions in rem, infants constructively served are properly before the court. Covington etc. R. Co. v. Bowler, 9 Bush (Ky.) 468; Ingersoll v.

be made strictly in accordance with the requirements of the statute.³⁵

(II.) **Who Must Be Served.**—(A.) **IN ABSENCE OF STATUTE.**—In the absence of statute regulating service of process upon minor defendants, the general rule is that process should be served upon him and a guardian ad litem appointed by the court.³⁶

(B.) **UNDER STATUTE.**—(1.) *When Minor Is Over Given Age.*—Statutes sometimes provide that where the infant is over a given age, usually fourteen, service on him personally is required,³⁷ and that such service

Mangam, 84 N. Y. 622, 626; Gotendorf v. Goldschmidt, 83 N. Y. 110. See the title "Proceedings in Rem."

35. **Ala.**—*Woods v. Montevallo C. Co.*, 107 Ala. 364, 18 So. 108; *Clark v. Gilmer*, 28 Ala. 265; *Coster's Exrs. v. Georgia Bank*, 24 Ala. 37. **Ark.**—*Boyd v. Roane*, 49 Ark. 397, 5 S. W. 704. **Cal.**—*Emeric v. Alvarado*, 64 Cal. 529, 2 Pac. 418. **Ill.**—*Campbell v. Campbell*, 63 Ill. 462; *Clark v. Thompson*, 47 Ill. 25. **Ky.**—*Cheatham v. Whitman*, 86 Ky. 614, 6 S. W. 595; *Covington, etc. R. Co. v. Bowler*, 9 Bush 468; *Benningfield v. Reed*, 8 B. Mon. 102; *United States Bank v. Cockran*, 9 Dana 395, 397; *Wornack v. Loar*, 11 Ky. L. Rep. 6, 11 S. W. 438. **Miss.**—*Burrus v. Burrus*, 56 Miss. 92; *Price v. Crone*, 44 Miss. 571. **Mo.**—*Campbell v. Laclede Gaslight Co.*, 84 Mo. 352. **Neb.**—*Melcher v. Schluter*, 5 Neb. (Unof.) 445, 98 N. W. 1082. **N. Y.**—*Syracuse Sav. Bk. v. Burton*, 6 Civ. Proc. 216; *Potter v. Ogden*, 136 N. Y. 384, 33 N. E. 228; *Smith v. Reid*, 134 N. Y. 568, 31 N. E. 1082; *Ingersoll v. Mangam*, 84 N. Y. 622, 626; *Gotendorf v. Goldschmidt*, 83 N. Y. 110; *Grogan v. Livingston*, 17 N. Y. 218. **Ohio.**—*Keys v. McDonald*, 1 Handy 287, 12 Ohio Dec. (Reprint) 146. **Okla.**—*Brunner v. Nordmier*, 150 Pac. 159; *Groves Nat. Bank v. Baker*, 148 Pac. 714; *Scott v. Brown*, 40 Okla. 184, 137 Pac. 113. **S. C.**—*Carrigan v. Drake*, 36 S. C. 354, 15 S. E. 339; *Tederall v. Bouknight*, 25 S. C. 275; *Whitesides v. Barber*, 24 S. C. 373; *Riker v. Vaughan*, 23 S. C. 187; *Genoles v. West*, 23 S. C. 151; *Finley v. Robertson*, 17 S. C. 435, 410; *Bulow v. Witte*, 3 S. C. 308. **Wis.**—*Helms v. Chadbourne*, 45 Wis. 60.

[a] **Service on minors will be sufficient** where it is made in conformity with the statutes of the jurisdiction. *Price v. Winter*, 15 Fla. 66; *Cornell v. Cornell*, 131 Ky. 650, 115 S. W. 795.

36. **U. S.**—*Carrington v. Brents*, 1 McLean 167, 5 Fed. Cas. No. 2,246. **Ala.**—*Walker v. Hallett*, 1 Ala. 379. **Fla.**

Gibbons v. McDermott, 19 Fla. 852; *Brock v. Doyle*, 18 Fla. 172. **Ill.**—*Nichols v. Mitchell*, 70 Ill. 258. **Ky.**—*Graham v. Sublett*, 6 J. J. Marsh. 45.

See also 1 Barb. Ch. Pr. 51; 1 Dan. Ch. Pr. 153.

[a] **Service must be upon the infant in the presence of the guardian or of some person who has the care and custody of the infant.** *Kellett v. Rathbun*, 4 Paige Ch. (N. Y.) 102; *Brick's Estate*, 15 Abb. Pr. (N. Y.) 12.

[b] **Both must be served and service on the infant must be in the presence of the guardian ad litem.** *McDermott v. Thompson*, 29 Fla. 299, 10 So. 584; *Thompson v. McDermott*, 19 Fla. 852, 853. See also *Brock v. Doyle*, 18 Fla. 172.

37. **Ala.**—Code, 1907, vol. 2, p. 1533. *Compare Sanders v. Godby*, 23 Ala. 473. **Cal.**—Code Civ. Proc., §411. **D. C.**—Ann. Code, 1910, §102, if infant over sixteen years of age. **Ga.**—*Sams v. Covington Buggy Co.*, 10 Ga. App. 191, 73 S. E. 18. **Ia.**—Code, §3533. **N. C.**—*Ward v. Lowndes*, 96 N. C. 367, 2 S. E. 591. **Ohio.**—*Keys v. McDonald*, 1 Handy 287, 12 Ohio Dec. (Reprint) 146. **Okla.**—Rev. Laws, 1910, §4721; *Brunner v. Nordmier*, 150 Pac. 159. **Pa.**—*Erksine v. Adams*, 9 Pa. Dist. 444, 24 Pa. Co. Ct. 382.

[a] **If it is not shown that the infant is under fourteen years of age, he must be served with process.** *Schuchart v. Clark*, 8 Ky. L. Rep. 342, 1 S. W. 479.

[b] **No Presumption as to Age.**—In *Johnston v. Hainesworth*, 6 Ala. 443, the court said: "Here the subpoena was not executed on two of the infants, but as it was executed on their mother it is insisted that we must presume they were under fourteen years of age. No presumption or intendments can be made against infants. For anything shown to the contrary, they may have been over fourteen years of age."

[c] **In South Carolina a minor over fourteen years of age is sufficiently served if copies of the summons and**

is sufficient without service on any other person on his behalf.³⁸

(2.) *Where Infant Is of Tender Years.*—In many jurisdictions, where the infant is of tender years, generally under fourteen, service must be made upon both the infant and the parent, guardian, or other person having his custody or with whom he resides,³⁹ or in whose service

complaint are left with someone of discretion at his home or place of business. *Hutto v. Black*, 88 S. C. 1, 70 S. E. 420.

38. **Ark.**—Dig. St., 1904, §6049. **Cal.** *Gray v. Palmer*, 9 Cal. 616. **Colo.**—*Fillmore v. Russell*, 6 Colo. 171. **Ga.**—Code 1911, § 5565. **Ia.**—Code, 1897, §3533. **Neb.**—Comp. St., 1911, §6648. **Okla.** Comp. Laws, 1909, §5611. **Wyo.**—Comp. St., 1910, §4365.

39. **U. S.**—*Hatch v. Ferguson*, 57 Fed. 966, laws of Washington. **Ark.** Dig. St., 1904, §6049; *Johnson v. Trotter*, 15 S. W. 1025. **Cal.**—Code Civ. Proc., §411 (service on the person having custody or with whom he resides may be had if the parents or guardian be absent from the state); *Richardson v. Loupe*, 80 Cal. 490, 22 Pac. 227; *Gray v. Palmer*, 9 Cal. 616. **D. C.**—Ann. Code 1910, §102, (where defendant is a minor under sixteen). **Ga.**—Code 1911, §5565; *Sams v. Covington Buggy Co.*, 10 Ga. App. 191, 73 S. E. 18. **Idaho.**—Rev. Codes, §4144, subd. 4. **Kan.**—Gen. St., 1909, §5670, where defendant is a "minor," no age being specified. See *Havens v. Drake*, 43 Kan. 484, 23 Pa. 621, service in partition suit. **Minn.** Rev. Laws, 1905, §4106. **Miss.**—*Gibson v. Currier*, 83 Miss. 234, 35 So. 315, 102 Am. St. Rep. 442; *Saxon v. Ames*, 47 Miss. 565; *Wells v. Smith*, 44 Miss. 296; *Johnson v. McCabe*, 42 Miss. 255; *Ingersoll v. Ingersoll*, 42 Miss. 155. **Mont.**—Rev. Codes, 1907, §6579. **Neb.** Comp. St., 1911, §6648. **Nev.**—Rev. Laws, 1912, §5023. **N. Y.**—Code Civ. Proc. 1908, §426; *Hogle v. Hogle*, 49 Hun 313, 2 N. Y. Supp. 172; *Bellamy v. Guhl*, 62 How. Pr. 460. **N. C.**—Rev., 1905, §440; *Roseman v. Roseman*, 127 N. C. 494, 37 S. E. 518; *Ward v. Lowndes*, 96 N. C. 367, 2 S. E. 591. **N. D.** Rev. Codes, 1905, §6838. **Ohio.**—Gen. Code, 1910, §11291 (when defendant is a "minor," no age specified); *Keys v. McDonald*, 1 Handy 287, 12 Ohio Dec. (Reprint) 146. **Okla.**—Rev. Laws, 1910, §4721; *Bruner v. Nordmier*, 150 Pac. 179; *Scott v. Brown*, 40 Okla. 184, 137 Pac. 113; *Bolling v. Campbell*, 36 Okla. 671, 128 Pac. 1091; *Bolling v. Gibson*, 36

Okla. 678, 128 Pac. 1093. **Ore.**—*Lord's Laws*, §55; *Cobb v. Klosterman*, 58 Ore. 211, 114 Pac. 96. **S. C.**—Code Laws, 1902, Code Civ. Proc., §155; *Foster v. Crawford*, 57 S. C. 551, 36 S. E. 5; *Faust v. Faust*, 31 S. C. 576, 10 S. E. 262. See *Hutto v. Black*, 88 S. C. 1, 70 S. E. 420. **S. D.**—Code Civ. Proc., §110. **Tenn.**—*Combs v. Young*, 4 Yerg. 218, 26 Am. Dec. 225. See also *Britain v. Cowen*, 5 Humph. 319; *Valentine v. Cooley*, Meigs 613, 33 Am. Dec. 166. **Utah.**—Comp. Laws, 1907, §2948. **Wash.** *Morrison v. Morrison*, 25 Wash. 466, 65 Pac. 779; *Kalb v. German Sav. & L. Soc.*, 25 Wash. 349, 65 Pac. 559. **Wis.** St. 1898, §2636. **Wyo.**—Comp. St., 1910, §4365.

[a] **The Mississippi statute** providing that "If the defendant be an unmarried infant the process should be served on him personally, and upon his father or mother or guardian if he have any in this state; but if he be married, process may be served as on an adult" relates only to process on minor defendants when the rights of property are involved. *Moore v. Allen*, 72 Miss. 273, 16 So. 600, citing *Jack v. Thompson*, 41 Miss. 49.

[b] **Infant Females Covert.**—"The service of a subpoena against a husband and wife on the husband alone is a good service on both, and the reason is that the husband and wife are one person in law and the husband is bound to answer for both" even though the wife be an infant. *Feitner v. Lewis*, 119 N. Y. 131, 23 N. E. 296, 16 Am. St. Rep. 811, reversing 55 N. Y. Super. 519, 1 N. Y. Supp. 1.

[c] **Substantial Compliance.**—Service upon the father and leaving a copy with the father, the infant not being home at the time is a substantial compliance with statute. *Durcell v. Gann*, 113 Ark. 332, 168 S. W. 1102.

[d] **Infant Lunatic.**—In an action for partition it is unnecessary to personally serve an infant lunatic with process. *Rogers v. McLean*, 11 Abb. Pr. (N. Y.) 440. See the title "Insane Persons."

he is employed,⁴⁰ providing that these persons are residents within the state.⁴¹ Where it is required that service be had upon both the infant and some other person, service upon either the infant⁴² or guardian⁴³ alone, is insufficient. But in a number of states if none of the persons named in the statute who may be served can be found service on the infant alone will suffice.⁴⁴ Where such service is sufficient when given, subsequent events will not necessitate additional service.⁴⁵

In some states the service of process may be made upon the parent, guardian, or other person designated by the statute, alone;⁴⁶ service

40. **Cal.**—Code Civ. Proc., §111, subd. 3 (if the father, mother or guardian is not within the state); *Richardson v. Loupe*, 80 Cal. 490, 22 Pac. 227. **Idaho.**—Rev. Codes, §4144, subd. 4. **Mont.**—Rev. Codes, 1907, §6519. **Nev.**—Rev. Laws, 1912, §5023. **N. Y.**—Code Civ. Proc., 1908, §426. **N. C.**—Rev., 1905, §440. **N. D.**—Rev. Code, 1905, §6838. **Ore.**—Lord's Laws, §55. **S. D.**—Code Civ. Proc., §110. **Utah.**—Comp. Laws, 1907, §2948. **Wis.**—St., 1898, §2636.

41. *Gibson v. Currier*, 83 Miss. 234, 35 So. 315, 102 Am. St. Rep. 442; *Johnson v. McCabe*, 42 Miss. 255; *Ingersoll v. Ingersoll*, 42 Miss. 155.

[a] If guardian is non-resident, he must be cited by publication. *Wells v. Smith*, 44 Miss. 296.

42. **U. S.**—*Hatch v. Ferguson*, 57 Fed. 966. **Ala.**—*Wells v. American Mtg. Co.*, 109 Ala. 430, 20 So. 136. **Ky.**—*Bedell v. Lewis*, 4 J. J. Marsh. 562.

[a] Service on Guardian Ad Litem Instead of Parent or Guardian.—Where an infant appears by guardian ad litem a copy of the summons having been left with the infant, and served on his guardian ad litem the fact that a copy of summons was not also left with his "father, mother or guardian," as provided by statute, is immaterial. *Roseman v. Roseman*, 127 N. C. 494, 37 S. E. 518.

Waiver of defect, see *infra*, I, B, 2, f.

43. **Cal.**—*Fanning v. Foley*, 99 Cal. 336, 33 Pac. 1098. **Okla.**—*Bruner v. Nordmier*, 150 Pac. 159. **Tenn.**—*Combs v. Young*, 4 Yerg. 218, 26 Am. Dec. 225.

44. **Neb.**—Comp. St., 1911, §6648. **Ohio.**—*Keys v. McDonald*, 1 Handy 287, 12 Ohio Dec. (Reprint) 146. **Okla.**—Comp. Laws, 1909, §5611. **Wyo.**—Comp. St., 1910, §4365.

[a] In Kansas, if none of the per-

sons named in the statute can be found service is the same as in the case of adults. **Kan.** Gen. St., 1909, §5670.

45. *Dillivan v. German Sav. Bank* (Iowa), 124 N. W. 350, in which an infant who had no parents was served personally and by delivering a copy of the summons to the person with whom he resided. The appointment of a general guardian between the day of service and return day did not necessitate additional service.

46. **Ala.**—Code, 1907, vol. 2, p. 533; *Herring v. Ricketts*, 101 Ala. 340, 13 So. 502; *Hibbler v. Sprowl*, 71 Ala. 50; *Cook v. Rogers*, 64 Ala. 406; *Bondurant v. Sibley*, 37 Ala. 565; *Walker v. Hallett*, 1 Ala. 379. **Ariz.**—Civ. Code, 1913, par. 1089. **Ill.**—*Nichols v. Mitchell*, 70 Ill. 258. **Ia.**—Code, 1897, §3533; *Sleeper v. Killion*, 147 N. W. 314; *Hrdlicka v. Evans*, 145 N. W. 84; *Dillivan v. German Sav. Bank*, 124 N. W. 350; *Cummings v. Landes*, 140 Iowa 80, 117 N. W. 22; *Allen v. Saylor*, 14 Iowa 435. **Ky.**—Rev. Codes, 1906, §52; *Cox v. Interstate Coal Co.*, 157 Ky. 373, 163 S. W. 231; *Palmer v. Husbands*, 134 Ky. 152, 119 S. W. 762; *Cornell v. Cornell*, 131 Ky. 650, 115 S. W. 795; *Cheatham v. Whitman*, 86 Ky. 614, 6 S. W. 595; *Wornack v. Loar*, 11 Ky. L. Rep. 6, 11 S. W. 438. For the rule prior to 1882, see *Lloyd's Admr. v. McCauley's Admr.*, 14 B. Mon. 535; *Messmore v. Stone's Admr.*, 6 Ky. L. Rep. 598. **Miss.**—*Jones v. Mathews*, 4 So. 547; *Burrus v. Burrus*, 56 Miss. 92; *Saxon v. Ames*, 47 Miss. 565. See also *Pollock v. Buie*, 43 Miss. 140, 151. **N. C.**—*Fry v. Currie*, 91 N. C. 436. **Pa.**—*Erksine v. Adams*, 24 Pa. Co. Ct. 382. **Tenn.**—*Britain v. Cowen*, 5 Humph. 315; *Cowan v. Anderson*, 7 Coldw. 284, but the practice of serving the guardian only is one not to be encouraged. **Tex.**—*Kegans v. Allcorn*, 9 Tex. 25. **Utah.**—See Comp.

upon the infant is not required; in such jurisdictions service upon the infant alone is insufficient.⁴⁷

Where the parent or guardian is the plaintiff service upon him as the representative of the infant does not give the court jurisdiction over the person of the infant,⁴⁸ and in such case it is unnecessary that he be served.⁴⁹ The proper person to receive service under such circumstances is the infant's general guardian if he have one.⁵⁰ Some statutes make provision for the appointment of a guardian ad litem in

Laws, 1907, §4046. **W. Va.**—*Ferrell v. Ferrell*, 53 W. Va. 515, 44 S. E. 187.

[a] **Reason For Rule.**—In *Cornell v. Cornell*, 131 Ky. 650, 115 S. W. 795, the court in speaking of the fact that summons on the infant himself when under fourteen was no longer required said: "The General Assembly at that time (1882) recognized the utter helplessness and inability of a child under that age to reason and look after its own interest; that it was a waste of money to require summonses and copies to be issued and served upon them." See also *Kegans v. Allecorn*, 9 Tex. 25.

[b] **In Chancery**, "the writ should be served on the father or guardian of the infant, or if none, then upon the person with whom the infant resides, or under whose care he is, unless the court or judge otherwise orders, but the court or judge may order that service made or to be made on the infant shall be deemed good service." *Dan. Ch. Pr.* (8th ed.) p. 110, 274. See also *Hibbler v. Sprowl*, 71 Ala. 50; *Walker v. Hallett*, 1 Ala. 379; *Thompson v. Jones*, 8 Ves. Jr. 141, 32 Eng. Reprint 306; 8 STANDARD PROC. 465. Compare *Nichols v. Mitchell*, 70 Ill. 258.

[c] **Service on both the father and mother** is not required, but the fact that both were served does not affect validity of service made. *Cox v. Interstate Coal Co.*, 157 Ky. 373, 163 S. W. 231.

[d] **Service upon the mother and infant** under fourteen is sufficient although it is not shown the father is dead. *Betty v. Petrie*, 138 Ky. 426, 128 S. W. 320.

[e] **If the mother is the guardian of the minors**, service of the summons on the mother is a proper service upon the infants. *Cohen v. Ripy*, 17 Ky. L. Rep. 1078, 33 S. W. 625.

[f] **Where the person with whom the infant resides is a minor** also, but is at an age of mature discretion, is a co-defendant and is served with process

in the action, this service is sufficient. *Lawrence v. Conner*, 12 Ky. L. Rep. 86, 14 S. W. 77.

[g] **Service on the mother** is sufficient where the infant has no general guardian. *Peck v. Adsit*, 98 Mich. 639, 57 N. W. 804.

[h] **Presumption of Custody.**—Where, in an action against infants under fourteen years of age, process has been served upon their step-father, it should be presumed that he had the care and control of them. *Louisville, etc. Exposition v. Johnson*, 8 Ky. L. Rep. 323.

[i] **In Colorado**, see *Colo. St., Ann.*, 1911, §7150.

47. *Wells v. American Mtg. Co.*, 109 Ala. 430, 20 So. 136; *Hibbler v. Sprowl*, 71 Ala. 50; *Bondurant v. Sibley*, 37 Ala. 565; *Brown v. Brown*, 157 Ky. 804, 164 S. W. 70; *Cox v. Story*, 80 Ky. 64. See also *Ariz. Civ. Code*, 1913, §1089; *Wyo. Comp. St.*, 1910, §5471.

48. *Isert v. Davis*, 17 Ky. L. Rep. 686, 32 S. W. 294; *Uhl v. Loughran*, 4 N. Y. Supp. 827.

49. *Brown v. Lawson*, 51 Cal. 615; *Foster v. Crawford*, 57 S. C. 551, 36 S. E. 5. Compare *Messmore v. Stone's Admr.*, 6 Ky. L. Rep. 598.

[a] In *Kennedy v. Williams*, 59 S. C. 378, 38 S. E. 8, the court said: "While it is indispensable that the summons should be served personally on the minor in order to give the court jurisdiction, this requirement is not so stringent as to service of the summons on the parent or guardian. The service of the summons on the parent or guardian is intended to make them, to that extent, a party to the proceedings. When, however, the parent or guardian is a plaintiff, he thereby becomes a party to the action, and there is no necessity in serving him with a summons which has been issued at his instance."

50. *Gayle v. Johnston*, 80 Ala. 395, decree reversed because there was no proof the person served was a guardian,

such cases.⁵¹ But service upon the plaintiff in such a case, has been held sufficient where his interests were not adverse to those of the child,⁵² and there was no fraud.⁵³

(III.) **Number of Copies Served.** — If the parent, guardian or other person on whom service must be made is a codefendant with the minor, it is not necessary that he be served with two copies of the summons,⁵⁴ and the service of one copy of the summons upon the parent or guardian of several minor defendants is sufficient to include all,⁵⁵ but each of the minor defendants must be served with a separate copy.⁵⁶

(IV.) **Where Infant Is Absent, or Whereabouts Unknown.** — Where the infant is absent from the jurisdiction or his whereabouts are unknown, he must be served⁵⁷ in the same manner⁵⁸ as adults under similar cir-

such fact being denied. See also *Cook v. Rogers*, 64 Ala. 406; *Mullins v. Mullins*, 120 Ky. 643, 87 S. W. 764.

51. When Parent, Guardian, Etc., Plaintiff.—When persons named in statute who might be served with process for infants are all dead or plaintiffs, the clerk should appoint a person to represent the infants, and upon whom summons might be served for them. Ky. Civ. Code, §52; *Cornell v. Cornell*, 131 Ky. 650, 115 S. W. 795; *Booker v. Kennerly*, 96 Ky. 415, 29 S. W. 323; *Isert v. Davis*, 17 Ky. L. Rep. 686, 32 S. W. 294; *Tyler v. Jewell*, 10 Ky. L. Rep. 887, 11 S. W. 25.

52. *Cohen v. Ripy*, 17 Ky. L. Rep. 1078, 33 S. W. 625.

[a] In an action by a guardian against his ward for the sale of the real estate of the ward, who is under fourteen years of age, service of process upon the infant and upon the plaintiff as guardian is sufficient. *Louisville, etc. Exposition v. Johnson*, 8 Ky. L. Rep. 328.

53. *Foster v. Crawford*, 57 S. C. 551, 36 S. E. 5.

54. Ky.—*Cheatham v. Whitman*, 86 Ky. 614, 6 S. W. 595; *Rodgers v. Rodgers' Admr.*, 17 Ky. L. Rep. 358, 31 S. W. 139; *Bailey v. Fanning Orphan School*, 12 Ky. L. Rep. 644, 14 S. W. 998; *Lawrence v. Comer*, 12 Ky. L. Rep. 86, 14 S. W. 77; *Donaldson v. Stone*, 11 Ky. L. Rep. 27, 11 S. W. 462; *Louisville, etc. Exposition v. Johnson*, 8 Ky. L. Rep. 328. **La.**—*Emmer v. Kelly*, 23 La. Ann. 763. **Miss.**—*Mellvoy v. Alsop*, 45 Miss. 365, 374. **S. C.**—*Faust v. Faust*, 31 S. C. 576, 10 S. E. 262.

Contra, *Helms v. Chadbourne*, 45 Wis.

60. And see *Hodges v. Wise*, 16 Ala. 509. Compare *Sanders v. Godley*, 23 Ala. 473.

[a] But where the guardian has been made a defendant merely because he is the guardian and is required to be served with process, it is only necessary that he be served with one copy. *Melcher v. Schluter*, 5 Neb. (Unof.) 445, 98 N. W. 1082.

55. Ark.—*Huggins v. Dabbs*, 57 Ark. 628, 22 S. W. 563. **Cal.**—See *Richardson v. Loupe*, 80 Cal. 490, 22 Pac. 227. **Wash.**—*Morrison v. Morrison*, 25 Wash. 466, 65 Pac. 779.

56. *Colwell v. Culbertson*, 126 Ill. App. 294. See *Morrison v. Morrison*, 25 Wash. 466, 65 Pac. 779.

57. *In re White's Estate*, 163 Pa. 388, 30 Atl. 192.

[a] **Statute.**—By the act of 1825, in partition suits if the court appoints a guardian ad litem who enters an appearance and answers the petition of the plaintiff, it is unnecessary to give notice by publication to non-resident minor defendants. *Hite v. Thompson*, 18 Mo. 461.

[b] **Personal service on mother** alone insufficient. *Ingersoll v. Mangam*, 84 N. Y. 622, affirming 24 Hun 202.

58. U. S.—*Bryan v. Kennett*, 113 U. S. 179, 5 Sup. Ct. 407, 28 L. ed. 908; *Cohen v. Portland Lodge No. 142*, B. P. O. E., 152 Fed. 357, 81 C. C. A. 483, 144 Fed. 266; *Woolridge v. McKenna*, 8 Fed. 650, 681. **Ala.**—*Irwin v. Irwin*, 57 Ala. 614; *Clark v. Gilmer*, 28 Ala. 265; *Coster's Exrs. v. Georgia Bank*, 24 Ala. 37; *Hodges v. Wise*, 16 Ala. 509; *Walker v. Mobile Bank*, 6 Ala. 452; *Walker v. Hallett*, 1 Ala. 379. **D. C.**

circumstances, as by substituted service,⁵⁹ or by publication.⁶⁰ A general statute providing for substituted or constructive service, applies to infants though they be not specifically mentioned therein.⁶¹ The infant's parent, guardian or the person with whom he resides must be served also, where required by law.⁶²

Duncanson v. Manson, 3 App. Cas. 260. **Ill.**—*Hale v. Hale*, 146 Ill. 227, 33 N. E. 858, 20 L. R. A. 247. **Ind.**—*Hawkins v. Hawkins*, 28 Ind. 66; *Peoples v. Stanley*, 6 Ind. 410. **Ia.**—*Williams v. Westcott*, 77 Iowa 332, 42 N. W. 314, 14 Am. St. Rep. 287. **Kan.**—*Walkenhorst v. Lewis*, 24 Kan. 420. **Md.**—*Snowden v. Snowden*, 1 Bland 550. **Miss.**—*Stanton's Heirs v. Pollard*, 24 Miss. 154. **Neb.**—*Davis v. Huston*, 15 Neb. 28, 16 N. W. 820. **N. Y.**—*Ingersoll v. Mangam*, 84 N. Y. 622; *Wheeler v. Scully*, 50 N. Y. 667; *Ontario Bank v. Strong*, 2 Paige 301. **Can.**—*Duffy v. O'Connor*, 1 Ch. Chamb. (U. C.) 393.

[a] **In Equity.**—To bring non-resident infant defendants before a court of equity and subject them to its jurisdiction it is simply necessary for the commission appointed by the court for that purpose to appoint a guardian ad litem and for such guardian to file an answer. *Duncanson v. Manson*, 3 App. Cas. (D. C.) 260.

59. *Gray v. Palmer*, 9 Cal. 616; *Merritt's Will*, 5 Dem. Surr. (N. Y.) 544.

[a] **Personal service upon an infant outside the state** is void in the absence of statute permitting it. *Potter v. Ogden*, 136 N. Y. 384, 33 N. E. 228; *Ward v. Lowndes*, 96 N. C. 367, 2 S. E. 591.

[b] **Service Through the Mail.** *Gray v. Palmer*, 9 Cal. 616.

60. **Ala.**—*Clark v. Gilmer*, 28 Ala. 265 (sending a copy of the order to the parent); *Walker v. Hallett*, 1 Ala. 379. **Ga.**—*Gefken v. Graef*, 77 Ga. 340. **Ill.** See *Hale v. Hale*, 146 Ill. 227, 33 N. E. 858, 20 L. R. A. 247. **Ia.**—*Williams v. Wescott*, 77 Iowa 332, 42 N. W. 304, 14 Am. St. Rep. 287. **Kan.**—*Walkenhorst v. Lewis*, 24 Kan. 420. **Neb.**—*Davis v. Huston*, 15 Neb. 28, 16 N. W. 820. **N. Y.** *Sloane v. Martin*, 145 N. Y. 524, 40 N. E. 217, 45 Am. St. Rep. 630, 28 L. R. A. 349, *affirming* 77 Hun 249, 28 N. Y. Supp. 332; *Ingersoll v. Mangam*, 84 N. Y. 622 (*affirming* 24 Hun 202); *Wheeler v. Scully*, 50 N. Y. 667; *Ontario Bank v. Strong*, 2 Paige Cas. 301; *Merritt's Will*, 5 Dem. Surr. 544.

[a] **What Deemed Residence of Infant.**—The court said: "For the pur-

pose of determining the infant's place of residence under the provisions of this statute (providing for service on non-residents, by publication) I am clearly of the opinion that that of her mother having the care, custody and control of her infant child must be regarded as that of the child." *Syracuse Sav. Bank v. Burton*, 6 N. Y. Civ. Proc. 216, 220.

[b] **Where infants are but temporarily absent**, service by publication is unauthorized. *Potter v. Ogden*, 136 N. Y. 384, 393, 33 N. E. 228; *Ward v. Lowndes*, 96 N. C. 367, 2 S. E. 591.

[c] **Period of publication must expire** before a guardian ad litem can be appointed. *Darrow v. Calkins*, 154 N. Y. 503, 49 N. E. 61.

61. *Steinhardt v. Baker*, 163 N. Y. 410, 57 N. E. 629, *affirming* 25 App. Div. 197, 49 N. Y. Supp. 357, *affirming* 20 Misc. 470, 46 N. Y. Supp. 707.

[a] **Non-resident infants may be** proceeded against by publication under a statute authorizing service by publication, although it is silent as to minors. *Bryant v. Kennett*, 113 U. S. 179, 5 Sup. Ct. 407, 28 L. ed. 908; *Gefken v. Graef*, 77 Ga. 340, 342.

[b] **Evasion of Service.**—The act of the infants' mother in preventing service upon them amounted to an avoidance or evasion of service under the statute. *Steinhardt v. Baker*, 163 N. Y. 410, 416, 57 N. E. 629, *affirming* 25 App. Div. 197, 49 N. Y. Supp. 357, *affirming* 20 Misc. 470, 46 N. Y. Supp. 707. See also *Lloyd v. Lloyd*, 11 L. J. Ch. (Eng.) 109, 6 Jur. 313.

62. *Gray v. Palmer*, 9 Cal. 616. See *supra* I, B, 2, c, (II).

[a] **In Federal Courts.**—It is unnecessary to mail a copy of the complaint and summons to the person with whom the minor resides. Mailing a copy of the complaint and summons to the non-resident minor is sufficient. *Union Pac. R. Co. v. Thomas*, 152 Fed. 365, 81 C. C. A. 491.

[b] **In Mississippi.**—"No decree shall bind or conclude a minor having a guardian resident in this state, unless the guardian shall be served with

Contents of Affidavit for Publication.—The affidavit for the order of publication should state not only what is required when the defendant is an adult,⁶³ but, in addition thereto, should state that the defendant is an infant,⁶⁴ giving his age if known.⁶⁵

(V.) Waiver and Acceptance of Service.—Where personal service upon an infant is required, he has no legal power to waive or accept or admit service upon himself, nor as a general rule has any other person the authority to waive or admit such service for him.⁶⁶ But a guard-

process. If the guardian be a non-resident, he must be cited by publication." Wells v. Smith, 44 Miss. 296.

63. Gray v. Palmer, 9 Cal. 616.

[a] **Affidavit of Non-residence.** Ind.—Martin v. Starr, 7 Ind. 224; Peoples v. Stanley, 6 Ind. 410. Kan.—Claypoole v. Houston, 12 Kan. 324. Neb. Davis v. Huston, 15 Neb. 28, 16 N. W. 820. Va.—Lawson v. Moorman, 85 Va. 880, 9 S. E. 150.

[b] **If residence be known**, it should be stated. U. S.—See Bryan v. Kennett, 113 U. S. 179, 5 Sup. Ct. 407, 28 L. ed. 908. Ga.—Gefken v. Graef, 77 Ga. 340, 342. Ill.—Hickenbotham v. Blackledge, 54 Ill. 316; McDermaid v. Russell, 41 Ill. 489. Ind.—Martin v. Starr, 7 Ind. 224. Kan.—Walkenhorst v. Lewis, 24 Kan. 420; Armstrong v. Wyandotte Bridge Co., McCahon 166.

[c] **Falsity of Affidavit Attacked.** How.—If the affidavit of non-residence is false, this falsity must be shown at the time or after the infants become of full age in direct proceedings to avoid the decree entered in the suit, but it cannot be attacked collaterally. Lawson v. Moorman, 85 Va. 880, 9 S. E. 150.

[d] **Form for Affidavit.**—It is sufficient to state in the affidavit of publication, "that said infants are non-residents of the state of Nebraska and that service of summons cannot be made upon them in this state." Davis v. Huston, 15 Neb. 28, 16 N. W. 820.

[e] **In Kansas.**—An allegation "that the above entitled cause is one of those mentioned in section 72 of the Code of Civil Procedure of the State of Kansas," does not sufficiently show such fact. It is subject to direct attack or petition in error but not collaterally. Claypoole v. Houston, 12 Kan. 324.

64. Gray v. Palmer, 9 Cal. 616.

65. Gray v. Palmer, 9 Cal. 616.

66. Ala.—Irwin v. Irwin, 57 Ala.

614. Ark.—Evans v. Davies, 39 Ark.

235; Haley v. Taylor, 39 Ark. 104, 106. Cal.—Gray v. Palmer, 9 Cal. 616; Estate of Bartels, Myr. Prob. 130. Ga. Taliaferro v. Calhoun, 137 Ga. 417, 420, 73 S. E. 675. Ill.—Dickison v. Dickison, 124 Ill. 483, 16 N. E. 861; Chambers v. Jones, 72 Ill. 275; Hickenbotham v. Blackledge, 54 Ill. 316; Greenman v. Harvey, 53 Ill. 386; Clark v. Thompson, 47 Ill. 25, 95 Am. Dec. 457; McDermaid v. Russell, 41 Ill. 489; Crocker v. Smith, 10 Ill. App. 376. Ind.—Hawkins v. Hawkins, 28 Ind. 66, 69; Abdil v. Abdil, 26 Ind. 287, 288; Pugh v. Pugh, 9 Ind. 132, 135; Peoples v. Stanley, 6 Ind. 410; Hough v. Canby, 8 Blackf. 301. Ia.—Hrdlicka v. Evans, 145 N. W. 84; Cummings v. Landes, 140 Iowa 80, 86, 117 N. W. 22; Good v. Norley, 28 Iowa 188. Kan.—Armstrong v. Wyandotte B. Co., McCahon 166, 1 Kan. (Dass. ed.) 576. La.—Jacobs v. Kansas City S. & G. R. Co., 134 La. 389, 64 So. 150. Minn.—Phelps v. Heaton, 79 Minn. 476, 82 N. W. 990. Miss. Winston v. McLendon, 43 Miss. 254. Mo.—Captain v. Trust Co., 240 Mo. 484, 498, 144 S. W. 466; Kansas City, etc. R. Co. v. Campbell, 62 Mo. 585; Gibson v. Chouteau, 39 Mo. 536. N. Y. Coughlin v. Fay, 68 Hun 521, 22 N. Y. Supp. 1095. N. C.—Bass v. Bass, 78 N. C. 374. Okla.—Bolling v. Campbell, 36 Okla. 671, 128 Pac. 1091. S. C. Morgan v. Morgan, 45 S. C. 323, 23 S. E. 64; Whitesides v. Barber, 24 S. C. 373; Riker v. Vaughan, 23 S. C. 187; Finley v. Robertson, 17 S. C. 435, 439. Tenn.—Taylor v. Walker, 1 Heisk. 734, 738. See Robertson v. Robertson, 2 Swan 197; Wheatley v. Harvey, 1 Swan 484; Frazier v. Pankey, 1 Swan 75; Crippen v. Crippen, 1 Head 128. See also Scott v. Porter, 2 Lea 224; Masson v. Swan, 6 Heisk. 450; Cowan v. Anderson, 7 Coldw. 281. Tex.—Wheeler v. Ahrenbeak, 54 Tex. 535.

Effect on judgment, of appearance without service. See *infra* I, B, 2, b, (II).

ian,⁶⁷ or guardian ad litem,⁶⁸ may waive service upon himself. An appearance and pleading to the action, after attaining his majority is a waiver of any defect in the service of process during his minority.⁶⁹

(VI.) Notices required to be served during the progress of the case, must, according to some authorities, be served on the guardian ad litem.⁷⁰

d. *Return*.—The return must show that the summons or other process was duly served upon the infant in strict compliance with the statute;⁷¹ the minority of the defendant should also be shown.⁷² And the return should show that the service was made upon the proper

[a] **Attorneys cannot waive service** of process upon minors or bring them into court by stipulation in their behalf. *Ala.*—*McIntosh v. Atkinson*, 63 *Ala.* 241. *Ark.*—*Evans v. Davies*, 39 *Ark.* 235, 236. *Ill.*—*McDermaid v. Russell*, 41 *Ill.* 489. *Pa.*—*Brown v. Downing*, 137 *Pa.* 569, 573, 20 *Atl.* 871. *Tex.*—*Russell v. Texas & P. R. Co.*, 68 *Tex.* 646, 5 *S. W.* 686.

[b] **An order by consent of counsel**, that infants "are made parties" does not make them parties so as to authorize the court to proceed against them. *Pond v. Doneghy*, 18 *B. Mon. (Ky.)* 558.

[c] **A non-resident minor cannot accept service** so as to dispense with the necessity of publication. *Ill.*—*Clark v. Thompson*, 47 *Ill.* 25, 95 *Am. Dec.* 457. *Mo.*—*Kansas City, etc. R. Co. v. Campbell*, 62 *Mo.* 585. *S. C.*—*Ricker v. Vaughan*, 23 *S. C.* 187. See also *Bailey v. Whaley*, 14 *Rich. Eq.* 81.

[d] **Where the guardian's interests are hostile** to the interests of the minors, as where the guardian is plaintiff, acceptance of service by the general guardian is insufficient and does not give the court jurisdiction of the case so as to bind the minors. *Morgan v. Morgan*, 45 *S. C.* 323, 23 *S. E.* 64.

[e] **Probably a parent may bind his minor child** by the acceptance of service of an original notice in his behalf, but if the acceptance of service relates solely to the parent, who is also a party to the suit, without notice that the minor is a party, jurisdiction of the minor is not thus acquired. *Cummings v. Landes*, 140 *Iowa* 80, 117 *N. W.* 22.

67. *Barrett v. Moise*, 61 *S. C.* 569, 574, 39 *S. E.* 755; *Scott v. Porter*, 2 *Lea (Tenn.)* 224; *Masson v. Swan*, 6 *Heisk. (Tenn.)* 450; *Cowan v. Anderson*, 7 *Coldw. (Tenn.)* 284.

68. *Whitaker v. Patton*, 1 *Port. (Ala.)* 9. But see *Jacobs v. Kansas City S. & G. R. Co.*, 134 *La.* 389, 64 *So.* 150, tutor ad hoc cannot waive citation.

69. *Hillegass v. Hillegass*, 5 *Pa.* 97, 100.

70. *Clarke v. Gilmanton*, 12 *N. H.* 515; *Strayer v. Long*, 83 *Va.* 715. But see the titles "Notice;" "Service of Process and Papers."

71. *Ill.*—*Colwell v. Culbertson*, 126 *Ill. App.* 294. *Mo.*—*Fischer v. Siekmann*, 125 *Mo.* 165, 28 *S. W.* 435. *Neb.*—*Melcher v. Schluter*, 5 *Neb. (Unof.)* 445, 98 *N. W.* 1082.

See generally, the titles "Returns;" "Service of Process and Papers."

[a] **A return of "served"** is sufficient. *Doe v. Bradley*, 6 *Smed. & M. (Miss.)* 485.

[b] **A return of "executed"** is irregular, but sufficient to sustain a decree upon collateral attack. *Rigby v. Lefevre*, 58 *Miss.* 639. See also *Erwin v. Carson*, 54 *Miss.* 282.

[c] **Return held sufficient** to show service on a widow and her minor children, viz.: "This summons came to hand September 4th, 1871, at 2 o'clock P. M., and on this 5th day of September, 1871, I served this summons on Sarah Sanders in person, and on Sarah E. Sanders and Charles Sanders by delivering to each of them a true and certified copy of this summons, with all the endorsements thereon. All of this done in Nemaha county, state of Nebraska." *Parker v. Starr*, 21 *Neb.* 680, 33 *N. W.* 424.

[d] **That a return does not expressly state that the service was made within the state** will not invalidate the proceedings where such fact may be inferred. *Middleton v. Stokes*, 71 *S. C.* 17, 50 *S. E.* 539.

72. *Allen v. Saylor*, 14 *Iowa* 435, 437.

persons,⁷³ acting in the proper capacity;⁷⁴ or that no such persons could be found,⁷⁵ or it should be shown that the age of the infant is such that the law makes a service upon the minor alone sufficient.⁷⁶ The return must be verified in some jurisdictions.⁷⁷

Amendment of Return. — The court may allow the return to be corrected by amendment.⁷⁸ Lapse of time will not bar an amendment

73. Ia.—*Allen v. Saylor*, 14 Iowa 435. **Ky.**—*Rodgers v. Rodgers' Admr.*, 17 Ky. L. Rep. 358, 31 S. W. 139; *Jenkins v. Crofton' Admr.*, 10 Ky. L. Rep. 456, 9 S. W. 406. **Okla.**—*Bolling v. Campbell*, 36 Okla. 671, 128 Pac. 1091, 1093.

[a] **Should show service on parent, guardian, etc., where service on them is required.** **Ala.**—*Estes v. Bridgforth*, 114 Ala. 221, 21 So. 512. **Ky.**—*Feltner v. Huff*, 118 S. W. 936. **Miss.**—*Erwin v. Carson*, 54 Miss. 282; *Winston v. McLendon*, 43 Miss. 254; *Mullins v. Sparks*, 43 Miss. 129.

74. Service on Parent To Be for the Infant.—If the parent is also a party defendant the return must show that service was made upon the parent for the infant. It is better in all cases that the fact of service being made upon the parent for the infant should distinctly appear in the return. *Cook v. Rogers*, 64 Ala. 406. See also *Dillivan v. German Sav. Bank (Iowa)*, 124 N. W. 359, decided on the authority of *Allen v. Saylor*, 14 Iowa 435. Compare *Rodgers v. Rodgers' Admr.*, 17 Ky. L. Rep. 358, 31 S. W. 139; and *supra*, I, B, 2, c. (III).

[a] But in *Melcher v. Schluter*, 5 Neb. (Unof.) 445, 98 N. W. 1082, it was unnecessary that the return show service on the guardian as such merely because he was also a party defendant, since he obviously had been made a party merely because he was guardian and had to be served as such.

[b] **A return showing that the minors reside with their mother or that she is their general guardian is sufficient without stating that she is the person in charge of them.** *Robinson v. Clark*, 17 Ky. L. Rep. 1401, 34 S. W. 1083.

75. *Erwin v. Carson*, 54 Miss. 282; *Keys v. McDonald*, 1 Handy (Ohio) 287, 12 Ohio Dec. (Reprint) 146. See *Gibson v. Currier*, 83 Miss. 231, 35 So. 315, 192 Am. St. Rep. 142.

[a] **The legal effect of a return nil habet in partition, in which a minor is a defendant, is that there is no one in**

the county upon whom service of the writ against the minor could be made. *Girard L. Ins. Co. v. Farmers' etc. Nat. Bank*, 57 Pa. 388.

[b] **Return showing service on the mother without a showing as to inability to find the father or guardian is insufficient under the statute of Kentucky.** *Lloyd's Admr. v. McCauley's Admr.*, 14 B. Mon. (Ky.) 535.

[c] **Showing Where Service Is on Person Having Control of Minor.** Where service can be made on the person having custody, etc., only in the absence of the parents or guardian of a minor under fourteen, a return which does not show the absence of the parent or guardian, and that the person served had the custody or control of the minor is insufficient. *Dillivan v. German Savings Bank (Iowa)*, 124 N. W. 350, on the authority of *Allen v. Saylor*, 14 Iowa 435.

76. Keys v. McDonald, 1 Handy (Ohio) 287, 12 Ohio Dec. (Reprint) 146.

[a] **Presumption as to Age.**—In *Melcher v. Schluter*, 5 Neb. (Unof.) 445, 98 N. W. 1082, the court said: "The ages of the minors are not disclosed anywhere in this record, and we think it will be in keeping with the strictness which the law enforces upon those who deal with the interests of minors to test the sufficiency of the return upon the assumption that they were below the age of fourteen."

[b] But a failure to state such age is not a fatal defect if that fact is conclusively established by the evidence upon the trial. *Ringstad v. Hanson*, 150 Iowa 324, 130 N. W. 145.

77. Hrdlicka v. Evans (Iowa), 145 N. W. 84, although made by an officer. See the title "Returns."

78. Tyler v. Jewell, 10 Ky. L. Rep. 887, 11 S. W. 25; *Foster v. Crawford*, 57 S. C. 551, 559, 36 S. E. 5. See generally the title "Returns."

[a] **If it is at all doubtful whether there is error in the return, the amendment ought not to be allowed.** *Spellymyer v. Gaff*, 112 Ill. 29, 1 N. E. 170.

where the rights of innocent third parties are not thereby injured.⁷⁹

Conclusiveness.—The return of the officer cannot be contradicted in a collateral proceeding.⁸⁰

c. Record and Presumptions.—In the absence of record evidence to the contrary,⁸¹ where the court has heard and determined the case, and the record shows that infant parties were represented by a guardian ad litem it will be presumed that such infants had been served with process.⁸²

79. *Spellmyer v. Gaff*, 112 Ill. 29, 1 N. E. 170.

[a] **The lapse of sixteen years** in a chancery case is no reason why the court should not allow a sheriff to amend his return. *Spellmyer v. Gaff*, 112 Ill. 29, 1 N. E. 170.

80. The conclusive effect of the sheriff's return showing service upon one as guardian cannot be evaded by showing that the minors had no guardian at the time of service, where such fact does not appear of record. *Levan v. Milholland*, 114 Pa. 49, 7 Atl. 194.

81. **Ill.**—*Benefield v. Albert*, 132 Ill. 665, 24 N. E. 634. **Ia.**—*Tharp v. Brennenan*, 41 Iowa 251; *Pursley v. Hayes*, 22 Iowa 11. **Ky.**—*Brown v. Brown*, 157 Ky. 804, 164 S. W. 70 (presumption overcome by return); *Beverly v. Perkins*, 1 Duv. 251. *Compare Sutton v. Louisville*, 5 Dana 28.

As to what the return should show see *supra* I, B, 2, d.

[a] **The return to a summons against infant defendants** which recites that it was executed by delivering a true copy to each of the persons named in it negatives the presumption that the service was on any other person than the infants. *Beverly v. Perkins*, 1 Duv. (Ky.) 251.

[b] **Such a presumption is rebutted when the return shows** in addition how the process was executed and that it was not executed as required by law. *Cheatham v. Whitman*, 86 Ky. 614, 6 S. W. 595.

[c] **Although the record shows that the minor has no father or guardian living but is silent as to the mother and that service was duly made upon the infant only, in a collateral attack on a decree of partition a recital of due service upon the infant in the order renders it valid.** *Cocks v. Simmons*, 57 Miss. 183; *Billups v. Brander*, 56 Miss. 495; *Crawford v. Redus*, 54 Miss. 700.

82. **Ark.**—*Bedding v. Smith*, 13 S.

W. 734; *Boyd v. Roane*, 49 Ark. 397, 5 S. W. 704. **Ill.**—*Bear v. Fletcher*, 252 Ill. 206, 96 N. E. 997, where there was a discrepancy in the name of an infant and process was served on, and the decree of sale was against, the landowners, and advantage was not taken of the discrepancy by a plea in abatement. **N. Y.**—*Bosworth v. Vandewalker*, 53 N. Y. 597. **Tenn.**—*Hopper v. Fisher*, 2 Head 253.

[a] **If the decree fails to show service of process on the minor defendants, service on the minors in the absence of record evidence to the contrary will be presumed.** *Benefield v. Albert*, 132 Ill. 665, 24 N. E. 634.

[b] **Record Silent.**—Although the record shows no prayer for process and no issuing of summons and no notice of the appointment of a guardian ad litem, that summons was issued and served may be presumed. *Harvey v. Harvey*, 25 S. C. 283. See *Cole v. Lewis*, 159 Ky. 747, 169 S. W. 490, where pleadings and papers were lost.

[c] **From a judgment showing proper service, it may be presumed service was issued and served properly.** *Tedgerall v. Bouknight*, 25 S. C. 275.

[d] **A judgment for the sale of a minor's land, which recites, that "citation has been properly issued, served, and returned as the law directs," on collateral attack is valid, even if it appears that a process issued in the case was not properly served, because there may have been a former process which was duly issued and served.** *Lyle v. Horstman* (Tex. Civ. App.), 25 S. W. 802.

[e] **Where the record and entries in the docket show the appearance of an attorney for the infant, a petition for and the appointment of a guardian, a guardian's answer, a trial and decree, the fact of the service of the subpoena on the infant is presumptively established.** *Sloane v. Martin*, 77 Hun 249, 28 N. Y. Supp. 332, affirmed in 145 N.

Proof of service of summons need appear of record only in case the declaration or complaint is not answered;⁸³ such a presumption, however, is rebuttable.⁸⁴ And it has been held that there can be no presumption against an infant that process was served, but that the record must affirmatively show this fact.⁸⁵

f. *Cure and Waiver of Defects.*⁸⁶—The failure to make legal service of the process is not cured by the appointment of a guardian ad litem,⁸⁷ or by appearance of the parent in his own behalf,⁸⁸ or by service of summons and complaint after judgment rendered.⁸⁹ But an irregularity in service may be waived by the appearance of the infant.⁹⁰

g. *Revivor of Action.*⁹¹—On the death of a defendant the action may be revived against the infant heirs by motion and order without the service of summons.⁹² Service of the order of revivor is necessary

Y. 524, 40 N. E. 217, 45 Am. St. Rep. 630, 28 L. R. A. 349.

[f] **Presumption as to Residence and Custody of Infant.**—Where a record of a judgment which is offered in evidence shows that the infant was served with process, if there is nothing in the record to suggest the contrary, the infant will be presumed to have been residing with, and to have been under the charge of, his parents. *Brown v. Lawson*, 51 Cal. 615, 617, in which case the father was plaintiff, and hence service upon him was unnecessary.

[g] **Where there is no record showing of the acceptance of the appointment by the guardian appointed for the defendants to a bill of revivor, his appearance, or notification to appear or any other act by him, the infants are not shown to have been in court and the judgment is erroneous.** *St. Clair v. Smith*, 3 Ohio 355.

83. *Bosworth v. Vandewalker*, 53 N. Y. 597, 601.

84. *Hedlicka v. Evans* (Iowa), 145 N. W. 84.

[a] **Recital in the judgment not conclusive.** *Smith v. Reid*, 134 N. Y. 568, 31 N. E. 1082, *affirming* 19 Civ. Proc. 363, 11 N. Y. Supp. 739; *Sledge v. Elliott*, 116 N. C. 712, 21 S. E. 797. But see *Lyle v. Hostrman* (Tex. Civ. App.), 25 S. W. 802, holding that generally such recital is conclusive on collateral attack. See generally the titles "Judgments;" "Res Judicata."

85. *Carver v. Carver*, 64 Ind. 194; *Abdil v. Abdil*, 26 Ind. 287; *Martin v. Starr*, 7 Ind. 224. See *Murphy v. Shea*, 143 N. Y. 78, 37 N. E. 675; *Allen v. Allen*, 48 S. C. 566, 26 S. E. 786. But see *Brackenridge v. Dawson*, 7 Ind. 383.

[a] **Where it appears that the infant is a non-resident, the record must show publication in the mode prescribed by the statute.** The fact that a person, styling himself guardian ad litem, appeared for the infant and made a defense, is insufficient. Where a decree against an infant defendant is assailed on error, the uniform holding of the court has been that it cannot be supported unless the record shows affirmatively, that in the precise mode the statutes and rules of practice prescribe, the infant has been brought before the court, and to represent and defend in his behalf a guardian ad litem has been appointed. *Rowland v. Jones*, 62 Ala. 322, and authorities cited. See *Woods v. Montevallo Coal & T. Co.*, 107 Ala. 364, 18 So. 108. See also *Caster v. Georgia Bank*, 24 Ala. 37; *Erwin v. Ferguson*, 5 Ala. 158; *Watker v. Hallett*, 1 Ala. 379.

86. See generally the title "Service of Process and Papers."

87. *Helms v. Chadbourne*, 45 Wis. 60.

88. *Gray v. Palmer*, 9 Cal. 616.

89. *Bellamy v. Guhl*, 62 How. Pr. (N. Y.) 469.

90. **Ark.**—*Williams v. Ewing*, 31 Ark. 229, by filing answer. **N. Y.** *Thistle v. Thistle*, 66 How. Pr. 472, appearance of non-resident minor by guardian ad litem. **N. C.**—*Turner v. Douglass*, 72 N. C. 127, 132, by filing answer.

Compare Woods v. Montevallo Coal & T. Co., 107 Ala. 364, 18 So. 108.

91. See generally the titles "Revivor;" "Survival."

92. **Ark.**—*Evans v. Davies*, 39 Ark. 235; *Haley v. Taylor*, 39 Ark. 104. **Cal.** *Emeric v. Alvarado*, 64 Cal. 529, 2 Pac.

to obtain jurisdiction of the infants.⁹³ This order is served in the same manner as a summons.⁹⁴

C. PLEADINGS. — 1. *Actions by Infants.* — a. *Complaint or Declaration.* — In an action by an infant the fact of infancy should be alleged,⁹⁵ but the age of the infant need not be stated.⁹⁶ Disaffirmance of a contract made during plaintiff's minority need not be alleged where the bringing of the action itself amounts to such a disaffirmance,⁹⁷ nor where it is properly a matter of defense.⁹⁸

The appointment of a representative for the infant being a traversable fact, it should be alleged.⁹⁹ It need not be averred that the consent of the next friend to the appointment has been filed.¹

418. S. C.—*Lyles v. Haskell*, 35 S. C. 391, 14 S. E. 829.

[a] In *Tennessee*, under the Code, §2855, a suit may be revived in the name of infants by their next friend by motion in the same way as it might be revived by bill of revivor by next friend. *Jones v. McKenna*, 4 Lea 630, 639.

[b] If the defendants in the bill of revivor be minors, a guardian ad litem must be appointed for them, who must be brought before the court as in other cases, by his voluntary act or by process. *St. Clair v. Smith*, 3 Ohio 355.

93. *Cox v. Story*, 80 Ky. 64, 67. See *Chambers v. Warren*, 6 B. Mon. (Ky.) 244.

94. *Ala.*—*Wells v. American Mtg. Co.*, 109 Ala. 430, 20 So. 136. *Ark.*—*Haley v. Taylor*, 39 Ark. 104; *Evans v. Davies*, 39 Ark. 235, 237. *Cal.*—*Emerie v. Alvarado*, 64 Cal. 529, 2 Pac. 418. *Ky.*—*Brown v. Brown*, 157 Ky. 804, 164 S. W. 70. S. C.—*Lyles v. Haskell*, 35 S. C. 391, 14 S. E. 829. *Tenn.*—*Rucker v. Moore*, 1 Heisk. 726.

See *supra*, I, B, 2, c.

[a] If a party dies before answer is filed, and leaves a minor representative, a subpoena with a copy of the bill should issue to bring the minor into court. *Lewis v. Outlaw*, 1 Overt. (Tenn.) 139.

95. See: *Fla.*—*West v. Reynolds*, 35 Fla. 317, 17 So. 740. *Md.*—*Boyd v. Boyd*, 6 Gill & J. 25. *Mo.*—*Higgins v. Hannibal*, etc. R. Co., 36 Mo. 418. *Ohio.*—*Hanley v. Levin*, 5 Ohio 228.

[a] A statement of minority in the caption of a complaint is not a sufficient averment of minority. *Funk v. Davis*, 103 Ind. 281, 2 N. E. 739.

96. *Stewart v. Chadwick*, 8 Iowa 462, 463. Compare *Keys v. McDonald*, 1 Handy (Ohio) 287, 12 Ohio Dec (Reprint) 146, holding that the process

should show the infant's correct age.

97. *Craig v. Van Bebber*, 100 Mo. 584, 13 S. W. 906.

98. *Briggs v. McCabe*, 27 Ind. 327.

99. *Cal.*—*Crawford v. Neal*, 56 Cal. 321. *Mo.*—*Cohn v. Metropolitan St. R. Co.*, 182 Mo. 577, 81 S. W. 846; *Higgins v. Hannibal*, etc. R. Co., 36 Mo. 418. *N. Y.*—*Grantman v. Thrall*, 44 Barb. 173; *Hulbert v. Young*, 13 How. Pr. 413. *Tenn.*—*Robertson v. Robertson*, 2 Swan 197, appointment must be shown by the record.

[a] But in *Bent v. Maxwell*, Land Grant & R. Co., 3 N. M. 167, it was held unnecessary that the bill should show an order appointing a prochein ami had been entered of record before the bill was filed. The recital of the fact that the infants appear by a next friend is sufficient, the presumption being that whatever steps if any were necessary to warrant that appearance had been properly taken before the bill was brought. See, however, *Wilson v. Vandyke*, 2 Harr. (Del.) 29, holding that the pleading should show permission from the court for the next friend to sue.

[b] A mistake in the allegation as to whom the appointment was made by does not conclude the plaintiff on a motion to dismiss. *Albrecht v. Canfield*, 92 Hun 240, 36 N. Y. Supp. 940.

In actions by or through guardian, see 10 STANDARD PROC. 868, et seq.

[c] Manner of appointment need not be alleged. *In re Snyder*, 136 N. Y. Supp. 670.

[d] An omission to make profert of letters of guardianship can be taken advantage of by demurrer only. *Switzer v. Holloway*, 2 Port. (Ala.) 88. See generally the title "Oyer and Profert."

1. *Dodd v. Moore*, 91 Ind. 522; *Lumpkins v. Justice*, 1 Ind. 557.

Right of or Damage to Infant — The declaration or complaint should show that right or obligation sued upon belongs to the infant,² and that he is entitled to the damages claimed.³

A complaint for the breach of a promise of marriage need not aver the consent of the parent or guardian although plaintiff is an infant.⁴

b *Demurrer*. — Where the plaintiff's infancy is not apparent from the declaration or complaint the fact that he purports to be suing by a next friend or guardian is not ground for demurrer.⁵ But where the legal incapacity of the plaintiff to sue because of his infancy is apparent on the face of the complaint, it may be objected to by demurrer,⁶ as may the failure to allege the authority of the next friend, guardian, or guardian ad litem, to represent him in the action.⁷

c *Plea in Abatement*. — Where a suit is brought by a minor in his own name, without representation, his incapacity to sue may be pleaded in abatement if not apparent from the face of the complaint.⁸ At common law, if infancy is not pleaded in abatement, the objection is

2. An allegation of indebtedness to the next friend is improper and insufficient to recover an indebtedness due the infant. *Shirley v. Bonham*, 5 W. Va. 501.

3. **Damage to Plaintiff**. — In an action to recover back money obtained of the plaintiff, a minor, it is not necessary to make any other than the general allegation of damage to the plaintiff. *Kellogg v. Kimball*, 122 Mass. 163.

[a] **In an action for damages for personal injuries** the infant plaintiff must allege facts sufficient to show that he is personally liable for medical services rendered necessitated by the injuries but not paid for. An allegation to the effect that he had incurred liability for such necessary services, is, however, sufficient without stating that there are no persons upon whom the law places the liability. *Gibbs v. Poplar Bluff L. & P. Co.*, 142 Mo. App. 19, 125 S. W. 840. Compare *Karpenski v. South River*, 83 N. J. L. 149, 83 Atl. 639.

4. *Cannon v. Alsbury*, 1 A. K. Marsh. (Ky.) 76.

5. *Funk v. Davis*, 103 Ind. 281, 2 N. E. 739; *Dodd v. Moore*, 92 Ind. 397; *Lancaster v. Gould*, 46 Ind. 397. But see *West v. Reynolds*, 35 Fla. 317, 17 So. 740.

[a] In such case it will be assumed that the plaintiff is an adult and the name of the next friend may be stricken as surplusage. *Lancaster v. Gould*, 46 Ind. 397; *Rowe v. Arnold*, 39 Ind. 24.

6. *Meyer v. Lane*, 40 Kan. 491, 20 Pac. 258. See 6 STANDARD PROC. 894.

Subject to Special Demurrer. — See 6 STANDARD PROC. 923, 931, and 936.

7. *Crawford v. Neal*, 56 Cal. 321; *Baxter v. St. Louis Transit Co.*, 198 Mo. 1, 95 S. W. 856; *Cohn v. Metropolitan St. R. Co.*, 182 Mo. 577, 81 S. W. 846; *Rogers v. Marsh*, 73 Mo. 64.

[a] **Special Demurrer Required**. *Baxter v. St. Louis Transit Co.*, 198 Mo. 1, 95 S. W. 856. See also *Crawford v. Neal*, 56 Cal. 321.

[b] **Failure to file an affidavit showing his right to sue** can be reached by special demurrer only and is waived by the filing of a general demurrer. *Maiden v. Stewart* (Ky.), 174 S. W. 5.

[c] **Objection is waived if not raised by demurrer in such case**. *Meyer v. Lane*, 40 Kan. 491, 20 Pac. 258; *Higgins v. Hannibal*, 36 Mo. 418.

See 6 STANDARD PROC. 895, note 26.

8. **Ala.** — *Howland v. Wallace*, 81 Ala. 238, 2 So. 96. **Del.** — *Graham v. Cain*, 2 Harr. 97. **Me.** — *McMullin v. McMullin*, 92 Me. 338, 42 Atl. 499, 69 Am. St. Rep. 511; *Delcourt v. Whitehouse*, 92 Me. 254, 42 Atl. 394. **Mass.** — *Smith v. Carney*, 127 Mass. 179; *Blood v. Harrington*, 8 Pick. 552. **Miss.** — *Gully v. Dunlap*, 24 Miss. 410. **N. H.** — *Young v. Young*, 3 N. H. 345. **N. Y.** — *Schemerhorn v. Jenkins*, 7 Johns. 373; *Treadwell v. Bruder*, 3 E. D. Smith 596. **N. C.** — *Carroll v. Montgomery*, 128 N. C. 278, 38 S. E. 874; *Hicks v. Beam*, 112 N. C. 642, 17 S. E. 490, 34 Am. St. Rep. 521. **S. C.** — *Drago v. Moso*, 1 Spear's L. 212, 40 Am. Dec. 592.

waived.⁹ Irregularity of service of process may be raised by plea in abatement.¹⁰

d. *Motions*.¹¹—It has been held that the legal incapacity of the plaintiff to sue,¹² or uncertainty in the allegation of the authority of the guardian to represent him in the action¹³ may be questioned by motion.

Motion for Nonsuit.—Lack of proper representation by an infant plaintiff is not ground for motion for non-suit.¹⁴

Motion in Arrest of Judgment.—An objection that the infant plaintiff has not been properly represented in the action cannot be raised by motion in arrest of judgment.¹⁵

e. *Answer*.¹⁶—In code states, the infant plaintiff's incapacity to sue, when not apparent from the face of the petition or complaint, must be taken by answer.¹⁷ An averment of representative capacity may be put in issue by a specific denial,¹⁸ but not by a general denial.¹⁹

9. 10 STANDARD PROC. 748. See also 1 STANDARD PROC. 53, 56.

[a] **Must Be Made Before Answer.** *Moke v. Fellman*, 17 Tex. 367.

Raising Objection by Answer.—See *infra*, I, C, 1, e.

[b] **Objection at Trial Too Late.** *Blumauer v. Clock*, 24 Wash. 596, 64 Pac. 844.

10. *Miller v. Luckey*, 132 Ga. 581, 64 S. E. 658. See generally the title "Service of Process and Papers."

11. **Improper Entitling of Cause.** *Motions* as a means of questioning, see *supra*, I, A.

12. *Treadwell v. Bruder*, 3 E. D. Smith (N. Y.) 596, motion to set aside the proceedings appointing guardian ad litem or next friend.

[a] **Since the appointment of a guardian ad litem is made in the action**, if an appointment has not been duly made, or if any person assumes to act as guardian without any appointment, the better and more convenient practice is to take preliminary objection by motion, before interposing an answer to the merits. An answer denying the allegation of appointment does put the fact in issue. *Schuek v. Hagar*, 24 Minn. 339.

13. *Sere v. Coit*, 5 Abb. Pr. (N. Y.) 481.

As to the method of attacking uncertainty generally see 4 STANDARD PROC. 859; 6 STANDARD PROC. 905, 935; 10 STANDARD PROC. 870.

14. **N. J.**—*Smith v. Van Houten*, 9 N. J. L. 381. **N. Y.**—*Schemerhorn v. Jenkins*, 7 Johns. 373. **S. C.**—*Drago v. Moso*, 1 Spears 212, 40 Am. Dec. 592.

15. *Rogers v. Marsh*, 73 Mo. 64. See generally 2 STANDARD PROC. 1011, et seq.

16. **Answers generally**, see the titles "Answers;" "Bills and Answers."

17. **Ind.**—*Hollingsworth v. State*, 8 Ind. 257. **Kan.**—*Meyer v. Lane*, 40 Kan. 491, 20 Pac. 258. **Mo.**—*Rogers v. Marsh*, 73 Mo. 64. **N. C.**—*Hicks v. Beam*, 112 N. C. 642, 17 S. E. 490.

See also 10 STANDARD PROC. 869.

But see *Schuek v. Hagar*, 24 Minn. 339, a statement of which is made *supra*, I, C, 1, e.

[a] The defendant must allege plaintiff's infancy and prove it. *House v. Croft*, 8 Mart. N. S. (La.) 704.

18. *Baxter v. St. Louis Transit Co.*, 198 Mo. 1, 95 S. W. 856.

As to denials generally, see the title "Denials."

[a] Where the petition alleges the appointment of the next friend "by order of the court," which meant that his appointment was a matter of record in that court, such an allegation can only be put in issue by a plea of null tiel record—under the Missouri code by special denial. *Wegenschiede v. St. Louis Transit Co.*, 118 Mo. App. 295, 94 S. W. 774.

19. *Baxter v. St. Louis Transit Co.*, 198 Mo. 1, 95 S. W. 856; *Cohn v. Metropolitan St. R. Co.*, 182 Mo. 577, 81 S. W. 846; *Morgan v. Hager & Sons Hinge Mfg. Co.*, 120 Mo. App. 590, 97 S. W. 638. See *O'Donnell v. Butte*, 44 Mont. 97, 119 Pac. 281; and 7 STANDARD PROC. 94.

[a] An answer, however, which "specifically denies that M. C. is the

Where defendant relies upon a contract with a minor and claims a ratification after majority, he must make a sufficient allegation of such ratification.²⁰

2. Actions Against Infants. — a. *Declaration, Complaint or Bill.* In an action against an infant, the plaintiff must allege such facts as show a liability on his part,²¹ or otherwise show that he is a proper party defendant.²² And local rules of practice may make it necessary to state the age of infant defendants.²³

Ratification or New Promise. — When the plaintiff relies upon a new promise made by the infant after attaining his majority, he should declare upon the new contract.²⁴ He need not, however, allege in his complaint, ratification after majority, of the contract relied upon.²⁵

b. *Plea or Answer.*²⁶ — (I.) **Generally.** — Before proceeding to a hearing of a cause, an answer should be filed on behalf of an infant defendant by his guardian ad litem,²⁷ and such answer must not be the

next friend of the plaintiff herein" is not a general denial. *Cohn v. Metropolitan St. R. Co.*, 182 Mo. 577, 81 S. W. 846.

20. Where plaintiff sued on the common counts for services rendered for defendant while plaintiff was a minor, the defendant answered "that said services were rendered in compliance with a contract made between plaintiff and defendant . . . and that the plaintiff, after he was of full age, and with a full knowledge of the facts, ratified and confirmed said agreement." On demurrer, the averment of ratification was held sufficient. *Voiles v. Beard*, 58 Ind. 510.

21. A complaint in an action against an infant for necessities (1) is sufficient if it contains allegations which if alleged in a declaration at common law would have stated a cause of action of debt, for board and lodging, or goods furnished. *Goodman v. Alexander*, 165 N. Y. 289, 59 N. E. 145, 55 L. R. A. 781. (2) It is not necessary to allege in addition that the infant has no father or other person standing in loco parentis who both could and would support the infant. *Goodman v. Alexander*, 165 N. Y. 289, 59 N. E. 145, 55 L. R. A. 781, reversing 28 App. Div. 227, 50 N. Y. Supp. 881. But see *Latham v. Kolb*, 76 Ga. 291, holding a complaint upon a promissory note given by the defendant during minority should allege that the note was given in payment for necessities furnished the defendant while a minor.

22. On the foreclosure of a mortgage where there are infant defendants

the complaint must allege the requisite facts to show what the interests of the infants in the premises are. *Aldrich v. Lapham*, 6 How. Pr. (N. Y.) 129.

23. A bill in equity against infant defendants should not only allege the fact of infancy but also allege whether the infants are over or under the age of fourteen years, under the rules of practice. *Hibbler v. Sprowl*, 71 Ala. 50.

24. *Bliss v. Perryman*, 2 Ill. 484, 485.

25. *American Freehold L. Mtg. Co. v. Dykes*, 111 Ala. 178, 18 So. 292, 56 Am. St. Rep. 38. See *infra*, I, C, 2, c.

[a] In *Stern v. Freeman*, 4 Mete. (Ky.) 309, it was held that under the code, where the plea of infancy is relied on in the defendant's answer to a suit upon a note, the plaintiff has a right to prove a ratification of the contract without averring it in his pleadings.

26. See generally the titles "Abatement, Pleas Of;" "Answers;" "Bills and Answers;" "Denials;" "Plea in Equity;" "Pleas."

27. See the title "Guardian Ad Litem," 10 STANDARD PROC. 757.

[a] If minor co-defendants have no separate or special defense, a separate and special answer need not be filed in their behalf, but they may join with the other defendants. *Western Lumb. Co. v. Phillips*, 94 Cal. 54, 29 Pac. 328.

[b] The guardian ad litem may adopt the answer that has been filed for the defendants when such answer denies in detail the allegations of complaint and sets forth affirmative matter of defense. *White v. Morris*, 107 N. C. 92, 12 S. E. 80.

guardian's personal answer, but the answer of the infant by the guardian.²⁸ But the infant is not bound by the answer of the guardian *ad litem*; or prejudiced by his failure to answer, proof of all material allegations against an infant being required,²⁹ and though under oath it

[c] **The infant is not allowed to answer personally**, and his answer by his guardian is a pleading merely and not an examination for the purposes of discovery, although an answer on oath is not waived by the complainant. *Bulkeley v. Van Wyck*, 5 Paige Ch. (N. Y.) 536.

28. *Tibbs v. Allen*, 27 Ill. 118, 119; *Johnson v. McCabe*, 42 Miss. 255. See 10 STANDARD PROC. 870, 871. But see *Durrett v. Davis*, 24 Gratt. (Va.) 302. *Compare* *Rieman v. Von Kapff*, 76 Md. 417, 25 Atl. 387, holding in a collateral proceeding that the answer which was complete in all other respects was not invalid because of the failure of the guardian to add his signature.

29. **U. S.**—*White v. Miller*, 158 U. S. 128, 15 Sup. Ct. 788, 39 L. ed. 921. **Ala.** *Stammers v. McNaughton*, 57 Ala. 277; *Matthews v. Dowling*, 54 Ala. 202. **Ark.** *Sexton v. Cribbens*, 80 Ark. 519, 98 S. W. 116; *Pinchback v. Graves*, 42 Ark. 222. **Fla.**—*Mote v. Morton*, 52 Fla. 548, 41 So. 607; *Lucas v. Wade*, 43 Fla. 419, 31 So. 231; *Walker v. Redding*, 40 Fla. 124, 23 So. 565; *Braswell v. Downs*, 11 Fla. 62. **Ill.**—*Wilhite v. Pearce*, 47 Ill. 413; *Quigley v. Roberts*, 44 Ill. 503; *Rhoads v. Rhoads*, 43 Ill. 239; *Tibbs v. Allen*, 27 Ill. 119 (the infants are in no way affected by the answer of the guardian); *Hitt v. Ormsbee*, 12 Ill. 166; *McClay v. Norris*, 9 Ill. 370. **Ind.** *Crain v. Parker*, 1 Ind. 374; *Hough v. Canby*, 8 Blackf. 301; *Hough v. Doyle*, 8 Blackf. 300. **Ia.**—*Ralston v. Lahee*, 8 Iowa 17, 74 Am. Dec. 291. **Me.** *Tucker v. Bean*, 65 Me. 352. **Md.**—*Stewart v. Duvall*, 7 Gill & J. 179; *Watson v. Godwin*, 4 Md. Ch. 25. **Mich.**—*Cooper v. Mayhew*, 40 Mich. 528; *Thayer v. Lane*, Walk. Ch. 200. **Miss.**—*Johnson v. McCabe*, 42 Miss. 255; *Ingersoll v. Ingersoll*, 42 Miss. 155. **Mo.**—*Collins v. Trotter*, 81 Mo. 275; *Révely v. Skinner*, 33 Mo. 98; *Fink v. Kansas City So. R. Co.*, 161 Mo. App. 314, 143 S. W. 568. **N. J.**—*Shultz v. Sanders*, 38 N. J. Eq. 154. **N. Y.**—*Mills v. Dennis*, 3 Johns. Ch. 367; *Wright v. Miller*, 1 Sandf. Ch. 103; *James v. James*, 4 Paige Ch. 115; *Ahearn v. Bowery Savings Bk.*, 164 App. Div. 809, 150 N. Y.

Supp. 244; *Murphy v. Holmes*, 87 App. Div. 366, 84 N. Y. Supp. 806; *Bates v. Violet*, 33 App. Div. 436, 53 N. Y. Supp. 893. **Tenn.**—*Crabtree v. Niblett*, 11 Humph. 488. **W. Va.**—*Glade Coal Min. Co. v. Harris*, 65 W. Va. 152, 63 S. E. 873.

[a] **Attitude of the Law Toward Infants.**—"Chancellor Kent says 'the law is so careful of the rights of infants that if they be made defendants at the suit of creditors, the answer of the guardian *ad litem* does not bind or conclude them. Such an answer *pro forma* leaves the plaintiff to prove his case and throws the infant upon the protection of the court.' 2 Kent Com. 258." *Braswell v. Downs*, 11 Fla. 62.

As to judgments by default, see *infra*, I, G. 2.

[b] **When Judgment May Be Avoided.**—A decree upon a formal answer would not bind the infant and he could open it, or set it aside, when he comes of age. *Mills v. Dennis*, 3 Johns. Ch. (N. Y.) 367. See *infra*, I, G. 9.

[c] **Effect of Answer.**—(1) The answer of an infant, however, neither admits nor denies the matters set forth in the bill and the effect of it is to put the complainant to the proof of all the material averments in his bill. *Rieman v. Von Kapff*, 76 Md. 417, 25 Atl. 387. (2) An infant cannot be bound by the answer of his guardian, if he shows his dissent to it within the proper time, although such answer will be evidence against him if at such time he neither amends nor makes a new answer, which he may do. *Prutzman v. Pitesell*, 3 Har. & J. (Md.) 77.

[d] **By making an infant a complainant instead of a defendant the necessity for proving the allegations of the petition is not avoided.** *Benson v. Wright*, 4 Md. Ch. 278; *Kent's Admr's v. Tancychill*, 6 Gill & J. (Md.) 1. See also *Davis v. Helbig*, 27 Md. 452, 92 Am. Dec. 646; *Watson v. Godwin*, 4 Md. Ch. 25.

[e] **Objection to Jurisdiction.** There are no exceptions in favor of infants to the statutory requirements, that objections to the jurisdiction of the court must be taken in the mode

is neither evidence in his favor³⁰ nor against him.³¹ It has been held that the answer of an infant cannot be excepted to for insufficiency.³²

Form of Answer.—While a guardian ad litem should make a full and specific answer,³³ since the court will not permit the infant's rights to be prejudiced by the guardian's failure to do his duty in this respect,³⁴ a formal answer which neither admits nor denies the plaintiff's allegations but places the infant under the protection of the court, is held to be sufficient, being equivalent to a denial of the plaintiff's case.³⁵

(II.) Infancy as a Defense.—The plea of infancy is a personal privilege, available only to the infant,³⁶ or his heirs,³⁷ or personal representative,³⁸ but not to persons merely in privity of estate.³⁹ The general rule is that this defense to become available must be pleaded specially,⁴⁰ though it would seem that this rule does not apply to a defend-

prescribed. *Boyd v. Martin*, 9 Heisk. (Tenn.) 382.

30. *Johnson v. McCabe*, 42 Miss. 255; *Thayer v. Lane*, Walk. Ch. (Miss.) 200.

31. **Md.**—*Benson v. Wright*, 4 Md. Ch. 278; *Harris v. Harris*, 6 Gill & J. 111; *Kent's Admrs. v. Taneyhill*, 6 Gill & J. 1. **Miss.**—*Johnson v. McCabe*, 42 Miss. 255; *Thayer v. Lane*, Walk. Ch. 200. **Va.**—*Bank v. Patton*, 1 Rob. 528.

Admissions in pleadings, see *infra*, I, C, 6.

32. *Leggett v. Sellon*, 3 Paige Ch. (N. Y.) 84.

33. See 10 STANDARD PROC. 758.

34. See *supra*, this section.

35. **Fla.**—*Note v. Morton*, 52 Fla. 548, 41 So. 695; *Lucas v. Wade*, 43 Fla. 419, 31 So. 231; *Walker v. Redding*, 40 Fla. 124, 23 So. 565; *Braswell v. Downs*, 11 Fla. 62. **Ill.**—*Skaggs v. Kincaid*, 48 Ill. App. 608. **Ind.**—*Alexander v. Fray*, 9 Ind. 481. **Mass.**—*Walsh v. Walsh*, 116 Mass. 377, 17 Am. Rep. 162. **Miss.**—*Price v. Crowe*, 44 Miss. 571. **N. Y.**—*Mills v. Dennis*, 3 Johns. Ch. 367. **S. C.**—*Boozer v. Teague*, 27 S. C. 348, 3 S. E. 551.

See 10 STANDARD PROC. 758, 759.

[a] The answer by the guardian ad litem for the infant commending themselves and their rights to the protection of the court and asking that no decree be made to their prejudice, is sufficient. *Proctor v. Scharff*, 80 Ala. 227, 229.

36. **U. S.**—*Sliver v. Shelback*, 1 Dall. 165, 1 L. ed. 84. **Ala.**—*Hutton v. Williams*, 60 Ala. 107; *Shropshire v. Burns*, 46 Ala. 108; *Jefford v. Ringgold*, 6 Ala. 544. **Cal.**—*Hastings v. Dollarhide*, 24 Cal. 195. **Ind.**—*Blake v. Douglass*, 27 Ind. 416. **N. Y.**—*Beardsley v. Hotchkiss*, 96 N. Y. 201.

[a] **A joint plea of infancy of one defendant upon a joint and several bond is bad on demurrer.** *Bordentown Twp. v. Wallace*, 50 N. J. L. 13, 11 Atl. 267. See also *Hutton v. Williams*, 60 Ala. 107.

37. *Hastings v. Dollarhide*, 24 Cal. 195.

38. *Hutton v. Williams*, 60 Ala. 107; *Shropshire v. Burns*, 46 Ala. 108; *Jefford v. Ringgold*, 6 Ala. 544; *Hastings v. Dollarhide*, 24 Cal. 195.

39. *Harris v. Ross*, 112 Ind. 314, 13 N. E. 873.

40. **Ala.**—*Sanders v. Williams*, 163 Ala. 451, 50 So. 893. **Del.**—*Jarman v. Windsor*, 2 Harr. 162. **Ill.**—*Curry v. St. John Plow Co.*, 55 Ill. App. 82. **Ind.**—*La Grange C. Inst. v. Anderson*, 63 Ind. 367; *Blake v. Douglass*, 27 Ind. 416; *Daugherty v. Reveal*, 54 Ind. App. 71, 102 N. E. 381. **Ky.**—*Mullins v. Watkins*, 146 Ky. 773, 143 S. W. 370; *Bryant v. Pottinger*, 6 Bush. 473; *McJohnston v. Armstrong*, 14 Ky. L. Rep. 621. **La.**—*Patterson v. Frazer*, 8 La. Ann. 512. **Miss.**—*Chicago B. & M. Co. v. Higginbotham*, 29 So. 79. **N. Y.**—*Reynolds v. Alderman*, 54 Misc. 73, 103 N. Y. Supp. 863; *Cutter v. Getz*, 22 Alb. L. J. 97. **Tex.**—*Foster v. Eoff*, 19 Tex. Civ. App. 405, 47 S. W. 399.

[a] **In Foreclosure Suit.**—When infant has signed a mortgage, the proper time to plead infancy in order to avoid it is in the action of foreclosure, on the sole ground of infancy when he executed the mortgage. *Hunter v. Bearn*, 3 Ky. L. Rep. 327.

[b] In an action upon a mortgage executed by a husband and his infant wife, a plea of infancy to be sufficient must, in addition to the allegation of the wife's minority, either aver that

ant who is still an infant and therefore under the protection of the court,⁴¹ and it has been held that this defense may be proved under the general issue,⁴² and that the plea of infancy is not a dilatory plea but one going to the foundation of the action.⁴³

c. *Replication*.—In actions at law, matters in avoidance of a plea of infancy, such as ratification, should be pleaded in the replication.⁴⁴

3. *Verification of Infant's Pleadings*.—The pleadings of an infant may be verified by his next friend or guardian ad litem.⁴⁵ Because the guardian ad litem may know nothing of the facts the answer of the infant need not be verified in some states,⁴⁶ though verification may be

the property is the separate property of the wife, or that the husband was also a minor at the time of the execution of the mortgage. *Baker v. Gilbert*, 93 Ind. 70.

[c] The court will not discharge a defendant out of custody upon the ground of infancy where there is no suggestion of fraud or imposition but will leave him to make use of that fact upon his defence. *Clemson v. Bush*, 3 Binn. (Pa.) 413.

[d] A defendant who has failed to avail himself of the plea of infancy has no remedy by writ of error coram nobis. *Cohoe v. Baer*, 134 Ind. 375, 32 N. E. 920.

[e] If infancy is not pleaded the judgment is as binding upon the infant as if he were of age. *Cohoe v. Baer*, 134 Ind. 375, 32 N. E. 920.

Form of plea or answer, see 9 STANDARD PROC. 610.

[f] In an action on a promissory note alleged to have been executed by a co-partnership, defendant pleaded that "during the entire continuance of the partnership" he was an infant, and that after his arrival at full age the said note was executed. It was held that this was not a plea of infancy but only an argumentative denial. *King v. Barbour*, 70 Ind. 35.

[g] That the contract was voidable need not be alleged in addition to the plea of infancy. *Stern v. Freeman*, 4 Mete. (Ky.) 309.

[h] **Where Plaintiff Alleges Fraudulent Concealment of Non-Age**.—Plaintiff alleged that at the time of sale defendant had the appearance of and held himself out as a man of full age, and that he concealed his infancy from plaintiff and thereby fraudulently obtained the goods. The answer pleaded infancy, denied concealment of non-age and alleged that agent of plaintiff knew of defendant's infancy at the time of

the sale. Knowledge of the agent was denied by replication. The court held that the denial of the defendant that he concealed his infancy was not a good plea. "His defense was an affirmative defense and he should have stated that he did communicate to plaintiff the fact of his minority." *Adams v. Hopkins*, 16 Ky. L. Rep. 678, 29 S. W. 293.

41. See *supra*, I, C, 2, b, (D).

42. *U. S.—Stansbury v. Marks*, 4 Dall. 130, 1 L. ed. 771. *Contra*, *Young v. Bell*, 1 Cranch C. C. 342, 30 Fed. Cas. No. 18,152, holding infancy cannot be given in evidence on a plea of nil debet. *Md.—Forrestell v. Wood*, 23 Atl. 133. *N. Y.—Walling v. Toll*, 9 Johns. 141. *Vt.—Kimball v. Lamson*, 2 Vt. 138.

As to what may be proved under the general issue or general denial, see the title "Denials."

43. *Green v. Wheeler*, 2 Ill. 554.

44. *American Freehold L. Mtg. Co. v. Dykes*, 111 Ala. 178, 18 So. 292, 56 Am. St. Rep. 38; *Petrow v. Wiseman*, 40 Ind. 148; *Kirby v. Cannon*, 9 Ind. 371.

Form of replication, see 9 STANDARD PROC. 611.

[a] A reply that the debt sued upon was for necessities is too vague because it does not specify the items. *Burr v. Wilson*, 18 Tex. 368.

Amendment of bill in equity to introduce matters in avoidance of a plea of infancy, see *infra* I, C, 5.

45. *Ark.—Reed v. Ryburn*, 23 Ark. 47. *Ind.—Turner v. Cook*, 36 Ind. 129. *Kan.—Wilson v. Menachas*, 40 Kan. 618, 20 Pac. 468. *N. Y.—Clay v. Baker*, 41 Hun 58, the guardian ad litem must verify as a party and not as an agent or attorney of the infant. *Wis.—Phillips v. Transit Co.*, 137 Wis. 189, 118 N. W. 529.

46. *Mo.—Revely v. Skinner*, 33 Mo. 98. *N. Y.—Roosevelt v. Schermerhorn*, 32 Misc. 287, 66 N. Y. Supp. 306, W. Va.

required in others, at least under some circumstances.⁴⁷

4. Time To Plead.⁴⁸ — Where the rules of court specify a definite time in which dilatory pleas must be filed, such time does not begin to run against an infant until the appointment of his guardian ad litem.⁴⁹

5. Amendment of Pleadings. — A mere defect in the form of the pleadings as bringing the action in the name of the next friend rather than in the name of the infant,⁵⁰ or in not stating in the complaint that the infants suing are the only ones entitled to bring the action⁵¹ may be cured by amendment. In some jurisdictions in equity, facts overcoming a plea of infancy should be introduced by amendment into the bill in equity.⁵²

6. Admissions in Pleadings. — An admission in a pleading is not binding upon the infant.⁵³

7. Parol Demurrer. — In actions at law involving his inheritance in lands the infant, at common law, could interpose what was called his parol demurrer, for the purpose of staying the action until his majority. This practice is now obsolete.⁵⁴

Eakin v. Hawkins, 52 W. Va. 124, 43 S. E. 211, unless it be a proceeding to sell or lease the infant's real estate.

See generally the title "Verification."

[a] **Raising Issue of Execution of Instruments.** — Under a statute providing that it is unnecessary for a guardian ad litem to verify his answer in order to put in issue the execution of written instruments, a general denial filed by such guardian puts in issue every material allegation of a petition, including allegations of the execution of written instruments and other allegations which an adult must deny under oath. *Sims v. Hedges*, 32 Okla. 683, 123 Pac. 155.

47. See *Martin v. Porter*, 4 Heisk. (Tenn.) 407; *Eakin v. Hawkins*, 52 W. Va. 124, 43 S. E. 211.

[a] **Presumption as to Verification.** The decree stating that the cause came on to be heard upon the answer of the guardian ad litem, it will be presumed that the answer was sworn to, although there is not now any evidence of the fact in the record. *Durrett v. Davis*, 24 Gratt. (Va.) 302. *Contra*, *Hull v. Hull*, 26 W. Va. 1.

48. See generally the title "Time To Plead."

49. *Fall River Foundry Co. v. Doty*, 42 Vt. 412.

50. *Ga.* — *Van Pelt v. Chattanooga R. & C. R. Co.*, 89 Ga. 706, 15 S. E. 622. *Kan.* — *Wilson v. Meneschas*, 40 Kan. 648, 20 Pac. 468. *N. D.* — *Willard v. Mohr*, 24 N. D. 390, 139 N. W. 979.

Amendments as to parties generally, see the title "Parties."

[a] **There is not a material substitution of one party plaintiff for another**, where in the original complaint it is alleged that minor plaintiffs sue by their next friend, A., guardian, and in the amended complaint by their next friend and guardian, A. Scroggins v. Oliver, 7 Ind. Ter. 740, 104 S. W. 1161.

51. A declaration at the suit of children for the homicide of their father is amendable by alleging that the deceased left no widow, and that the plaintiffs are all the children which survived him. *Van Pelt v. Chattanooga R. & C. R. Co.*, 89 Ga. 706, 15 S. E. 622.

52. **Plaintiff should introduce facts constituting a ratification or other matter of avoidance into his pleading by amending his bill.** *American Freehold Land Mtg. Co. v. Dykes*, 111 Ala. 178, 18 So. 292. See generally 8 STANDARD PROC. 489.

53. See *supra*, I, C, 2, b, (I). See also 1 ENCY. OF EV. 460, 569.

[a] **Admissions in answers of adult co-defendant cannot bind the infant defendant.** *Childers v. Milam*, 68 W. Va. 503, 70 S. E. 118.

54. See the following cases: *Cal.* *Joyce v. McAvoy*, 31 Cal. 274. *Del.* *Lockwood v. Stradley*, 1 Del. Ch. 298, 303. *Ill.* — *Enos v. Capps*, 15 Ill. 277; *McClay v. Norris*, 9 Ill. 370, 381. *Mo.* *Hendricks v. McLean*, 18 Mo. 32, 39. *N. Y.* — *Harris v. Youman*, 1 Hoffman Ch. 178. *Ore.* — *English v. Savage*, 5 Ore. 518. *Va.* — *Parker v. McCoy*, 10

In equity, however, the infant could not insist upon his non-age to suspend suit.⁵⁵

8. Aider by Verdict.—The general rules governing aider by verdict are applicable in actions to which infants are parties.⁵⁶

D. APPEARANCE.⁵⁷—**1. By Guardian.**—An appearance by the general guardian or guardian ad litem, where authorized by law, will be sufficient to give the court jurisdiction over the ward,⁵⁸ except where personal service upon the infant is necessary and has not been made.⁵⁹

2. By Attorney.—This subject will be found treated elsewhere in this work.⁶⁰

E. DISMISSAL AND DISCONTINUANCE.⁶¹—An infant may under

Gratt. 594, 607. *Can.*—S. M. Inv. & R. E. Co. v. Blanchard, 2 Manitoba 154, 155.

[a] But a Maryland statute continues the practice in that state. Tise v. Shaw, 68 Md. 1, 11 Atl. 363, 582.

55. See cases in note next preceding.

As to reservation in a decree in equity, giving the infant the right to a day in court after attaining his majority, see *infra*, I, G, 8.

56. See generally the titles "Pleading;" "Waiver."

[a] Where the parent sues as next friend of infant to recover damages for personal injuries and fails to allege that infant has no lawful guardian, such defect is cured by verdict. Gulf, C. & S. F. R. Co. v. Reagan (Tex. Civ. App.), 34 S. W. 796.

[b] A failure to aver that the parent is suing as next friend is cured by verdict. Thus where a mother sues "in behalf" of herself and minor children her status as "next friend" is established, although not stated, and the defect is cured by verdict. King v. King, 37 Ga. 205.

57. See generally the title "Appearances."

58. **U. S.**—Sprague v. Litherberry, 4 McLean 442. *Cal.*—Western Lamb. Co. v. Phillips, 94 Cal. 54, 29 Pac. 328; Richardson v. Loupe, 80 Cal. 490, 22 Pac. 227; Emerie v. Alvarado, 64 Cal. 529, 2 Pac. 418; Smith v. McDonald, 42 Cal. 484; Gronfier v. Puymiro, 19 Cal. 629. *Ky.*—Banta v. Calhoon, 2 A. K. Marsh. 166. *N. Y.*—Kindgen v. Craig, 162 App. Div. 508, 147 N. Y. Supp. 571, he must appear by guardian ad litem. *Ore.* §32 Lord's Laws; Everart v. Fischer, 147 Pac. 189, when an infant is a party he shall appear by guardian. *S. C.* Rollins v. Brown, 37 S. C. 345, 16 S. E. 44; Walker v. Veno, 6 S. C. 459; Below v. Witte, 3 S. C. 308. *Tenn.*—Scott v.

Porter, 2 Lea 224; Masson v. Swan, 6 Heisk. 450; Cowan v. Anderson, 7 Coldw. 284; Britain v. Cowen, 5 Humph. 315.

See 10 STANDARD PROC. 857, 757.

[a] **Appearance Presumed Sanctioned by Court.**—Where judgment was rendered against an infant upon process issuing against his guardian, who appeared for the infant his appearance, although irregular, is taken to have been sanctioned by the court. White v. Albertson, 14 N. C. 241, 22 Am. Dec. 719.

[b] **Record recitals conclusive** as to appearance by guardian. Smith v. Smith, 21 Ala. 761.

Procedure governing appointment of guardian, see the titles, "Guardian Ad Litem;" "Guardian and Ward."

[c] **Appointing Next Friend After Judgment.**—After judgment in favor of an infant without appointment of a next friend at the commencement of the suit, the court may appoint a next friend and approve his bond to secure the money recovered on the judgment. Jones v. Steele, 36 Mo. 324.

[d] **Permitting a foreign guardian to make defense for a non-resident infant** who is sued in this state, does not render the judgment void. Martin v. Gwynn, 90 Ark. 44, 49, 117 S. W. 754.

[e] **Where appearance by curator** is unauthorized, a judgment in favor of the infant, because of the application of statute relating to unauthorized appearance by attorney, cannot be stayed or reversed. Thomas v. St. Louis, I. M. & S. R. Co., 187 Mo. App. 420, 173 S. W. 728.

59. See *supra*, I, B, 2, b, (II).

60. 2 STANDARD PROC. 518.

Employment of attorney by guardian ad litem, see 10 STANDARD PROC. 761.

61. See generally the title "Dismissal, Discontinuance and Nonsuit."

proper circumstances discontinue his action.⁶² An action on contract, against several defendants may be discontinued as to one of them who establishes the defense of infancy, without affecting the proceedings against the others.⁶³

F. TRIAL.—1. **Generally.**—The general rules governing trials apply to cases to which infants are parties.⁶⁴

2. **Trial by Jury.**⁶⁵—It has been held that a trial by jury cannot be waived by an infant party,⁶⁶ nor by a special guardian,⁶⁷ but a judgment rendered by the court without a jury is not void.⁶⁸

3. **Questions of Law and Fact.**—The question of the infancy of a party is one of fact for the jury,⁶⁹ but the question of the due appointment of a next friend is for the court.⁷⁰

The question of whether there has in fact been a ratification,⁷¹ or an avoidance of an infant's deed or contract⁷² is a question for the jury,

62. An infant plaintiff may be allowed in the court's discretion to discontinue his suit in equity so that he may proceed in the federal courts. *Ambrosius v. Ambrosius*, 152 N. Y. Supp. 562.

63. *Woodward v. Newhall*, 1 Pick. (Mass.) 500. See more fully 7 STANDARD PROC. 668.

64. See generally the title "Trial."

[a] **Time of Trial.**—In case an infant appears and makes an issue, it may be noticed for trial at once, like other issues. *Newins v. Baird*, 19 Hun (N. Y.) 306.

[a] The case was not prematurely submitted where an answer for the infant was filed some three months previously, denying the allegations of the amended petition, and the answer of the guardian ad litem, to the effect that he had examined the record in the case and was unable to make any defense other than that already made, was filed before judgment. *Childers v. Bales* (Ky.), 124 S. W. 295.

[b] **Control of Action.**—After issue joined the guardian ad litem may accept short notice of trial, pursuant to his right to control the action. *Newins v. Baird*, 19 Hun (N. Y.) 306. See generally, 10 STANDARD PROC. 754. Compare *supra*, 1, B. 2, c, (VI).

65. See generally the title, "Juries and Jurors."

66. *Lieserowitz v. West Chicago St. R. Co.*, 80 Ill. App. 248. But see *Fairweather v. Burling*, 181 N. Y. 117, 73 N. E. 565.

[a] All partition suits to which an infant is a party should by statute be

tried by a jury. *Fairweather v. Burling*, 181 N. Y. 117, 73 N. E. 565.

[b] **Where a judgment is reversed after full age**, the fact of infancy must be tried per pais and not by inspection. *Sliver v. Shelback*, 1 Dall. (U. S.) 165, 1 L. ed. 84; *Haigler v. Way*, 2 Rich. (S. C.) 324.

67. *In re Harden's Estate*, 88 Misc. 420, 150 N. Y. Supp. 743.

68. *Hunter v. Empire State Surety Co.*, 261 Ill. 335, 103 N. E. 1052.

69. **Ala.**—*Hubbert v. Collier*, 6 Ala. 269. **Ia.**—*First Nat. Bank v. Casey*, 158 Iowa 349, 138 N. W. 897. **N. J.**—*Fenton v. White*, 4 N. J. L. 100; *Ryerson v. Grover*, 1 N. J. L. 458. **N. Y.**—*Waterman v. Waterman*, 42 Misc. 195, 85 N. Y. Supp. 377. **Ohio.**—*Rohrer v. Morningstar*, 18 Ohio 579.

70. *Heinzle v. Metropolitan St. Ry. Co.*, 182 Mo. 528, 81 S. W. 848.

71. **Mich.**—*Lynch v. Johnson*, 109 Mich. 640, 67 N. W. 908; *Tyler v. Gallop's Estate*, 68 Mich. 185, 35 N. W. 902. **N. Y.**—*Bay v. Gunn*, 1 Denio 108. **N. C.**—*Alexander v. Hutchinson*, 12 N. C. 13. **Tex.**—See *Johnson v. Johnson*, 38 Tex. Civ. App. 385, 388, 85 S. W. 1023. **W. Va.**—*Hobbs v. Hinton F. M. & P. Co.*, 82 S. E. 267.

[a] A promise, after arrival at full age, to pay a debt contracted during infancy, may be inferred, but it is an inference of fact to be drawn only by the jury. *Alexander v. Hutchinson*, 12 N. C. 13.

72. **Ala.**—*Slaughter v. Cunningham*, 24 Ala. 260. **Ia.**—*First Nat. Bank v. Casey*, 158 Iowa 349, 138 N. W. 897. **Tex.**—See *Johnson v. Johnson*, 38 Tex. Civ. App. 385, 388, 85 S. W. 1023.

as is also the question whether such action was taken within a reasonable time.⁷³

Whether alleged negligence⁷⁴ or fraud⁷⁵ of an infant is a question of law or one of fact, is determined in accordance with general rules elsewhere discussed.

Necessaries.—The question as to whether the articles, claimed in a particular case to be necessaries, are such is a mixed question of law and fact;⁷⁶ it is a question for the court to determine whether or not the articles in question belong to a class that are necessaries,⁷⁷ and it is for the jury to determine whether they are necessary and suitable to the estate and condition of the infant.⁷⁸

73. U. S.—Hegler v. Faulkner, 153 U. S. 109, 14 Sup. Ct. 779, 38 L. ed. 653. Ga.—Walker v. Pope, 101 Ga. 665, 29 S. E. 8. Ind.—Stringer v. Northwestern Mut. Life Ins. Co., 82 Ind. 100; Wiley v. Wilson, 77 Ind. 596. N. H. State v. Plaisted, 43 N. H. 413. Tenn. Scott v. Buchanan, 11 Humph. 468. Tex. Clemmer v. Price (Tex. Civ. App.), 125 S. W. 604; Simpkins v. Searcy, 10 Tex. Civ. App. 406, 32 S. W. 849, 851. W. Va. Hobbs v. Hinton F. M. & P. Co., 82 S. E. 267.

Compare 11 STANDARD PROC. 1064, 1065.

[a] **Diligence in Seeking To Set Aside Judgment.**—Whether the infant exercised reasonable diligence after reaching his majority in bringing a suit to set aside a judgment against him is for the jury. Johnson v. Johnson, 38 Tex. Civ. App. 385, 85 S. W. 1023.

[b] **Question of Mixed Law and Fact.**—What constitutes a reasonable time is sometimes a question of law, sometimes a question of fact, but ordinarily it is a question of mixed law and fact. Goodnow v. Empire Lumb. Co., 31 Minn. 468, 18 N. W. 283, 47 Am. Rep. 798; Derosia v. Winona & St. P. R. Co., 18 Minn. 119; Cochran v. Toher, 14 Minn. 293. See generally the title "Province of Judge and Jury."

[c] **Delay as a Question of Law.** Where there is a mere delay with nothing to explain or excuse it or show its necessity it will be for the court to decide as to reasonableness of the delay. Goodnow v. Empire Lumb. Co., 31 Minn. 468, 18 N. W. 283.

74. See the title "Negligence." See also: Cal.—Foley v. California Horse-shoe Co., 115 Cal. 184, 47 Pac. 42. Del. Adams v. Clymer, 1 Marv. 80, 36 Atl. 1104. Ill.—Johnson v. Chicago, 178 Ill. App. 210, 214. Mass.—O'Connor v.

Adams, 120 Mass. 427. Minn.—Olm-scheid v. Nelson-Tenney Lumb. Co., 66 Minn. 61, 68 N. W. 605; Barg v. Bous-field, 65 Minn. 355, 68 N. W. 45. Wis. Larson v. Knapp, Stout & Co. Company, 98 Wis. 178, 73 N. W. 992; Vorbrich v. Gaider & Paeschke Mfg. Co., 96 Wis. 277, 71 N. W. 434; Christianson v. Pioneer Furniture Co., 92 Wis. 649, 66 N. W. 699; Wolski v. Knapp-Stout Co. Com-pany, 90 Wis. 178, 63 N. W. 87; Chopin v. Badger Paper Co., 83 Wis. 192, 53 N. W. 452; Nailon v. Marinette & M. Paper Co., 75 Wis. 579, 44 N. W. 772.

75. See the title "Fraud and De-
ceit."

[a] Where a minor was doing busi-ness under her father's name under such circumstances that third parties dealing with the firm might suppose that her father was the owner of the business, the question should be submitted to the jury whether or not the minor obtained the goods by fraud. Harseim v. Cohen, (Tex. Civ. App.), 25 S. W. 977.

76. Cobbeey v. Buchanan, 48 Neb. 391, 67 N. W. 176; Englebert v. Troxell, 40 Neb. 195, 58 N. W. 852; Johnson v. Lines, 6 Watts & S. (Pa.) 80, 40 Am. Dec. 542.

77. Conn.—See Stanton v. Willson, 3 Day 37, 3 Am. Dec. 255. Ill.—McKanna v. Merry, 61 Ill. 177; Maloney v. Perks, 169 Ill. App. 227. Ind.—Garr v. Has-kett, 86 Ind. 373; Henderson v. Fox, 5 Ind. 489. Ky.—Beeler v. Young, 1 Bibb 519. Mass.—Merriam v. Cunningham, 11 Cush. 40. Mich.—Lynch v. Johnson, 109 Mich. 640, 67 N. W. 908. Miss. Decell v. Leventhal, 57 Miss. 331, 34 Am. Rep. 449. S. C.—Glover v. Ott, 1 McCord 572.

78. Conn.—International Text Book Co. v. Doran, 80 Conn. 307, 68 Atl. 255; Stanton v. Wilson, 3 Day 37, 3 Am. Dec. 255. Ill.—McKanna v. Merry, 61 Ill.

4. **Reference.**⁷⁹ — a. *Who May Consent Thereto.* — Although a minor cannot consent to a reference in an action to which he is a party,⁸⁰ a general guardian,⁸¹ or guardian ad litem⁸² may.

b. *When Cause Should Be Referred.* — In cases of compromise or where a consent decree is entered, it is usual to refer the cause to a master to inquire if the decree be for the benefit of the minor.⁸³ The next friend cannot withdraw himself from the suit without a reference to a master.⁸⁴

c. *Notice.* — All parties in interest including infants, upon a reference to a master, should be given notice of proceedings in the master's office.⁸⁵

177; *Maloney v. Perks*, 169 Ill. App. 227. Ind.—*Garr v. Haskett*, 86 Ind. 373; *Henderson v. Fox*, 5 Ind. 489. Ky.—*Bonney v. Reardin*, 6 Bush 34; *Beeler v. Young*, 1 Bibb. 519. Mass.—*Davis v. Caldwell*, 11 Cush. 40; *Swift v. Bennett*, 10 Cush. 436. Mich.—*Lynch v. Johnson*, 109 Mich. 640, 67 N. W. 908. Miss.—*Decell v. Lewenthal*, 57 Miss. 331, 34 Am. Rep. 449. Neb.—*Cobbe v. Buchanan*, 48 Neb. 391, 67 N. W. 176; *Englebert v. Troxell*, 40 Neb. 195, 58 N. W. 852. N. H.—*Heath v. Stevens*, 48 N. H. 251. S. C.—*Glover v. Ott*, 1 McCord 572. Tex.—*Melton v. Katzenstein* (Tex. Civ. App.), 49 S. W. 173. Vt.—*Bent v. Manning*, 10 Vt. 225.

[a] "Where the supply has been so grossly profuse as to shock the sense, it is the business of the judge to say so as a matter of law, and charge that there can be no recovery for more than was absolutely necessary." *Johnson v. Lines*, 6 Watts & S. (Pa.) 80, 40 Am. Dec. 542.

79. See the title "References."

80. *Gamache v. Prevost*, 71 Mo. 84; *Garesche v. Gambs*, 3 Mo. App. 572.

81. *Gronfier v. Puymiro*, 19 Cal. 629, 631.

82. *Where Beneficial to Infant.*—A guardian ad litem of an infant defendant, however, should not consent to a general reference to a master to take an account against the infant, until he has ascertained that the rights of the infant can be protected on such reference and that his wards will not be subjected to the expense of a double litigation. *Jenkins v. Fowler*, 4 Paige Ch. (N. Y.) 47.

83. *Allen v. McCullough*, 2 Heisk. (Tenn.) 174, 195. See *Fairweather v. Burling*, 181 N. Y. 117, 73 N. E. 565.

[a] A decree made without a reference is valid if beneficial to the minor. *Allen v. McCullough*, 2 Heisk. (Tenn.)

174, 195; *Milby v. Harrison*, 7 Coldw. (Tenn.) 191, 199.

[b] Even though the answer of the guardian ad litem admits the allegations of the bill of complaint to be true the cause should be referred to a master. *Mote v. Morton*, 52 Fla. 548, 553, 41 So. 607.

84. *Melling v. Melling*, 4 Madd. 261, 56 Eng. Reprint 702, for it may be that the suit is improper or has been improperly conducted, and he is not thus to escape costs for which he may be liable.

85. *Mote v. Morton*, 52 Fla. 548, 552, 41 So. 607; *Boyer v. Boyer*, 89 Ill. 447; *Turner v. Jenkins*, 79 Ill. 228; *McClay v. Norris*, 9 Ill. 370, 386.

[a] *Effect of Failure To Notify Guardian Ad Litem.*—Where testimony is taken before a master in chancery without any notice to the guardian ad litem of infant defendants, it is not admissible as against the infants, for want of notice, and this is true, even though the guardian may have made no objection at the hearing. *Boyer v. Boyer*, 89 Ill. 447; *Turner v. Jenkins*, 79 Ill. 228. See *Mote v. Morton*, 52 Fla. 548, 555, 41 So. 607.

[b] *The failure of the master to give notice cannot be waived or cured* as far as the infant defendants are concerned, by the fact that the guardian ad litem had notice of the application for the final decree, and did not appear to resist the same. *Mote v. Morton*, 52 Fla. 548, 553, 41 So. 607.

[c] *It is the duty of the master to see that all parties entitled to notice are duly summoned and to preserve the notices with proof of service and his report should show this fact.* *Mote v. Morton*, 52 Fla. 548, 552, 41 So. 607.

[d] *Objections to report, and proceedings thereafter, see McClay v. Norris*, 9 Ill. 370.

5. **Variance.**⁸⁵ — As in other actions the evidence, in actions against infants, must correspond with and establish the allegations in the complaint or petition.⁸⁷

6. **Verdict and Findings.**⁸⁸ — A statute providing that findings may be waived by the several parties to an issue of fact, includes infants as well as adults.⁸⁹

A verdict cannot be based upon infancy where it has not been properly made an issue.⁹⁰ But a verdict may be in favor of an infant defendant because of his infancy and against his adult co-defendants.⁹¹

G. **JUDGMENT OR DECREE.**⁹² — 1. **Generally.** — A judgment must be upon the issues presented, in an action against an infant.⁹³ The judgment in favor of⁹⁴ or against⁹⁵ the infant should be rendered for or against him individually and not for or against his next friend or guardian.⁹⁶

86. See generally the title "**Variance and Failure of Proof.**"

87. *Bliss v. Perryman*, 2 Ill. 484; *Freeman v. Nichols*, 138 Mass. 313. See *Wyzal v. Myers*, 76 Tex. 598, 13 S. W. 567.

[a] A variance in the name of an infant as stated in the complaint and in the petition for the appointment of a guardian may be disregarded as immaterial, especially when neither was the infant's true name. *Varian v. Stevens*, 2 Duer (N. Y.) 635.

88. See generally the titles "**Findings and Conclusions;**" "**Verdict.**"

89. *Western Lumb. Co. v. Phillips*, 94 Cal. 54, 29 Pac. 328.

90. *Mundina v. Perry*, 2 Stew. & P. (Ala.) 130.

91. See *Woodward v. Newhall*, 1 Pick. (Mass.) 500.

[a] In an action of *assumpsit* against several defendants the jury may find a verdict for the infant defendant and against the other defendants. *Cutts v. Gordon*, 13 Me. 474; *Hartness v. Thompson*, 5 Johns. (N. Y.) 160.

92. See generally the titles "**Decrees;**" "**Judgments.**"

93. Ark.—*Rankin v. Schofield*, 81 Ark. 440, 463, 98 S. W. 674. Cal.—*Waterman v. Lawrence*, 19 Cal. 210, 79 Am. Dec. 212. Ill.—*Waugh v. Robbins*, 33 Ill. 182; *Burger v. Potter*, 32 Ill. 66, 73. Md.—*Robinson v. Townshend*, 3 Gill & J. 413.

[a] Must correspond with the allegations of the bill. *Waugh v. Robbins*, 33 Ill. 182; *Burger v. Potter*, 32

Ill. 66, 73. See *Reavis v. Fielden*, 18 Ill. 77, 82.

94. Mich.—*Kees v. Maxim*, 99 Mich. 493, 58 N. W. 473. Mo.—*Thomas v. St. Louis, I. & M. & S. R. Co.*, 187 Mo. App. 420, 173 S. W. 728. Tex.—*Galveston Oil Co. v. Thompson*, 76 Tex. 235, 13 S. W. 60; *Texas Cent. R. Co. v. Stuart*, 1 Tex. Civ. App. 642, 20 S. W. 962; *Galveston City R. Co. v. Hewitt*, 67 Tex. 473, 3 S. W. 705, 60 Am. Rep. 32; *Island City Sav. Bank v. Wales*, 3 Wills. Civ. Cas. 244.

[a] The proper form of judgment is to recite that the plaintiff by her next friend, naming him, do have and recover the amount of the judgment for the sole use of the minor, and the judgment should also recite that the money when collected is to remain in court until the qualification of a regular guardian or the minor reaches his majority. *Texas Cent. R. Co. v. Stuart*, 1 Tex. Civ. App. 642, 20 S. W. 962.

[b] The court will upon request amend an entry of judgment so as to read in favor of the minor instead of in favor of the next friend. *Kees v. Maxim*, 99 Mich. 493, 58 N. W. 473.

95. *Tucker v. McClure*, 17 Iowa 583.

96. See 10 STANDARD PROC. 873.

[a] No judgment against a party as guardian, can have the effect to charge either the person or the estate of the infant ward. *Tobin v. Addison*, 2 Strobb. L. (S. C.) 3.

[b] Mere technical inaccuracy in the description of the capacity in which the representative of the infant appears does not render the proceedings and judgment void. *Martin v. Weyman*, 26 Tex. 460, 468.

The decree or judgment in favor of an infant and other co-parties should not be joint where it would thus become possible for the co-parties to collect or enforce the judgment without security to the infant,⁹⁷ though such a judgment or decree may be binding upon the adult co-parties.⁹⁸ It should be entered at the time prescribed by law.⁹⁹

A decree for the conveyance of infant's lands is proper according to some¹ but not according to other authorities.²

2. Judgment by Default.—A judgment taken by default against an infant is erroneous and voidable,³ but such a judgment is not

97. *Armstrong v. Walkup*, 9 Gratt. (Va.) 372.

98. If the adults file a petition for a partition of land belonging to them and some minors, a decree in conformity to their prayer although not binding on the minors is, however, conclusive on them by way of estoppel. *Kindell v. Titus*, 9 Heisk. (Tenn.) 727, 742.

99. See generally the titles "Decrees," "Judgments."

[a] It is not necessary that twenty days shall elapse between the appointment of a guardian ad litem and the entry of judgment against the infant except in case of judgment by default. *Newins v. Baird*, 19 Hun (N. Y.) 306.

[b] The fact that the guardian ad litem consents to the entry as of a date prior to the actual rendition of the decree, does not show fraud where the purpose was merely to get an earlier hearing on an appeal. *Kingsbury v. Buckner*, 124 U. S. 659, 10 Sup. Ct. 638, 33 L. ed. 1917.

1. *Pulliam v. Pulliam*, 4 Dana (Ky.) 123.

[a] Such a decree should order a special commissioner appointed by the court after judgment rendered against the infant to convey the infant's land. *Shelby v. Smith*, 2 A. K. Marsh. (Ky.) 504, 514, a decree ordering a conveyance by the guardian is erroneous.

[b] A decree against non-resident infant, subjecting his land to the payment of debts should require the statutory bond of the complainant. *Hanna v. Spotts*, 5 B. Mon. (Ky.) 362, 365, 43 Am. Dec. 132.

2. **During Minority a Conveyance Cannot Be Decreed.**—*Whitney v. Stearns*, 11 Met. (Mass.) 319; *Coffin v. Heath*, 6 Met. (Mass.) 76.

3. Ala.—*Howell v. Randle*, 171 Ala. 451, 51 So. 563; *Dunning v. Stanton*, 9 Port. 513. Ark.—*Gartin v. Schofield*, 70 Ark. 83, 66 S. W. 197; *Boel v. Roney*, 19 Ark. 397, 5 S. W. 791; *Wood-*

all v. Delatour, 43 Ark. 521. But see note 9. Fla.—*Gibbons v. McDermott*, 19 Fla. 852, 855. Ill.—*White v. Kilmartin*, 265 Ill. 525, 68 N. E. 1086; *Thomas v. Adams*, 59 Ill. 223; *Quigley v. Roberts*, 14 Ill. 593; *Rhoads v. Rhoads*, 43 Ill. 239; *Peak v. Pricer*, 21 Ill. 164; *Mastersson v. Wiswold*, 18 Ill. 48; *Cost v. Rose*, 17 Ill. 275, 276; *Hamilton v. Gilman*, 12 Ill. 259, 260; *Enos v. Capps*, 12 Ill. 255. Ind.—*Blake v. Douglass*, 27 Ind. 416. See also *Abdil v. Abdil*, 26 Ind. 287; *Richards v. Richards*, 17 Ind. 636; *Pugh v. Pugh*, 9 Ind. 132; *Wells v. Wells*, 6 Ind. 447; *Driver v. Driver*, 6 Ind. 286. Compare *Kirby v. Holmes*, 6 Ind. 33. Ind. Ter.—*Cook v. Edson Keith & Co.*, 5 Ind. Ter. 595, 82 S. W. 918. Ia.—*Ralston v. Lahee*, 8 Iowa 17, 74 Am. Dec. 291. Kan.—*Watts v. Cook*, 24 Kan. 278. Ky.—*Thornton v. McGrath*, 1 Duv. 349; *Ullery v. Blackwell*, 3 Dana 300; *Chalfant v. Monroe*, 3 Dana 35; *Bourne v. Bourne's Admr.*, 14 Ky. L. Rep. 189, 19 S. W. 401; *Marshall v. Marshall*, 7 Ky. L. Rep. 749. Compare *Covington & L. R. R. Co. v. Bowler*, 9 Bush 468 (in the case of non-resident infant defendants), and *Young v. Whitaker*, 1 A. K. Marsh. 398, after appearance by the guardian ad litem, a default may be entered for failure to plead; and note 9. Me.—*Tucker v. Bean*, 65 Me. 352. Mass.—*Walsh v. Walsh*, 116 Mass. 377, 17 Am. Rep. 162; *Swan v. Horton*, 14 Gray 179; *Knapp v. Crosby*, 1 Mass. 479. Mich.—*Ballentine v. Clark*, 38 Mich. 395. Minn.—*Eisenmenger v. Murphy*, 42 Minn. 84, 43 N. W. 784. Miss.—*McTiroy v. Alsop*, 45 Miss. 365. See *Ingersoll v. Ingersoll*, 42 Miss. 155, 163. Mo.—*Heath v. Ashley*, 15 Mo. 393. N. H.—*Beckley v. Newcomb*, 24 N. H. 359. N. J.—*Foulkes v. Young*, 21 N. J. L. 438. N. Y.—*McMurray v. McMurray*, 66 N. Y. 175; *Kellett v. Rathbun*, 4 Paige 102; *Mills v. Dennis*, 3 Johns. Ch. 367; *Bloom v. Burdick*, 1 Hill 130, 113. Compare Code

void,⁴ although some cases hold to the contrary.⁵ On the other hand, in some instances, a judgment taken by default against an infant has been held valid and binding upon him,⁶ as where a properly represented minor failed to avail himself of the plea of infancy at the proper time,⁷ or where he had been judicially emancipated,⁸ and defaults against minors are sometimes allowed by statutes under the limitations prescribed therein.⁹

Civ. Proc., §1218, which provides that "a judgment by default shall not be taken against an infant defendant, until 20 days have expired, since the appointment of a guardian ad litem." *Jackson v. Brunor*, 38 N. Y. Supp. 110. See *Newins v. Baird*, 19 Hun 306, referring to §1218, Code Civ. Proc. **N. C.** *White v. Albertson*, 14 N. C. 241, 22 Am. Dec. 719. *Compare Mauney v. Gidney*, 88 N. C. 200. **Ohio.**—*Massie v. Donaldson*, 8 Ohio 377. **Tenn.**—*Rutherford v. Richardson*, 1 Sneed 609. **Tex.**—*Carlton v. Miller*, 2 Tex. Civ. App. 619, 21 S. W. 697. **Va.**—*Lee v. Braxton*, 5 Call 459; *Fox v. Cosby*, 2 Call 1. **W. Va.** *Curtis v. Deepwater R. Co.*, 68 W. Va. 762, 768, 70 S. E. 776.

Necessity of proving case against infant, see *supra*, I, C, 2, b, (I).

[a] **Non-resident infant defendants** may be constructively summoned before the court and a voidable default judgment taken against them. *Covington & L. R. R. Co. v. Bowler*, 9 Bush (Ky.) 468. *Compare supra*, I, B, 2, c, (IV).

[b] **Withdrawal of a plea by guardian ad litem and entry of a default** is not allowable. *Peak v. Prier*, 21 Ill. 164.

4. **Ark.**—*Boyd v. Roane*, 49 Ark. 397, 5 S. W. 704. **Ind.**—*Blake v. Douglass*, 27 Ind. 416. See also *Abdil v. Abdil*, 26 Ind. 287. **Ind. Ter.**—*Cook v. Edson Keith & Co.*, 5 Ind. Ter. 595, 82 S. W. 918. **Kan.**—*Watts v. Cook*, 24 Kan. 278. **Ky.**—*Thornton v. McGrath*, 1 Duv. 349; *Bourne v. Bourne's Admr.*, 14 Ky. L. Rep. 189, 19 S. W. 401. **Minn.**—*Eisenmenger v. Murphy*, 42 Minn. 84, 43 N. W. 784. **Miss.**—*Campbell v. Hays*, 41 Miss. 561. **N. Y.**—*McMurray v. McMurray*, 66 N. Y. 175; *Althouse v. Radde*, 3 Bosw. 410; *Bloom v. Burdick*, 1 Hill 130, 143; *Jackson v. Brunor*, 17 Misc. 339, 39 N. Y. Supp. 1080. **N. C.** *White v. Albertson*, 14 N. C. 241, 22 Am. Dec. 717. **W. Va.**—*Curtis v. Deepwater R. Co.*, 68 W. Va. 762, 768, 70 S. E. 776.

[a] **Where the infant is sued as an adult** a default judgment against him is not void but simply erroneous and reviewable by motion. *Curtis v. Deepwater R. Co.*, 68 W. Va. 762, 768, 70 S. E. 776.

5. *Dohms v. Mann*, 76 Iowa 723, 39 N. W. 823. See also *Chandler v. McKinney*, 6 Mich. 217; *Brown v. Downing*, 137 Pa. 569, 20 Atl. 871.

[a] **Where there has been neither service of process upon an infant nor appearance in any form the judgment against the infant by default is absolutely void.** *Bloom v. Burdick*, 1 Hill (N. Y.) 130, 143. See *supra*, I, B, 2, b, (II).

6. See *Blake v. Douglass*, 27 Ind. 416; *Leonard v. Henderson*, 23 Gratt. (Va.) 331, 340.

7. *Blake v. Douglass*, 27 Ind. 416; *Graham v. Pinckney*, 7 Robt. (N. Y.) 147.

8. *Merriman v. Sarlo*, 63 Ark. 151, 155, 37 S. W. 879.

As to judicial emancipation, see *infra*, II.

[a] **An infant who has been judicially emancipated is competent to act for himself in an action without a guardian and is bound by his acts or failure to act.** *Merriman v. Sarlo*, 63 Ark. 151, 37 S. W. 879.

9. See the following: **Ark.**—*Rankin v. Schofield*, 70 Ark. 83, 66 S. W. 197, "no judgment can be rendered against an infant until after a defense by a guardian." **Ky.**—*Adams v. De Dominques*, 129 Ky. 599, 112 S. W. 663; *Womble v. Tricé's Guardian*, 23 Ky. L. Rep. 1939, 66 S. W. 370, 67 S. W. 9, the guardian must first file a report stating that after a careful examination of the case he is unable to make a defense. If the record does not show such report a default judgment will be reversed. **N. Y.**—Code Civ. Proc., §1218; *Kindgen v. Craig*, 162 App. Div. 508, 147 N. Y. Supp. 571; *Jackson v. Brunor*, 17 Misc. 339, 39 N. Y. Supp. 1080; *Appel v. Brooks*, 4 Misc. 626, 24 N. Y. Supp.

3. **Decree Pro Confesso.**—A bill cannot be taken as confessed by an infant, nor a decree by confession entered against him.¹⁰ For a like reason, a counterclaim cannot be taken as confessed against an infant.¹¹

The error of entering a decree pro confesso against an infant is not cured by the reservation of a right to show cause against the decree after the infant attains majority.¹² nor by an acknowledgment of the liability after majority.¹³ But a decree so rendered will not be set aside except for equitable reasons.¹⁴

4. **Consent Judgments.**—A decree cannot be rendered against an infant upon his consent,¹⁵ or with the consent of his guardian ad litem

100; *Graham v. Pinckney*, 7 Robt. 147.

[a] **Investigation on Practical Default.**—In a partition suit, when no adult defendant has answered, and where the infant's answer merely submits his rights to the court, and raises no issue, there is a practical default, and an investigation is required by §1545 of the Code of Civil Procedure to aid the court in entering judgment. *Fairweather v. Burling*, 181 N. Y. 117, 73 N. E. 565. See also *Kindgen v. Craig*, 162 App. Div. 508, 147 N. Y. Supp. 571.

10. **U. S.**—*Walton v. Coulson*, 1 McLean 120, 29 Fed. Cas. No. 17,132, affirmed in 9 Pet. 62, 9 L. ed. 51. **Ala.** *Howell v. Randle*, 171 Ala. 451, 460, 54 So. 563; *Griffith v. Ventress*, 91 Ala. 366, 369, 8 So. 312, 24 Am. St. Rep. 918; *Daily v. Reid*, 74 Ala. 415; *Tabor v. Lorraine*, 53 Ala. 543, 546; *Dunning v. Stanton*, 9 Port. 513. **Ill.**—*Preston v. Hodgen*, 50 Ill. 56, 61; *Quigley v. Roberts*, 44 Ill. 503; *Rhoads v. Rhoads*, 43 Ill. 239; *Reddick v. Pres. State Bank*, 27 Ill. 145, 148; *Chaffin v. Kimball*, 23 Ill. 33; *McClay v. Norris*, 9 Ill. 370. **Ind.**—*Knox v. Coffey*, 2 Ind. 161. **Ky.** *Berryhill v. Holland*, 124 Ky. 615, 618, 99 S. W. 902; *Henley v. Gore*, 4 Dana 123; *Carneal v. Streshley*, 1 A. K. Marsh. 471; *Hanna v. Spotts*, 5 B. Mon. 362, 364. **La.**—*Bondreaux v. Lower Terrebonne R. & Mfg. Co.*, 12 La. 98, 112, 53 So. 456 (the tutor may submit the matter to the court, he need not deny the verity of allegations known to be true or make a defense known to be unavailing); *Metcalfe v. Alter*, 31 La. Ann. 389; *De Moss v. Cobb*, 23 La. Ann. 336. **Me.**—*Tucker v. Bean*, 65 Me. 552. **Md.**—*Tiernan v. Hammond*, 41 Md. 518. **Mich.**—*Soper v. Fry*, 37 Mich. 236, 239. **Miss.**—*McIlvoy v. Alsop*, 45 Miss. 365, 374; *Wells v. Smith*, 44 Miss.

296, 303; *Hargrove v. Martin*, 6 Smed. & M. 61, 68. **N. Y.**—*Mills v. Dennis*, 3 Johns. Ch. 367; *Bennett v. Davis*, 6 Cow. 393. See *Flynn v. Powers*, 54 Barb. 550, 555. **Pa.**—*Knox v. Flack*, 22 Pa. 337; *Rogers v. Smith*, 4 Pa. 93, 100; *Read v. Bush*, 5 Binn. 455. See *Etter v. Curtis*, 7 Watts & S. 170. **S. C.** *Bailey v. Whaley*, 14 Rich. Eq. 81. **Tenn.** *Rutherford v. Richardson*, 1 Sneed 609. **Va.**—*Daingerfield v. Smith*, 83 Va. 81, 1 S. E. 599. **W. Va.**—*Holderby v. Hagan*, 57 W. Va. 341, 346, 50 S. E. 437.

[a] **Reversal in Appeal.**—*Ingersoll v. Ingersoll*, 42 Miss. 155.

[b] If a decree pro confesso be allowable, it is clear, that it cannot be regularly rendered, until an opportunity has been afforded for an answer, and declined; nor can proof be made by the plaintiff, till an answer has been filed, or the bill taken for confessed. *Dunning v. Stanton*, 9 Port. (Ala.) 513.

11. *Morris v. Edmonds*, 43 Ark. 427; *Smith v. Ferguson*, 3 Met. (Ky.) 424.

12. *Hargrove v. Martin*, 6 Smed. & M. (Miss.) 61, 68.

13. *De Moss v. Cobb*, 23 La. Ann. 336.

14. *Krickow v. Pennsylvania Tar Mfg. Co.*, 87 Ill. App. 653.

15. **Ala.**—*Dunning v. Stanton*, 9 Port. 513. **Ill.**—*Hunter v. Empire State Surety Co.*, 261 Ill. 335, 103 N. E. 1052; *Bennett v. Bradford*, 132 Ill. 269, 24 N. E. 630; *Lieserowitz v. West Chicago St. R. R. Co.*, 80 Ill. App. 248, 253. **Ind.**—*Martin v. Starr*, 7 Ind. 224.

La.—*Mackin v. Wilds*, 106 La. 1, 30 So. 257, at least not in the absence of the advice of a family meeting, duly homologated. Compare *Greenwood v. New Orleans*, 12 La. Ann. 426, 431. **Mich.**—*Claxton v. Claxton*, 56 Mich. 557, 23 N. W. 310, in a partition case. See *Smith v. Smith*, 13 Mich. 258.

or next friend,¹⁶ or general guardian;¹⁷ but evidence must be produced to prove the case against him.

Neither can there be a valid *ex parte* waiver of proof of a substantial fact by the infant's tutor as that substantially permits a consent judgment against the infant.¹⁸ In some jurisdictions such decrees are allowed,¹⁹ but the court before entering a consent decree should inquire whether the terms of it are for the interest of the infant.²⁰

Validity of Judgment.—A consent judgment against an infant where not allowable is not void, but only voidable and may be set aside as between the original parties to the action,²¹ but not as against a bona

N. Y.—*Scott v. Monell*, 1 Redf. Surr. 431, 442. **Va.**—*Daingerfield v. Smith*, 83 Va. 81, 1 S. E. 599, 605; *Armstrong v. Walkup*, 9 Gratt. 372.

[a] "**Full Faith and Credit.**"—A consent decree in a sister state will not be entitled to full faith and credit. *Braswell v. Downs*, 11 Fla. 62, 71.

16. **U. S.**—Bank of the United States *v. Ritchie*, 8 Pet. 128, 144, 8 L. ed. 891. **Ala.**—*Mitchel v. Hardie*, 84 Ala. 349, 4 So. 182. See *Matthews v. Dowling*, 54 Ala. 202, 204; *Dunning v. Stanton*, 9 Port. 513. **Ark.**—*Rankin v. Schofield*, 81 Ark. 440, 462, 98 S. W. 674. See *Driver v. Evans*, 47 Ark. 297, 300, 1 S. W. 518. **Fla.**—*Braswell v. Downs*, 11 Fla. 62, 71. **Ill.**—*Allison v. Drake*, 145 Ill. 500, 517, 32 N. E. 537; *Gooch v. Green*, 102 Ill. 507; *Lieserowitz v. West Chicago St. R. Co.*, 80 Ill. App. 248, 253; *Atchison, T. & S. F. R. Co. v. Elder*, 50 Ill. App. 276. **Ind.**—*McEndree v. McEndree*, 12 Ind. 97; *Martin v. Starr*, 7 Ind. 224. **La.**—*Mackin v. Wilds*, 106 La. 1, 30 So. 257. **Mich.**—*Wood v. Truax*, 39 Mich. 628; *Burt v. McBain*, 29 Mich. 260. **Miss.**—*Johnson v. McCabe*, 42 Miss. 255, 259. **Va.**—*Daingerfield v. Smith*, 83 Va. 81, 1 S. E. 599, 605; *Armstrong v. Walkup*, 9 Gratt. 372; *Hite v. Hite*, 2 Rand. 409, 417.

[a] A decree for a conveyance of the infant's property cannot be rendered upon the consent of the guardian ad litem only. *Pulliam v. Pulliam*, 4 Dana (Ky.) 123.

[b] **Conflict Between Recitals in Decree and Judgment Book.**—The entry in the judgment-book that "by the consent of parties the following decree was ordered by the court to be filed," did not have the effect to overcome the recital in the decree that it was rendered, "after hearing the proofs and allegations of the respective parties."

Reed v. Ring, 93 Cal. 96, 104, 28 Pac. 851.

17. **U. S.**—Bank of United States *v. Ritchie*, 8 Pet. 128, 144, 8 L. ed. 891; *Walton v. Coulson*, 1 McLean 120, 134, 29 Fed. Cas. No. 17,132. **Fla.**—*Braswell v. Downs*, 11 Fla. 62, 72. **Ill.**—*Allison v. Drake*, 145 Ill. 500, 517, 32 N. E. 537; *Gooch v. Green*, 102 Ill. 507; *Quigley v. Roberts*, 44 Ill. 503; *Reddiek v. President, etc. Bank*, 27 Ill. 145. **Ind.**—*Martin v. Starr*, 7 Ind. 224. **La.**—*Aiken v. Gatlin*, 48 La. Ann. 877, 19 So. 929. **Me.**—*Tucker v. Bean*, 65 Me. 352. **Mich.**—*Bearington v. Pelton*, 78 Mich. 109, 114, 43 N. W. 1042; *Claxton v. Claxton*, 56 Mich. 557, 23 N. W. 310. **Mich.**—*Johnson v. McCabe*, 42 Miss. 255, 259. **N. Y.**—*Litchfield v. Burwell*, 5 How. Pr. 341, 345.

See 10 STANDARD PROC. 760.

18. *Aiken v. Gatlin*, 48 La. Ann. 877, 19 So. 929.

19. See *infra*, this section.

20. **U. S.**—*Thompson v. Maxwell Land Grant Co.*, 168 U. S. 451, 463, 18 Sup. Ct. 121, 42 L. ed. 539. **Ark.**—*Rankin v. Schofield*, 71 Ark. 168, 173, 66 S. W. 197, 70 S. W. 306, 81 Ark. 440, 453, 98 S. W. 674. **Ill.**—*Spring Valley Coal Co. v. Donaldson*, 123 Ill. App. 196, 201. **Tenn.**—*Milly v. Harrison*, 7 Coldw. 191, 199. See *Allen v. McCullough*, 2 Heisk. 174, 195, 5 Am. Rep. 27.

[a] **Court Presumed To Have Done Its Duty.**—*Thompson v. Maxwell Land Grant Co.*, 168 U. S. 451, 463, 18 Sup. Ct. 121, 42 L. ed. 539.

21. **Cal.**—*San Fernando H. Assn v. Porter*, 58 Cal. 81, 82. **Ill.**—*Hunter v. Empire State Surety Co.*, 261 Ill. 335, 103 N. E. 1052; *Allison v. Drake*, 145 Ill. 500, 517, 32 N. E. 537. **N. M.**—See *Bent v. Maxwell Land Grant & R. Co.*, 3 N. M. 167, 182, allegations sufficient to warrant setting aside of decree. **N. C.**—*Rawls v. Mayo*, 163 N. C. 177, 79 S. E. 298. **Tex.**—*Hollis v. Dashiell*, 52 Tex.

fide third person such as a purchaser for value without notice of the error.²² On the other hand, a consent decree has been held absolutely void, entitling third parties to no rights under it.²³ In some jurisdictions, however, a decree taken by consent in a suit in which an infant is a party is binding on the infant,²⁴ especially where made upon representation by counsel and after inquiry by the court²⁵ into

187, 197. **Va.**—*Morris v. Virginia Ins. Co.*, 85 Va. 588, 594, 8 S. E. 383 (if his rights were prejudiced); *Daingerfield v. Smith*, 83 Va. 81, 1 S. E. 599, if the infant was prejudiced thereby.

[a] **An adult adversary** cannot have it set aside. *Harmon v. Davis*, 30 Gratt. (Va.) 461, 468.

[b] **Where Minor's Interest Not Prejudiced.**—A decree setting aside a will, rendered with the consent of minors leaving their interests the same as under the will cannot be set aside simply because of the incapacity of the minors to give a valid consent. *Cox v. Lynn*, 138 Ill. 195, 29 N. E. 857.

[c] **After entry upon the record** the infant may be estopped from denying the validity of a consent decree. *Cannon v. Hemphill*, 7 Tex. 184, 187, 193.

22. *Franklin Sav. Bank v. Taylor*, 53 Fed. 854, 4 C. C. A. 55, 62; *Hunter v. Empire State Surety Co.*, 261 Ill. 335, 103 N. E. 1052; *Allison v. Drake*, 145 Ill. 500, 517, 32 N. E. 537.

[a] **Belated Motion Denied.**—A motion to set aside a judgment of foreclosure against infants because entered by consent, made twelve years after rendition and after the rights of innocent third parties have intervened, should be denied. *Ferrell v. Broadway*, 127 N. C. 404, 37 S. E. 504; *following* 127 N. C. 407, 37 S. E. 503; *overruling* 126 N. C. 258, 35 S. E. 467.

23. *Rankin v. Schofield*, 81 Ark. 440, 464, 98 S. W. 674.

[a] **Collateral attack** (1) allowed (*Hatch v. Ferguson*, 57 Fed. 966; *Sandoval v. Rosser*, 86 Tex. 682, 26 S. W. 933), (2) especially in the case of a decree of the probate court. *Peters v. Peters*, 8 Cush. (Mass.) 529, 543.

24. **U. S.**—*Thompson v. Maxwell Land Grant Co.*, 168 U. S. 451, 468, 18 Sup. Ct. 121, 42 L. ed. 539. **Cal.**—*San Fernando H. Assn. v. Porter*, 58 Cal. 81. **Ga.**—*Southern Marble Co. v. Stegall*, 90 Ga. 236, 15 S. E. 806. **Miss.**—*Gusdofer v. Gundy*, 72 Miss. 312, 16 So. 432; *Johns v. Harper*, 61 Miss. 142. See, however, *Johnson v. McCabe*, 42 Miss.

255, 259. **Tenn.**—*Oody v. Roane Iron Co.* (Tenn. Ch.), 53 S. W. 1002; *Allen v. McCullough*, 2 Heisk. 174, 195, 5 Am. Rep. 27. **Tex.**—*Day v. Johnson*, 32 Tex. Civ. App. 107, 72 S. W. 426.

[a] **If no appeal is taken** within the time allowed for appeal. *Greenwood v. New Orleans*, 12 La. Ann. 426, 431.

[b] **Effect of Failure To Perform Duty.**—If a court does pronounce a consent decree without inquiry whether it will be for the infant's benefit he is as much bound by the decree as if there had been a reference to a master and a report by him that it was for the benefit of the minor. *Thompson v. Maxwell Land Grant Co.*, 168 U. S. 451, 463, 18 Sup. Ct. 121, 42 L. ed. 539; *Walsh v. Walsh*, 116 Mass. 377, 383.

[c] **In Missouri** under Wag. St., §§48, 49, the guardian ad litem may in partition proceedings, if he is convinced that no defense can be made to the proceedings on behalf of the infant defendants, stipulate that judgment for partition may be entered in accordance with plaintiff's petition. *Le Bourgeoise v. McNamara*, 10 Mo. App. 116, 119, *affirmed* in 82 Mo. 189.

[d] **When there is no fraud or prejudice** to infant. *Franklin Sav. Bank v. Taylor*, 53 Fed. 854, 4 C. C. A. 55, 66.

[e] **Where there is no fraud or collusion** an infant cannot maintain an original bill to vacate a decree in his favor when taken by consent of all parties although the decree is erroneous and the infant consented under a mistake as to his legal rights. *Gusdofer v. Gundy*, 72 Miss. 312, 16 So. 432.

[f] **A decree rendered during vacation** is binding. *Southern Marble Co. v. Stegall*, 90 Ga. 236, 15 S. E. 806.

[g] **Collateral Attack Not Allowed.** See *Gooch v. Green*, 102 Ill. 507; *Ivey v. Harrell*, 1 Tex. Civ. App. 226, 230, 20 S. W. 775.

25. *Walsh v. Walsh*, 116 Mass. 377, 383; *Harman v. Davis*, 30 Gratt. (Va.) 461, 468. See *Morris v. Virginia Ins. Co.*, 85 Va. 588, 595, 8 S. E. 383.

the facts, even where it goes beyond the issues in the cause,²⁶ or fails to recite that evidence was heard by the court.²⁷

5. Presumptions.²⁸—Any condition of facts consistent with the validity of the judgment against the infant will be presumed to have existed, rather than one which will defeat the judgment.²⁹

6. Conclusiveness.—A judgment whether in open court or at chambers³⁰ in an action within the jurisdiction of the court³¹ is generally as binding upon infant parties as upon adults,³² until it has

[a] **Notice of Judgment to Infants.**

Where the court passed upon and approved a partition made of infants' property and the guardians entered a consent decree it is not necessary to notify the infants of the judgment in order to impose upon them the obligation to move for a new trial within ten days after the judgment. *San Fernando H. Assn. v. Porter*, 58 Cal. 81, 83.

26. *Oody v. Roane Iron Co. (Tenn. Ch.)*, 53 S. W. 1002.

27. *Day v. Johnson*, 32 Tex. Civ. App. 107, 72 S. W. 426.

28. See generally the title "Judgments;" and also the ENCY. OF EV.

29. **U. S.**—See *Thompson v. Maxwell Land Grant & R. Co.*, 168 U. S. 451, 18 Sup. Ct. 121, 42 L. ed. 539. **Cal.**—*Eichhoff v. Eichhoff*, 107 Cal. 42, 47, 40 Pac. 24, 48 Am. St. Rep. 110. **Ill.**—*Tibbs v. Allen*, 27 Ill. 119, 124. **Ind.**—*Young v. Wiley*, 107 N. E. 278; *Alexander v. Frary*, 9 Ind. 481, 487, where the evidence was not in the record. **Tenn.** *Hopper v. Fisher*, 2 Head 253, 257. See *Ridgely v. Bennett*, 13 Lea 210, 218; also *Andrews v. Andrews*, 7 Heisk. 234, 236, 246.

[a] **Presumption of Service of Process.**—*Hopper v. Fisher*, 2 Head (Tenn.) 253.

[b] **Presumption of Due Appointment of a Guardian Ad Litem.**—*Welsh v. Koch*, 4 Cal. App. 571, 577, 88 Pac. 604.

30. *Baggott v. Sawyer*, 25 S. C. 405.

31. *Hunter v. Empire State S. Co.*, 261 Ill. 335, 103 N. E. 1052; *Cox v. Interstate Coal Co.*, 157 Ky. 373, 163 S. W. 231. See the title "Jurisdiction."

[a] **If jurisdiction over the infant or subject-matter did not exist**, the judgment is a nullity. *Mulford v. Hagerty*, 46 Ill. 303. See *Chambers v. Jones*, 72 Ill. 276, 278; *Capitain v. Mississippi Val. Tr. Co.*, 240 Mo. 484, 497, 144 S. W. 466.

[b] **The district court cannot render**

a decree affecting the property of minors as their estates are cared for by the county courts acting as probate courts under our statute. *Allen v. Von Rosenberg (Tex.)*, 16 S. W. 1096, 1099, 1100.

[c] **The determination by the court that it has acquired jurisdiction** of the infant parties is as conclusive upon them as its determination of any other issue or question in the action. *Welsh v. Koch*, 4 Cal. App. 571, 579, 88 Pac. 604. But see the titles "Judgments;" "Jurisdiction."

32. **U. S.**—*Thompson v. Maxwell Land Grant Co.*, 168 U. S. 451, 462, 18 Sup. Ct. 121, 42 L. ed. 539; *Kingsbury v. Buckner*, 134 U. S. 650, 10 Sup. Ct. 638, 33 L. ed. 1047; *Kansas City, Ft. S. & M. R. Co. v. Morgan*, 76 Fed. 429, 21 C. C. A. 468; *Gillespie v. Pocahontas C. & C. Co.*, 162 Fed. 742, 747. **Ala.**—*Waring v. Lewis*, 53 Ala. 615; *Tabor v. Lorraine*, 53 Ala. 543; *Rivers v. Durr*, 46 Ala. 418. **Ark.**—*Woodall v. Moore*, 55 Ark. 22, 29, 17 S. W. 268. **Cal.**—*Welsh v. Koch*, 4 Cal. App. 571, 575, 88 Pac. 604; *Reed v. Ring*, 93 Cal. 96, 104, 28 Pac. 851; *Gray v. Winder*, 77 Cal. 525, 20 Pac. 47; *Joyce v. McAvoy*, 31 Cal. 273, 89 Am. Dec. 172; *Regla v. Martin*, 19 Cal. 463. **Conn.** *Clark v. Platt*, 30 Conn. 282. **Ga.**—*Byrom v. Varner*, 136 Ga. 780, 72 S. E. 596; *Lowe v. Equitable Mtg. Co.*, 102 Ga. 103, 29 S. E. 148; *Evans v. Collier*, 79 Ga. 319, 4 S. E. 266; *Cuyler v. Wayne*, 64 Ga. 78. **Idaho.**—*Trask v. Boise King Placers Co.*, 26 Idaho 290, 142 Pac. 1073, where a guardian has been duly appointed and has accepted judgment. **Ill.**—*Hunter v. Empire State S. Co.*, 261 Ill. 335, 103 N. E. 1052; *Lloyd v. Kirkwood*, 112 Ill. 329, 337; *Chudleigh v. Chicago, R. I. & P. R. Co.*, 51 Ill. App. 491; *Allman v. Taylor*, 101 Ill. 185; *Enos v. Capp*, 15 Ill. 277; *Young v. Lorain*, 11 Ill. 624, 52 Am. Dec. 463. **Ind.**—*Thain v. Rudisill*, 126 Ind. 272, 280, 26 N. E. 46 (judgment rendered

after he reached majority); *Blake v. Douglass*, 27 Ind. 416. **Ia.**—*Ringstad v. Hanson*, 150 Iowa 324, 130 N. W. 145; *Dahms v. Alston*, 72 Iowa 411, 34 N. W. 182; *Ralston v. Lahee*, 8 Iowa 17, 24 Am. Dec. 291. **Ky.**—*Jenkins v. Hamilton*, 153 Ky. 163, 168, 154 S. W. 937; *Eversole v. First Nat. Bank*, 136 Ky. 362, 365, 124 S. W. 360; *Berryhill v. Holland*, 124 Ky. 615, 99 S. W. 902; *Beeler v. Bullitt*, 3 A. K. Marsh. 280, 13 Am. Dec. 161; *Weakley v. Middleton*, 30 Ky. L. Rep. 571, 99 S. W. 288; *Abernathy v. Ross*, 14 Ky. L. Rep. 282, 20 S. W. 222. **La.**—*Boudreaux v. Lower Terrebonne R. & Mfg. Co.*, 127 La. 98, 112, 53 So. 456; *Dupre v. Soye*, 31 La. Ann. 450; *Lesassier v. Dashiell*, 17 La. 194; *Le Blanc v. His Creditors*, 16 La. 120; *Rawlins v. Giddens*, 46 La. Ann. 1136, 15 So. 501, 17 So. 262, approval of exchange of minor's property. **Mass.**—*Peters v. Peters*, 8 Cush. 529, 545. **Mich.**—*Lowes v. Lowes*, 127 Mich. 307, 86 N. W. 820. **Miss.**—*Cocks v. Simmons*, 57 Miss. 183; *Doe v. Bradley*, 6 Smed. & M. 485. **Mo.**—*Reineman v. Larkin*, 222 Mo. 156, 172, 121 S. W. 307; *Smith v. Perkins*, 124 Mo. 50, 27 S. W. 574. See *Townsend v. Cox*, 45 Mo. 401; *Jeffries v. Robideaux*, 3 Mo. 33. **Neb.** *Weddle v. Specht*, 97 Neb. 693, 151 N. W. 160; *McCreary v. Creighton*, 76 Neb. 179, 107 N. W. 240, 243; *Sutphen v. Joslyn*, 93 Neb. 34, 139 N. W. 1016; *Kazebeer v. Nunemaker*, 82 Neb. 732, 735, 118 N. W. 646. **N. H.**—*Simmons v. Goodell*, 63 N. H. 458. **N. J.**—*Sites v. Eldredge*, 45 N. J. Eq. 632, 18 Atl. 214; *Shultz v. Sanders*, 38 N. J. Eq. 154, 157. **N. Y.**—*Wood v. Martin*, 66 Barb. 241; *Mills v. Dennis*, 3 Johns. Ch. 367; *Mutual Life Ins. Co. v. Holloday*, 13 Abb. N. C. 16; *Matter of Wood's Estate*, 70 App. Div. 321, 75 N. Y. Supp. 272; *Mutual Life Ins. Co. v. Schwaner*, 36 Hun 373; *Phillips v. Dusenberry*, 8 Hun 348. **N. C.**—*Ward v. Lowndes*, 96 N. C. 367, 377, 2 S. E. 591; *Tate v. Mott*, 96 N. C. 19, 2 S. E. 176; *Grant-ham v. Kennedy*, 91 N. C. 148; *Beeton v. Beeton*, 56 N. C. 419, 422; *Ludwick v. Fair*, 29 N. C. 422, 47 Am. Dec. 333. **Ohio.**—*Rammelsberg v. Mitchell*, 29 Ohio St. 22. **Ore.**—*English v. Savage*, 5 Ore. 518. **Pa.**—*Mercer v. Watson*, 1 Watts 330. **S. C.**—*Owings v. Hunt*, 53 S. C. 187, 31 S. E. 237; *Baggott v. Sawyer*, 25 S. C. 405; *McCrosky v. Parks*, 13 S. C. 90; *Bulow v. Witte*, 3 S. C. 308; *Huson v. Wallace*, 1 Rich. Eq. 1. **Tenn.**—*Hurt v. Long*, 90 Tenn. 445, 16 S. W. 968; *Allen v. Shanks*, 90 Tenn. 359, 16 S. W. 715 (although master's report is erroneous on the evidence); *Vaccaro v. Cicalla*, 89 Tenn. 63, 14 S. W. 43; *Grimstead v. Huggins*, 13 Lea 728; *Winchester v. Winchester*, 1 Head 460; *Rogers v. Clark*, 5 Sneed 665; *Oody v. Roane Iron Co. (Tenn. Ch.)*, 53 S. W. 1002; *Crawford v. Woodward*, 1 Tenn. Ch. App. 274, 317. **Tex.**—*McGhee v. Romatka*, 92 Tex. 38, 45 S. W. 552; *Miller v. Foster*, 76 Tex. 479, 13 S. W. 529; *Deering v. Hurt*, 2 S. W. 42; *Canon v. Hemphill*, 7 Tex. 184, 203; *Grogan v. Spaulding (Tex. Civ. App.)*, 155 S. W. 1014; *Day v. Johnson*, 32 Tex. Civ. App. 107, 72 S. W. 426. **Vt.**—*Fuller v. Smith*, 49 Vt. 253; *Wrisleys v. Kenyon*, 28 Vt. 5; *Robinson v. Swift*, 3 Vt. 283. **Va.**—*McComb v. Gilkeson*, 110 Va. 406, 412, 66 S. E. 77, 135 Am. St. Rep. 944; *Harrison v. Walton's Exr.*, 95 Va. 721, 30 S. E. 372, 64 Am. St. Rep. 830, 41 L. R. A. 703; *Zirkle v. McCue*, 26 Gratt. 517; *Staton v. Pittman*, 11 Gratt. 99; *Brown v. Armistead*, 6 Rand. 594, 602; *Beverley v. Miller*, 6 Munf. 99. **Wash.**—*Gravelle v. Canadian & A. Mtg. & Tr. Co.*, 42 Wash. 457, 85 Pac. 36; *Morrison v. Morrison*, 25 Wash. 466, 473, 65 Pac. 779; *Kromer v. Friday*, 10 Wash. 621, 39 Pac. 229, 32 L. R. A. 671. **W. Va.**—*Plant v. Humphries*, 66 W. Va. 88, 66 S. E. 94, 26 L. R. A. (N. S.) 558; *McSwegin v. Howard*, 63 W. Va. 92, 97, 59 S. E. 894; *Lafferty v. Lafferty*, 42 W. Va. 783, 26 S. E. 262. **Eng.**—*Gregory v. Molesworth*, 3 Atk. 626, 26 Eng. Reprint 1160; *Morgan v. Thorne*, 9 Dowl. P. C. 226, 228, 7 Mees. & W. 400, 10 L. J. Exch. 125. **Can.**—*Ricker v. Ricker*, 27 Grant Ch. (U. C.) 576; *McDougall v. Bell*, 10 Grant Ch. (U. C.) 283.

See also 10 STANDARD PROC. 874.

[a] **An infant when complainant is** as much bound by a decree as an adult, but if gross laches appear upon the part of the next friend, the infant may open the decree by a new bill. *Bent v. Maxwell Land Grant & Ry. Co.*, 3 N. M. 167.

[b] **An infant suing out writ of error is a plaintiff in the writ and as such concluded by the decree.** *McClay v. Norris*, 9 Ill. 370. See also *Phillips v. Allegheny Val. R. Co. (Pa.)*, 3 Atl. 438.

[c] **Infants whether residents or non-residents of this state are bound by judgments against them when properly represented in court.** *Ward v. Lowndes*,

been reversed or set aside in some lawful manner.³³

There are exceptions to this rule, however,³⁴ as where a decree itself or the statute gives an infant an opportunity after the attainment of majority to secure a rehearing of the matters involved in the suit,³⁵ and an infant is not concluded by a default,³⁶ or consent³⁷ judgment, or where he has not been properly served with process.³⁸

Certain legal proceedings are construed as having the same binding effect as decrees and judgments.³⁹

96 N. C. 367, 377, 2 S. E. 591; Tate v. Mott, 96 N. C. 19, 2 S. E. 176.

[d] **Judgment of Justice of Peace Is Binding on Minor.**—Ludwick v. Fair, 29 N. C. 422, 47 Am. Dec. 333.

[e] **That the judgment was rendered in pursuance of the rulings of an appellate court on a proceeding in error does not affect the validity of the decree.** It is immaterial from what source the court derived its knowledge of the law applicable to the case. Carey v. Kemper, 45 Ohio St. 93, 97, 11 N. E. 130.

[f] **Although sued by a wrong name the infant is concluded by the judgment.** McGhee v. Romatka, 92 Tex. 38, 45 S. W. 552.

[g] **Where Infant Is Not a Party.** Where the guardian brings suit in his own name although describing himself as "guardian of James Swift, Jr.," the infant is not a party to the suit and the judgment is not binding on him. Swift v. Yanaway, 153 Ill. 197, 206, 38 N. E. 589. See Salter v. Salter, 80 Ga. 178, 183, 4 S. E. 391, 12 Am. St. Rep. 249. Compare Burger v. Potter, 32 Ill. 66.

[h] **A judgment in rem binds an infant although not a party to the proceeding.** Wills v. Spraggins, 3 Gratt. (Va.) 529, 547.

33. See *infra*, I, G, 7; I, G, 9; I, I; and the following cases: U. S.—Thompson v. Maxwell Land Grant & R. Co., 168 U. S. 451, 462, 18 Sup. Ct. 121, 42 L. ed. 539. Ala.—Waring v. Lewis, 53 Ala. 615, 624. Cal.—Reed v. Ring, 93 Cal. 96, 104, 28 Pac. 851. Ill.—Lloyd v. Kirkwood, 112 Ill. 329, 337. Ia. Ralston v. Lahee, 8 Iowa 17, 74 Am. Dec. 291. N. M.—Bent v. Maxwell Land Grant & Ry. Co., 3 N. M. 167, 182. N. Y.—*In re Hawley*, 100 N. Y. 206, 211, 3 N. E. 68; *In re Tilden*, 98 N. Y. 434; Brick's Estate, 15 Abb. Pr. 12, 43, 47. N. C.—Beeton v. Beeton, 56 N. C. 419, 422. Ore.—English v. Savage, 5 Ore. 518, 522. Tenn.—Hurt v.

Long, 90 Tenn. 445, 16 S. W. 968; Rogers v. Clark, 5 Sneed 665, 669. Tex. Johnson v. Johnson, 38 Tex. Civ. App. 385, 390, 85 S. W. 1023. Va.—Harrison v. Walton's Exr., 95 Va. 721, 30 S. E. 372, 64 Am. St. Rep. 830, 41 L. R. A. 703; Zirkle v. McCue, 26 Gratt. 517; Parker v. McCoy, 10 Gratt. 594, 604; Pierce v. Trigg, 10 Leigh 406, 429. W. Va.—Lafferty v. Lafferty, 42 W. Va. 783, 26 S. E. 262.

34. **Where the guardian ad litem is codefendant with an adverse interest, the decree pronounced in the cause will not bar a subsequent suit by the minors against the defendant.** Elrod v. Lancaster, 2 Head (Tenn.) 571, 75 Am. Dec. 749. See John II Estate v. Brown, 201 Fed. 224, 119 C. C. A. 458, 475.

[a] **Judgment upon an agreed statement of facts not made by the judge as his statement does not bind minor defendants who have not signed it personally or by their representative.** S. C. Wooden Ware Co. v. Hill (Tex.), 59 S. W. 318.

[b] **Judicial proceedings upon a void instrument are void, and whether the widow may be concluded or not by any proceedings taken by her in her own behalf, the minors whom she represents are certainly not concluded.** Buelow v. Mandal, 28 La. Ann. 697.

35. See *infra*, I, G, 8.

36. See *supra*, I, G, 2 and 3.

37. See *supra*, I, G, 4.

38. **Where infant is not properly served with process he is not bound.** Whitesides v. Barber, 24 S. C. 373. See *supra*, I, B, 2, b, (11).

39. **The settlements of a trustee of an infant's property, made and confirmed in due course, have the effect of decrees, and import, not mere prima facie correctness, but absolute verity.** Vaccaro v. Cicalla, 89 Tenn. 63, 76, 14 S. W. 43.

Conclusiveness of final settlement of

Infants not in esse at the rendition of the judgment or decree may be bound under the doctrine of representation,⁴⁰ but if born after filing the bill and before judgment, he must be made a party in order that he may be bound.⁴¹

7. Direct and Collateral Attack.—Judgments against infants which are erroneous but not void cannot be attacked collaterally,⁴²

guardian, see 10 STANDARD PROC. 843, and supplement thereto.

40. **U. S.**—Franklin Sav. Bank v. Taylor, 53 Fed. 854, 4 C. C. A. 55. **Ga.**—Mayer v. Hover, 81 Ga. 308, 7 S. E. 562. **Ill.**—Hale v. Hale, 146 Ill. 227, 261, 33 N. E. 858, 20 L. R. A. 247. **Ky.**—Jenkins v. Hamilton, 153 Ky. 163, 168, 154 S. W. 937. **Va.**—Harrison v. Wallton's Exr., 95 Va. 721, 30 S. E. 372, 64 Am. St. Rep. 830, 41 L. R. A. 703.

[a] **Doctrine of Representation.** Where it appears that a particular party, though not before the court in person, is so far represented by others that his interests receive actual and efficient protection, the decree may be held to be binding upon him. Hale v. Hale, 146 Ill. 227, 256, 33 N. E. 858, 20 L. R. A. 247.

[b] **When the trustee of the property is in court and subject to its jurisdiction together with the living beneficiaries, after-born beneficiaries are bound by the decree.** Franklin Sav. Bank v. Taylor, 53 Fed. 854, 4 C. C. A. 55.

41. Botsford v. O'Connor, 57 Ill. 72, 77.

42. **U. S.**—Thompson v. Tolmie, 2 Pet. 157, 168, 7 L. ed. 381. **Cal.**—Reed v. Ring, 93 Cal. 96, 104, 28 Pac. 851; Joyce v. McAvoy, 31 Cal. 273, 29 Am. Dec. 172; Regla v. Martin, 19 Cal. 463. **Conn.**—Clark v. Platt, 30 Conn. 282. **D. C.**—See Duncanson v. Manson, 3 App. Cas. 260, 271. **Ga.**—Lowe v. Equitable Mtg. Co., 102 Ga. 103, 29 S. E. 148. **Ill.**—Mulford v. Stalzenbaeck, 46 Ill. 303, 308; Young v. Lorain, 11 Ill. 624, 52 Am. Dec. 463; Chudleigh v. Chicago, R. I. & P. Ry. Co., 51 Ill. App. 491. **Ind.**—Hawkins v. McDougal, 126 Ind. 539, 25 N. E. 820. **Ia.**—Ringstad v. Hanson, 150 Iowa 324, 130 N. W. 145; Dahms v. Alston, 72 Iowa 411, 34 N. W. 182. **Ky.**—Cox v. Interstate Coal Co., 157 Ky. 373, 163 S. W. 231; Bourne v. Simpson, 9 B. Mon. 454, 457; Beeler v. Bullitt, 3 A. K. Marsh. 280, 13 Am. Dec. 161. See Arnold v. Lawson, 146 Ky. 365, 142 S. W. 684. **La.**—Le Blanc

v. His Creditors, 16 La. 120. **Md.**—Long v. Long, 62 Md. 33, 62; Hunter v. Hatton, 4 Gill 115, 45 Am. Dec. 117. **Miss.**—Cocks v. Simmons, 57 Miss. 183; Doe v. Bradley, 6 Smed. & M. 485. **Mo.**—Reineman v. Larkin, 222 Mo. 156, 172, 121 S. W. 307. See Townsend v. Cox, 45 Mo. 401. **Neb.**—Weddle v. Specht, 97 Neb. 693, 151 N. W. 160. **N. J.**—Shultz v. Sanders, 38 N. J. Eq. 154, 157. **N. Y.**—Mutual Life Ins. Co. v. Schwaner, 36 Hun 373. **N. C.**—Smith v. Gray, 116 N. C. 311, 314, 21 S. E. 200; Tate v. Mott, 96 N. C. 19, 2 S. E. 176; Burgess v. Kirby, 94 N. C. 371; White v. Albertson, 14 N. C. 241, 22 Am. Dec. 719. **Pa.**—Kennedy v. Baker, 159 Pa. 146, 28 Atl. 252. **S. C.**—McCroskey v. Parks, 13 S. C. 90; Bulow v. Witte, 3 S. C. 308. **Tenn.**—Kindell v. Titus, 9 Heisk. 727, 738 (errors can be corrected only in a revising court); Andrews v. Andrews, 7 Heisk. 234, 236, 246; Crawford v. Woodward, 1 Tenn. Ch. App. 274, 322. **Tex.**—McGhee v. Romatka, 92 Tex. 38, 45 S. W. 552; Bouldin v. Miller, 26 S. W. 133; Montgomery v. Carlton, 56 Tex. 361, 365; Simmons v. Arnim (Tex. Civ. App.), 172 S. W. 184; Grogan v. Spaulding (Tex. Civ. App.), 155 S. W. 1014; Schneider v. Sellers, 25 Tex. Civ. App. 226, 61 S. W. 541; Stephens v. Hewett, 22 Tex. Civ. App. 303, 305, 54 S. W. 301; Ivey v. Harrell, 1 Tex. Civ. App. 226, 230, 20 S. W. 775. **W. Va.**—McSwegin v. Howard, 63 W. Va. 92, 97, 59 S. E. 894.

[a] **An inquiry into the authority of the next friend or guardian ad litem is not permissible in a collateral proceeding.** Harris v. Bennett, 160 N. C. 339, 76 S. E. 217; Sumner v. Sessoms, 94 N. C. 371, 376.

[b] **The entry of the satisfaction of an infant's judgment cannot be collaterally attacked by the infant.** Oody v. Roane Iron Co. (Tenn. Ch.), 53 S. W. 1002.

[c] **Power and jurisdiction of the probate court in appointing curators cannot be collaterally attacked.** Thomas v. St. Louis, I. M. & S. R. Co., 187 Mo. App. 420, 173 S. W. 728.

but a void judgment or decree against him may be so attacked.⁴³ Judgments against an infant erroneous and improper or in other words voidable because of some defect or error in the proceedings may, however, be attacked in a proceeding to set it aside.⁴⁴

8. Infant's Day in Court.—In equity, the decree rendered against an infant defendant contained a clause giving him an opportunity after attaining his majority to show cause against the decree.⁴⁵ This

43. *Chambers v. Jones*, 72 Ill. 276, 278; *Jacobs v. Kansas City, S. & G. R. Co.*, 134 La. 389, 64 So. 150. See the title "**Judgments.**"

44. **U. S.**—*Kansas City, Ft. S. & M. R. Co. v. Morgan*, 76 Fed. 429, 21 C. C. A. 468; *Gillespie v. Pocahontas, C. & C. Co.*, 162 Fed. 742, 747. **Ark.**—*Trappall v. The State Bank*, 18 Ark. 53, 64. **Cal.**—*Reed v. Ring*, 93 Cal. 96, 104, 28 Pac. 851. See *Eichhoff v. Eichhoff*, 107 Cal. 42, 40 Pac. 235, 48 Am. St. Rep. 110. **Ga.**—*Lowe v. Equitable Mtg. Co.*, 102 Ga. 103, 29 S. E. 148; *Evans v. Collier*, 79 Ga. 319, 4 S. E. 266. **Ill.**—*Lloyd v. Kirkwood*, 112 Ill. 329, 337; *Chudleigh v. Chicago, R. I. & P. Ry. Co.*, 51 Ill. App. 491. **Ind.**—*Seward v. Clark*, 67 Ind. 289, 301. **Ia.**—*Ringstad v. Hanson*, 150 Iowa 324, 130 N. W. 145; *Dahms v. Alston*, 72 Iowa 411, 34 N. W. 182; *Ralston v. Lahee*, 8 Iowa 17, 74 Am. Dec. 291. **Ky.**—*Berryhill v. Holland*, 124 Ky. 615, 618, 99 S. W. 902; *Beeler v. Bullitt*, 3 A. K. Marsh. 280, 13 Am. Dec. 161. **La.**—*Le Blanc v. His Creditors*, 16 La. 120. **Md.**—*Hunter v. Hatton*, 4 Gill 115, 122, 45 Am. Dec. 117. **Miss.**—*Cocks v. Simmons*, 57 Miss. 183. **Mo.**—*Reineman v. Larkin*, 222 Mo. 156, 172, 121 S. W. 307; *Townsend v. Cox*, 45 Mo. 401, 404. **Neb.**—*Kazebeer v. Nunemaker*, 82 Neb. 732, 735, 118 N. W. 646. **N. J.**—*Shultz v. Sanders*, 38 N. J. Eq. 154, 157. **N. Y.**—*Mutual Life Ins. Co. v. Schwaner*, 36 Hun 373. **N. C.**—*Smith v. Gray*, 116 N. C. 311, 21 S. E. 200; *Ward v. Lowndes*, 96 N. C. 367, 380, 2 S. E. 591; *Burgess v. Kirby*, 94 N. C. 575; *Sumner v. Sessoms*, 94 N. C. 371, 376. **S. C.**—*McCrosky v. Parks*, 13 S. C. 90; *Bulow v. Witte*, 3 S. C. 308. **Tenn.**—*Crawford v. Woodward*, 1 Tenn. Ch. App. 274-317. See *Hurt v. Long*, 90 Tenn. 445, 16 S. W. 968; *Vaccaro v. Cicalla*, 89 Tenn. 63, 14 S. W. 43; *Rogers v. Clark*, 5 Sneed 665; *Oody v. Roane Iron Co. (Tenn. Ch.)*, 53 S. W. 1002. **Tex.**—*McGhee v. Romatka*, 92 Tex. 38, 45 S. W. 552; *Grogan v. Spaulding (Tex. Civ. App.)*, 155 S. W. 1014; *Day v. John-*

son, 32 Tex. Civ. App. 107, 72 S. W. 426; *Schneider v. Sellers*, 25 Tex. Civ. App. 226, 61 S. W. 541; *Stephens v. Hewett*, 22 Tex. Civ. App. 303, 54 S. W. 301. **Va.**—*Harrison v. Wallton's Exr.*, 95 Va. 721, 30 S. E. 372, 64 Am. St. Rep. 830, 41 L. R. A. 703. **W. Va.**—*Plant v. Humphries*, 66 W. Va. 88, 66 S. E. 94, 26 L. R. A. (N. S.) 558; *McSwegin v. Howard*, 63 W. Va. 92, 97, 59 S. E. 894.

Vacating and setting aside, see *infra*, I, G, 9.

[a] **Where Minor Not Represented.** Even though the judgment was obtained in a suit in which the minor was not represented by a next friend or guardian, it is merely voidable. **Ga.**—*Evans v. Collier*, 79 Ga. 319, 4 S. E. 26. **Ill.**—*Wettrick v. Martin*, 181 Ill. App. 94. **Tex.**—*Martin v. Weyman*, 26 Tex. 460, 468. **Vt.**—*Fuller v. Smith*, 49 Vt. 253 (where appearance by natural guardian did not appear of record); *Robinson v. Swift*, 3 Vt. 283.

See also *Burger v. Potter*, 32 Ill. 66; and 7 STANDARD PROC. 725, 726.

45. **Cal.**—*Joyce v. McAvoy*, 31 Cal. 273, 89 Am. Dec. 172. **Del.**—*Lockwood v. Stradley*, 1 Del. Ch. 298. **Ga.**—*Coalson v. Tooke*, 18 Ga. 742, he is not entitled to a day in court after minority under the facts of this case. **Ill.**—*Lloyd v. Kirkwood*, 112 Ill. 329, 337; *Enos v. Capps*, 15 Ill. 277; *McClay v. Norris*, 9 Ill. 370, 381. **Ind.**—*Stanley v. Brannon*, 6 Blackf. 193. **Ky.**—*Anderson v. Irvine*, 11 B. Mon. 341; *Hanna v. Spotts*, 5 B. Mon. 362, 43 Am. Dec. 132; *Heiatt v. Barnes*, 5 Dana 219; *Arnold v. Voorhies*, 4 J. J. Marsh. 507; *Jones v. Adair*, 4 J. J. Marsh. 220; *Funk v. McKeoun*, 4 J. J. Marsh. 162; *Ewing v. Armstrong*, 4 J. J. Marsh. 68; *Collard v. Groom*, 2 J. J. Marsh. 487; *Passmore v. Moore*, 1 J. J. Marsh. 591; *Jameson v. Moseley*, 4 T. B. Mon. 414; *Beeler v. Bullitt*, 4 Bibb 11; *Shield v. Bryant*, 3 Bibb 525. **Me.**—*McClellan v. McClellan*, 65 Me. 500. See *Perry v. Perry*, 65 Me. 399, 402. **Miss.**—*Cole v. Miller*, 82 Miss.

rule has no application, however, to infant plaintiffs.⁴⁶

89; *Williams v. Stratton*, 10 Smed. & M. 418; *Doe v. Bradley*, 6 Smed. & M. 485. **Mo.**—*Hendricks v. McLean*, 18 Mo. 32, 40. **N. H.**—*Dow v. Jewell*, 21 N. H. 470. **N. Y.**—*Jackson v. Edwards*, 7 Paige 386; *Wright v. Miller*, 1 Sandf. Ch. 103; *affirmed* in 8 N. Y. 9, *reversed*, 4 Barb. 600. See also *Mills v. Dennis*, 3 Johns. Ch. 367; *Harris v. Youman*, 1 Hoffman Ch. 178. **Ohio**.—*Long v. Mulford*, 17 Ohio St. 484, 93 Am. Dec. 638. **S. C.**—See *Drayton v. Drayton*, 1 Desaus. 125; also *Wilkinson v. Wilkinson*, 1 Desaus. 201. **Tenn.**—*Simpson v. Alexander*, 6 Coldw. 619. **Va.**—*Parker v. McCoy*, 10 Gratt. 594, 607; *Tennent v. Pattons*, 6 Leigh 196; *Jackson v. Turner*, 5 Leigh 119; *Wilkinson v. Oliver*, 4 Hen. & M. 450; *Lee v. Braxton*, 5 Call 459. **Eng.**—*Booth v. Rich*, 1 Vern. 295, 23 Eng. Reprint 478; *Effingham v. Napier*, 4 Brown 340, 2 Eng. Reprint 230; *Savage v. Carroll*, 1 Ball & B. 550, 12 Rev. Rep. 32. **Can.**—*Mair v. Kerr*, 2 Grant Ch. (U. C.) 223; *L. & C. Loan & Agency Co. v. Everitt*, 8 Ont. Pr. 489.

See 1 Dan. Ch. Pr. (8th ed.), p. 113.

[a] An infant is entitled to his day in court after becoming of age even though his answer to the bill, made by his guardian admitted the case to be as alleged. *Lockwood v. Stradley*, 1 Del. Ch. 298.

[b] **Form of Saving Clause.**—See *Hendricks v. McLean*, 18 Mo. 32, 40, the saving clause of the decree was as follows: "And this decree is to be binding on the infant, unless, being served with process for that purpose, he shall, within six months after he shall have attained his age of twenty-one years, show unto this court, good cause to the contrary." See also *MéLemore v. Chicago, etc. R. Co.*, 58 Miss. 514.

[c] A judgment in ejectment did not divest the infant of property but simply held he had no title, and consequently reservation of a day to show cause against it is improper. *Paragould Trust Co. v. Perrin*, 103 Ark. 67, 145 S. W. 886.

[d] **Saving Clause in Interlocutory Decree.**—(1) Where it is objected that no day was given to infant to show cause against the decree after she came of age, it is sufficient to answer that the decree is only interlocutory, and

that this omission may be corrected hereafter. *Pickett v. Chilton*, 5 Munf. (Va.) 467. (2) See *Winston v. Campbell*, 4 Hen. & M. (Va.) 477, wherein one of the defendants against whom there had been an interlocutory decree during his minority, was allowed, upon coming of full age, to amend his answer upon motion.

[e] **This practice has no application** to an action at law to recover money. *Mutual Life Ins. Co. v. Holloday*, 13 Abb. N. C. (N. Y.) 16; *Phillips v. Dusenberry*, 8 Hun (N. Y.) 348.

[f] **Personalty.**—Such day was never given in the English courts of chancery where the decree affected only the personality. **Mo.**—*Hendricks v. McLean*, 18 Mo. 32, 46. **Neb.**—*Manfull v. Graham*, 55 Neb. 645, 76 N. W. 19. **Eng.**—*Gregory v. Molesworth*, 3 Atk. 626, 26 Eng. Reprint 1160.

46. Ark.—*Woodall v. Moore*, 55 Ark. 22, 17 S. W. 268. **Ga.**—*Coalson v. Tooke*, 18 Ga. 742. **Ill.**—*Mason v. Wait*, 5 Ill. 127. **Ky.**—*Hanna v. Spotts*, 5 B. Mon. 362, 367; *Jameson v. Moseley*, 4 T. B. Mon. 414, 416; *Williamson v. Johnston*, 4 T. B. Mon. 253. **Neb.**—See *McCreary v. Creighton*, 76 Neb. 179, 107 N. W. 240, 243. **Tenn.**—*Simpson v. Alexander*, 6 Coldw. 619. **Va.**—*Brown v. Armistead*, 6 Rand. 594, 602. **Eng.**—See *Gregory v. Molesworth*, 3 Atk. 626, 26 Eng. Reprint 1160.

[a] **An application by a guardian to sell his ward's real estate** is in reality an application by the infant, or on her behalf, for power and authority to do acts for her benefit and interest and cannot be regarded as proceedings against the infant and hence does not entitle the infant to any other day in court unless upon suggestion, as *amicus curiae*, it should appear that the guardian was about to abuse the trust, or was seeking power to injure and misapply the estate. *Mason v. Wait*, 5 Ill. 127, 133.

[b] **Where There Is Fraud on the Part of the Next Friend.**—Probably where the infant's realty is involved, a minor complainant who has obtained less than he is entitled to or has a decree rendered against him may vacate the judgment where there has been fraud, collusion or misstatement of his rights by his next friend. *Bennett v.*

A decree failing to give such right is not void so as to subject it to attack collaterally.⁴⁷ The substance of this practice has been preserved by statutes giving the infant a certain time after arriving at majority to attack the decree, and in such case it is unnecessary to reserve that right in the decree itself.⁴⁸ In some jurisdictions, however, statutes make no such exception to the conclusiveness of a decree, in the case of infants.⁴⁹ In others, the rule allowing an infant a day after minority is abrogated by statute authorizing the appointment of a guardian ad litem.⁵⁰

Statutes which give an infant the right to show cause against a judgment, do not extend that right beyond those cases in which under the old practice such right was reserved in the decree.⁵¹ The right of the

East, 7 Ind. 174; *Jones v. Harper*, 61 Miss. 142.

47. *Joyce v. McAvoy*, 31 Cal. 273, 89 Am. Dec. 172; *Regla v. Martin*, 19 Cal. 463; *Doe v. Bradley*, 6 Smed. & M. (Miss.) 485.

[a] **Appellate Court Will Remedy Lack of Saving Clause.**—A decree of a chancery court, in relation to the realty of minors, which contains no saving clause as to their rights on arrival at age, is erroneous; but being regular in other particulars the appellate court will protect the minor's rights by decree in that court. *Williams v. Stratton*, 10 Smed. & M. (Miss.) 418.

[b] **Correction of Interlocutory Decree on Final Decree.**—An interlocutory decree will not be set aside because there was no day given the minor after becoming of age to show cause as such error may be corrected in the final decree. *Pickett v. Chilton*, 5 Munf. (Va.) 467.

48. *Ala.*—*Kennedy v. Kennedy*, 2 Ala. 571; *Cato v. Easley*, 2 Stew. 214. *Ark.*—*Kirby's Dig.*, §6248; *Purcell v. Gann*, 113 Ark. 332, 168 S. W. 1102; *Martin v. Gwynn*, 90 Ark. 44, 49, 117 S. W. 754; *Rankin v. Schofield*, 81 Ark. 440, 463, 98 S. W. 674; *Woodall v. Moore*, 55 Ark. 22, 17 S. W. 268. *Cal.* *Regla v. Martin*, 19 Cal. 463. *Ill.*—*Wadhams v. Gay*, 73 Ill. 415; *Hess v. Voss*, 52 Ill. 472, 478; *Barnes v. Hazelton*, 50 Ill. 429; *Kuchenbeiser v. Beckert*, 41 Ill. 172, 177; *Enos v. Capps*, 15 Ill. 277. *Ind. Ter.*—*Cook v. Edson Keith & Co.*, 5 Ind. Ter. 595, 82 S. W. 918. *Kan.* *Delashmutt v. Parrent*, 39 Kan. 548, 554, 18 Pac. 712. *Md.*—*Gregory v. Lenning*, 54 Md. 51. *Mass.*—*Walsh v. Walsh*, 116 Mass. 377. *Miss.*—*McLemore v. Chicago, etc. R. Co.*, 58 Miss. 514. *Mo.* *Shields v. Powers*, 29 Mo. 315; *Creath*

v. Smith, 20 Mo. 113; *Hendricks v. McLean*, 18 Mo. 32; *Heath v. Ashley*, 15 Mo. 393, *overruling Ruby v. Strother*, 11 Mo. 422. *Neb.*—*Manfull v. Graham*, 55 Neb. 645, 76 N. W. 19, 70 Am. St. Rep. 412. *Ohio.*—*Carey v. Kemper*, 45 Ohio St. 93, 96, 11 N. E. 130. *Okla.*—*Sawyer v. Ware*, 36 Okla. 139, 128 Pac. 273. *Va.*—*Zirkle v. McCue*, 26 Gratt. 517, 529. *Can.*—*S. M. Inv. & R. E. Co. v. Blanchard*, 2 Manitoba 154.

[a] **Statutory Right Co-extensive With Former Practice.**—*Manfull v. Graham*, 55 Neb. 645, 76 N. W. 19. The right to review exists in the minor only where by the former practice it was proper to reserve in the decree his right to show cause. *Woodall v. Moore*, 55 Ark. 22, 17 S. W. 268.

[b] **A judgment in an action of ejectment**, under the statute, is not conclusive on the infant heirs and they may re-try the title under their bill filed for that purpose within the time limited by statute. *Rhodes v. Crutchfield*, 7 Lea (Tenn.) 518, 523.

[c] **An infant who is a married woman** cannot show cause against herself, under the Kentucky statute. *Eversole v. First Nat. Bank*, 136 Ky. 362, 124 S. W. 360.

49. *Welsh v. Koch*, 4 Cal. App. 571, 576, 88 Pac. 604. See §1806. *Code Civ. Proc.*; *Reed v. Ring*, 93 Cal. 96, 108, 28 Pac. 851; *Shields v. Powers*, 29 Mo. 315, *citing Creath v. Smith*, 20 Mo. 113, *overruling Ruby v. Strother*, 11 Mo. 417; *Hendricks v. McLean*, 18 Mo. 32, 46.

50. *Mutual Life Ins. Co. v. Holloday*, 13 Abb. N. C. (N. Y.) 16; *Phillips v. Dusenberry*, 8 Hun (N. Y.) 348.

51. *Ark.*—*Paragould Trust Co. v. Perrin*, 103 Ark. 67, 145 S. W. 886; *Martin v. Gwynn*, 90 Ark. 44, 117 S. W.

infant must be limited to the extent of showing cause existing at the rendition of the decree, and not such as afterwards arose.⁵²

An infant is not entitled to a day in court after attaining his majority to show cause against a judgment ordering the sale of his lands.⁵³ But he has this right where he is directed to convey.⁵⁴

Where the right to show cause was reserved in the decree, the infant upon attaining majority could by appropriate process be brought into court for the purpose of having the decree made absolute,⁵⁵ and a similar practice is sometimes provided by statute.⁵⁶ Until made absolute, the decree was of no force against the infant.⁵⁷

754; *Blanton v. Rose*, 70 Ark. 415, 68 S. W. 674; *Woodall v. Moore*, 55 Ark. 22, 17 S. W. 268. **Neb.**—*Manfull v. Graham*, 55 Neb. 645, 76 N. W. 19, 70 Am. St. Rep. 412. **Okla.**—*Sawyer v. Ware*, 36 Okla. 139, 128 Pac. 273.

[a] But a statute giving a court power to vacate or modify its own judgment against an infant within a given time after he attains majority, is apparently not limited by the equity practice. See *Sawyer v. Ware*, 36 Okla. 139, 128 Pac. 273. As to such statutes, see *infra*, I, G, 9.

52. **Ia.**—*Dillivan v. Bank*, 124 N. W. 350, 356. **Va.**—*Lancaster v. Barton*, 92 Va. 615, 623, 24 S. E. 251; *Zirkle v. McCue*, 26 Gratt. 517; *Durrett v. Davis*, 24 Gratt. 302; *Walker v. Page*, 21 Gratt. 636. **W. Va.**—*Poling v. Poling*, 61 W. Va. 78, 82, 66 S. E. 94; *Lafferty v. Lafferty*, 42 W. Va. 783, 786, 26 S. E. 262.

[a] Matters in existence at the rendition of judgment considered by the court may be raised to attack the judgment. *Park v. Bolinger*, 10 Ky. L. Rep. 303, 8 S. W. 914.

53. **Miss.**—*Doe v. Bradley*, 6 Smed. & M. 485, sale of mortgaged premises. **Mo.**—*Shields v. Powers*, 29 Mo. 315, citing *Creath v. Smith*, 20 Mo. 113, overruling *Ruby v. Strother*, 11 Mo. 417; *Hendricks v. McLean*, 18 Mo. 32, 46. **Neb.**—*Manfull v. Graham*, 55 Neb. 645, 76 N. W. 19. **Tenn.**—*Rogers v. Clark*, 5 Sneed 665, 668.

See 1 Dan. Ch. Pr. (8th ed.), p. 113.

[a] The doctrine that an infant must have a day in court after attaining majority, has no application where the title is divested by the decree. **Tenn.** *Winchester v. Winchester*, 1 Head 460. **Tex.**—*Cannon v. Hemphill*, 7 Tex. 184, 202. **Va.**—*Wilkinson v. Oliver*, 4 Hen. & M. 450. **Eng.**—See *Booth v. Rich*, 1 Vern. 295, 23 Eng. Reprint 478, to avoid giving an infant a day to show cause

the court should decree the lands to be sold to pay the debts.

[b] In Foreclosure Proceedings. *Scholefield v. Heafield*, 8 Sim. 470, 59 Eng. Reprint 187; *Dan. Ch. Pr.* (8th ed.), p. 113. See *McClay v. Norris*, 9 Ill. 370.

54. **Ky.**—*Pulliam v. Pulliam*, 4 Dana 123; *Meriwether v. Hite*, 2 A. K. Marsh. 181. **Miss.**—*Williams v. Stratton*, 10 Smed. & M. 418. **Ohio.**—*St. Clair v. Smith*, 3 Ohio 355. **Tenn.**—*Winchester v. Winchester*, 1 Head 460. **Tex.**—*Cannon v. Hemphill*, 7 Tex. 184. **Va.**—*Wilkinson v. Oliver*, 4 Hen. & M. 450.

[a] Where the infant holds land as a trustee the court will compel him to make a conveyance without reserving for him a day in court after attaining his majority. **Del.**—*Lockwood v. Stradley*, 1 Del. Ch. 298, 305. **Me.**—*McClellan v. McClellan*, 65 Me. 500. **Mass.**—*Walsh v. Walsh*, 116 Mass. 377, 17 Am. Dec. 162. **Eng.**—*Thornton v. Blackbourne*, 2 Eq. Cas. Abr. 303, 22 Eng. Reprint 255, 256; *Bingham v. Clamorris*, 2 Molloy 393. **Can.**—*Lake v. McIntosh*, 7 Grant Ch. (U. C.) 532.

55. **Ill.**—*McClay v. Norris*, 9 Ill. 370, 381. **Mo.**—*Hendricks v. McLean*, 18 Mo. 32, 40. **N. Y.**—See *Bushnell v. Harford*, 4 Johns. Ch. 302.

56. Concluding Infant at Earlier Date Than Statutory Limit.—Where our statute allows an infant three years after full age to assail a decree, the party interested in concluding the infant defendant at an earlier day may within six months after he attains the age of twenty-one years, summon him to appear and show cause against the decree, or serve him with a copy of it. *McLemore v. Chicago, etc. R. Co.*, 58 Miss. 514.

57. *Enos v. Capps*, 15 Ill. 277, by failure to show cause against it after attaining his majority. See 10 STANDARD PROC. 874.

After the infant comes of age and before the decree is made absolute, or within the time allowed by statute he may, as a matter of course, obtain leave to amend his answer,⁵³ or put in a new one and have the cause reheard.⁵⁹ The answer of the infant may set up a different case in his behalf and thus urge defenses not before made.⁶⁰ He may also file a bill of discovery.⁶¹

9. Vacating and Setting Aside.⁶² — a. *Generally.* — While an infant may, in a proper proceeding and upon a sufficient showing, have a judgment or decree against him set aside,⁶³ he is not always entitled to such relief as a matter of absolute right,⁶⁴ and generally the attack

[a] **Where Decree Beneficial.**—Although it is a general rule that an infant defendant is not bound by a decree, if, when he arrives of age, he can show error in it, yet, it seems that where a decree is obviously for his benefit, his rights may be absolutely bound by it. *Brown v. Armistead*, 6 Rand. (Va.) 594.

58. *Ralston v. Lahee*, 8 Iowa 17, 74 Am. Dec. 291.

59. **Ia.**—*Ralston v. Lahee*, 8 Iowa 17, 74 Am. Dec. 291. **Ky.**—*Booker v. Kennerly*, 96 Ky. 415, 418, 29 S. W. 323; *Jameson v. Moseley*, 4 T. B. Mon. 414, 416. **Miss.**—*McLemore v. Chicago*, etc. R. Co., 58 Miss. 514. **N. Y.**—*Curtis v. Ballagh*, 4 Edw. Ch. 635. **S. D.**—*In re Nelson's Estate*, 26 S. D. 615, 620, 129 N. W. 113. **Va.**—*Pierce v. Trigg*, 10 Leigh 406, 428. **W. Va.**—*Poling v. Poling*, 61 W. Va. 78, 80, 66 S. E. 94; *Lafferty v. Lafferty*, 42 W. Va. 783, 26 S. E. 262. **Eng.**—*Dan. Ch. Pr.* (8th ed.), p. 114; *Fountain v. Caine*, 1 P. Wms. 504, 24 Eng. Reprint 491.

[a] **But Not While Still a Minor.** *Bennett v. Lee*, 2 Atk. 487, 26 Eng. Reprint 694.

[b] **New Answer in Foreclosure Proceedings Not Allowed.**—*McClay v. Norris*, 9 Ill. 370, 381. Compare *Stanley v. Brannon*, 6 Blackf. (Ind.) 193, holding he may show error in the decree.

60. **Ind.**—*Stanley v. Brannon*, 6 Blackf. 193. **Ky.**—*Booker v. Kennerly*, 96 Ky. 415, 29 S. W. 323; *Jameson v. Moseley*, 4 T. B. Mon. 414, 416. **W. Va.**—*Lafferty v. Lafferty*, 42 W. Va. 783, 786, 26 S. E. 262.

But see *Dillivan v. Bank* (Iowa), 124 N. W. 350, 356; *Bickel v. Erskine*, 43 Iowa 213.

[a] **Facts Sustaining Decree.**—Where the infants in showing cause against a decree allege additional and heretofore unknown facts sufficient to have sustained the decree, the decree will not

be set aside. *Pierce v. Trigg*, 10 Leigh (Va.) 406, 428, even though without these facts the decree would have been vacated.

61. *Ralston v. Lahee*, 8 Iowa 17, 74 Am. Dec. 291.

62. See generally the titles "Bills of Review;" "Bills To Impeach Judgments and Decrees;" "Decrees;" "Judgments."

As to infant's day in court after attaining majority, see *supra*, I, G, 8. Setting aside a sale of infant's property, see *infra*, III, A, 9.

63. **U. S.**—*Sliver v. Shelback*, 1 Dall. 165, 1 L. ed. 84. **Ind.**—*Brown v. Keyser*, 53 Ind. 85, St. 2 G. & H. 366, §29, providing for review of partition by any person not served with summons, upon showing cause, construed. **Ky.**—*Thompson v. Peeble*, 6 Dana 387, 392. **S. C.**—*Haigler v. Way*, 2 Rich. L. 324. **Va.**—*Brown v. Armistead*, 6 Rand. 594. **Wash.**—*Ball v. Clothier*, 34 Wash. 299, 308, 75 Pac. 1099.

See *supra*, I, G, 7, and *infra*, this section.

64. **Ark.**—*Paragould Trust Co. v. Perrin*, 103 Ark. 67, 145 S. W. 886. **Neb.**—*Manfull v. Graham*, 55 Neb. 645, 76 N. W. 19, 70 Am. St. Rep. 412. **N. C.**—*Harris v. Bennett*, 160 N. C. 339, 344, 76 S. E. 217; *Syme v. Trice*, 96 N. C. 243, 1 S. E. 480, 482. **S. C.**—*Robertson v. Blair*, 56 S. C. 96, 34 S. E. 11, 76 Am. St. Rep. 543; *Haigler v. Way*, 2 Rich. L. 324. **Va.**—*Brown v. Armistead*, 6 Rand. 594. **W. Va.**—*Lafferty v. Lafferty*, 42 W. Va. 783, 26 S. E. 262.

See *infra*, I, G, 9, j.

[a] **Where no injustice has been done the infant the judgment or decree will not be vacated.** **Ark.**—*Martin v. Gwvnn*, 90 Ark. 44, 117 S. W. 754. **Ky.**—*Richards v. Richards*, 10 Bush 617. **N. C.**—*Harris v. Bennett*, 160 N. C. 339, 76 S. E. 217.

may be made only by infant defendants⁶⁵ who were minors at the rendition of the judgment.⁶⁶ Where, however, the infant's property rights are disposed of by a decree he may attack it even though he was not a party to the action.⁶⁷

Statutes frequently make special provision for the setting aside of judgments against infants.⁶⁸

[b] The court is not bound to set aside such a judgment but may consider lapse of time, conduct of the infant and other circumstances as having confirmed the judgment or rendered the interference of the court improper. *Haigler v. Way*, 2 Rich. L. (S. C.) 324.

65. *Woodall v. Moore*, 55 Ark. 22, 17 S. W. 268. See *McClay v. Morris*, 9 Ill. 370; *Bent v. Maxwell Land Grant & Ry. Co.*, 3 N. M. 167; and *supra*, I, G, 8.

[a] Privies and alienees have the same right as the infant. *Gillespie v. Pocahontas C. & C. Co.*, 162 Fed. 742, 747. See *Back v. Combs*, 96 Ky. 522, 29 S. W. 352; *Cox v. Story*, 80 Ky. 64.

66. *Back v. Combs*, 96 Ky. 522, 29 S. W. 352.

67. See the following cases: *Cal.* *Fanning v. Foley*, 99 Cal. 336, 33 Pac. 1098. *Fla.*—*Gibbons v. McDermott*, 19 Fla. 852, 856. *Ill.*—*Swift v. Yanaway*, 153 Ill. 197, 206, 38 N. E. 589. *Ky.* *Bohannon v. Tarbin*, 25 Ky. L. Rep. 515, 76 S. W. 46. *Minn.*—*Hoyt v. Lightbody*, 93 Minn. 249, 101 N. W. 304.

But see *Gunter v. Fox*, 51 Tex. 383; *Poling v. Poling*, 61 W. Va. 78, 66 S. E. 94.

68. See the discussion following, and also: *Ala.*—*Kennedy v. Kennedy*, 2 Ala. 571; *Cato v. Easley*, 2 Stew. 214. *Ark.* *Martin v. Gwynn*, 90 Ark. 44, 117 S. W. 754; *Rankin v. Schofield*, 81 Ark. 440, 98 S. W. 674; *Jones v. Pond & D. Mfg. Co.*, 79 Ark. 194, 96 S. W. 756; *Blanton v. Rose*, 70 Ark. 415, 68 S. W. 674; *Woodall v. Moore*, 55 Ark. 22, 17 S. W. 268. *Cal.*—*Code Civ. Proc.*, §1806; *Reed v. Ring*, 93 Cal. 96, 28 Pac. 851. See *Welsh v. Koch*, 4 Cal. App. 571, 88 Pac. 604. *Ill.*—*Teel v. Dunnahoo*, 221 Ill. 471, 77 N. E. 906, 112 Am. St. Rep. 192; *Johnson v. Buck*, 220 Ill. 226, 77 N. E. 163; *Lloyd v. Kirkwood*, 112 Ill. 329; *Barnes v. Hazleton*, 50 Ill. 429; *Enos v. Capp*, 15 Ill. 277. *Ind.*—*Zerger v. Flattery*, 83 Ind. 399; *Seward v. Clark*, 67 Ind. 289; *Bennett v. East*, 7 Ind. 174. *Ind. Ter.*—*Cook v. Edson Keith & Co.*, 5 Ind. Ter. 595, 82 S. W. 918. *Ia.* *Ringstad v. Hanson*, 150 Iowa 324, 130

N. W. 145; *Dillivan v. Bank*, 124 N. W. 350; *Wise v. Schloesser*, 111 Iowa 16, 82 N. W. 439; *Dahms v. Alston*, 72 Iowa 411, 34 N. W. 182; *Bickel v. Erskine*, 43 Iowa 213. *Kan.*—*Delaschmutter v. Parent*, 39 Kan. 548, 18 Pac. 712. *Ky.* *Back v. Combs*, 96 Ky. 522, 29 S. W. 352, 16 Ky. L. Rep. 613; *Booker v. Kennerly*, 96 Ky. 415, 29 S. W. 323, 16 Ky. L. Rep. 537; *Richards v. Richards*, 10 Bush 617; *Speak v. Mattingly*, 4 Bush 310; *Bohannon v. Tarbin*, 25 Ky. L. Rep. 515, 76 S. W. 46; *Park v. Bolinger*, 10 Ky. L. Rep. 303, 8 S. W. 914. *La.* *Boudreaux v. Lower Terrebonne R. & Mfg. Co.*, 127 La. 98, 53 So. 456. *Minn.* *Hoyt v. Lightbody*, 93 Minn. 249, 101 N. W. 304. *Miss.*—*McLemore v. Chicago, etc. R. Co.*, 58 Miss. 514; *Mayo v. Clancy*, 57 Miss. 674; *Sledge v. Boone*, 57 Miss. 222; *Cock v. Simmons*, 57 Miss. 183. *Neb.*—*McCreary v. Creighton*, 76 Neb. 179, 107 N. W. 240; *Manfull v. Graham*, 55 Neb. 645, 76 N. W. 19, 70 Am. St. Rep. 412. *N. Y.*—*McMurray v. McMurray*, 60 Barb. 117; *Byrnes v. Byrnes*, 109 App. Div. 535, 96 N. Y. Supp. 306. *Ohio.*—*Roberts v. Roberts*, 61 Ohio St. 96, 55 N. E. 411; *Carey v. Kemper*, 45 Ohio St. 93, 11 N. E. 130. *Okla.*—*Comp. Laws*, 1909, §6094; *Sawyer v. Ware*, 36 Okla. 139, 128 Pac. 273. *Tenn.*—*Vaccaro v. Cicalla*, 89 Tenn. 63, 14 S. W. 43; *Rhodes v. Crutchfield*, 7 Lea 518; *Winchester v. Winchester*, 1 Head 460; *Crawford v. Woodward*, 1 Tenn. Ch. App. 274. *Va.*—*Harrison v. Wallton's Exr.*, 95 Va. 721, 30 S. E. 372, 64 Am. St. Rep. 830, 41 L. R. A. 703; *Zirkle v. McCue*, 26 Gratt. 517; *Wills v. Spraggins*, 3 Gratt. 555; *Brown v. Armistead*, 6 Rand. 594. *Wash.* *Wilson v. Hubbard*, 39 Wash. 671, 82 Pac. 154; *Ball v. Clothier*, 34 Wash. 299, 75 Pac. 1099; *Morrison v. Morrison*, 25 Wash. 466, 65 Pac. 779. *W. Va.* *McSwegin v. Howard*, 63 W. Va. 92, 59 S. E. 894; *Poling v. Poling*, 61 W. Va. 78, 66 S. E. 94; *Seymour v. Alkire*, 47 W. Va. 302, 34 S. E. 953; *Lafferty v. Lafferty*, 42 W. Va. 783, 26 S. E. 262.

After attaining majority, see *supra*, I, G, 8; *infra*, I, G, 9, f.

The infant may be estopped from denying the validity of the decree by having received benefits under it.⁶⁹

Ratification of Irregularities.—Where after attaining majority, the infant takes some step in the action, such as a motion for new trial or an appeal, he thereby ratifies the previous proceedings and is bound by any subsequent determination or disposition thereof.⁷⁰

As Against Bona Fide Purchasers.—It has been held that an irregular judgment against an infant will not be set aside to the prejudice of bona fide purchasers without notice.⁷¹

b. **Grounds.**—(I.) **Generally.**—As the rights and interests of infants are under the special protection of courts of equity, they may in general vacate every judgment by which injustice has been done the infant,⁷² but such relief will not be granted for mere technical errors in the procedure.⁷³ The infant may set up only such grounds as relate to his own interests.⁷⁴

In some jurisdictions any error or irregularity which might have been but was not corrected by motion for new trial or by appeal, is not sufficient ground for setting aside the judgment.⁷⁵

(II.) **Particular Grounds.**—If it appears that the infant's interests were not properly cared for,⁷⁶ as where the guardian, intentionally or otherwise, failed to disclose important facts in the case,⁷⁷ an adverse judgment may be set aside.

69. *Sharp v. Findley*, 71 Ga. 654-667; *Fischer v. Siekmann*, 125 Mo. 165, 28 S. W. 435.

70. *Childs v. Lanterman*, 103 Cal. 387, 391, 37 Pac. 382, 42 Am. St. Rep. 121.

71. **Ill.**—*Hunter v. Empire State S. Co.*, 261 Ill. 335, 103 N. E. 1052; *Teel v. Dunnihoo*, 221 Ill. 471, 475, 77 N. E. 906, 112 Am. St. Rep. 192; *Lloyd v. Kirkwood*, 112 Ill. 329. See *Allison v. Drake*, 145 Ill. 500, 32 N. E. 537. **Md.** *Ridgely v. Barton*, 10 Atl. 148. **N. Y.** *McMurray v. McMurray*, 66 N. Y. 175; *Feitner v. Hoeger*, 14 Daly 470.

As to setting aside decree of sale, see *infra*, III, A, 9.

[a] When bona fide purchasers have acquired interests under a judgment against an infant, it will not be set aside for error as the infant may have his remedy for any injuries suffered, against the guardian and sureties upon their bonds. *Prior v. Prior*, 49 Hun 502, 506, 2 N. Y. Supp. 523, following *Reed v. Reed*, 107 N. Y. 545, 14 N. E. 442.

72. **Ky.**—*Newland v. Gentry*, 18 B. Mon. 666, 671. **Tex.**—*Day v. Johnson*, 32 Tex. Civ. App. 107, 72 S. W. 426. **W. Va.**—*Poling v. Poling*, 61 W. Va. 78, 81, 55 S. E. 993.

[a] **Fact of infancy and injustice** is sufficient to warrant relief. *Allen v.*

Troutman, 10 Bush (Ky.) 61; *House v. Greathouse*, 10 Ky. L. Rep. 317.

[b] **Even though entered into by agreement** a judgment prejudicial to the minor will be set aside. *Day v. Johnson*, 32 Tex. Civ. App. 107, 72 S. W. 426.

73. *Tomblin v. Peck*, 73 W. Va. 336, 80 S. E. 450, misnomer.

74. *Clark v. Shawen*, 190 Ill. 47, 57, 60 N. E. 116.

75. *Welsh v. Koch*, 4 Cal. App. 571, 577, 88 Pac. 604; and see *infra*, I, G, 9, b, (II).

[a] **The misconduct or neglect of a guardian ad litem or of infant's counsel** is a mere error or irregularity to be corrected in the action, on motion for a new trial, or on appeal. *Welsh v. Koch*, 4 Cal. App. 571, 578, 88 Pac. 604.

76. **Ark.**—See *French v. Vanatta*, 83 Ark. 306, 312, 104 S. W. 141; also *Freeman v. Russell*, 40 Ark. 56. **Ill.**—*Lloyd v. Kirkwood*, 112 Ill. 329. **Ia.**—*Harris v. Bigley*, 136 Iowa 307, 310, 111 N. W. 432.

Kan.—*Missouri Pac. R. Co. v. Lasca*, 79 Kan. 311, 99 Pac. 616, 21 L. R. A. (N. S.) 338. **Tex.**—*Stephens v. Hewett*, 22 Tex. Civ. App. 303, 54 S. W. 301.

77. *Newland v. Gentry*, 18 B. Mon. (Ky.) 666, 671. See *Day v. Johnson*, 32 Tex. Civ. App. 107, 72 S. W. 426;

A judgment against an infant may be set aside on a showing of fraud,⁷⁸ mistake,⁷⁹ surprise,⁸⁰ newly-discovered evidence,⁸¹ irregularity⁸² or error,⁸³ provided, in some jurisdictions, that the alleged

Schneider v. Sellers, 25 Tex. Civ. App. 226, 61 S. W. 541.

[a] **The fact that the infant had a good defense** which was not presented. *Johnson v. Johnson*, 38 Tex. Civ. App. 385, 390, 85 S. W. 1023.

78. Cal.—*Joyce v. Joyce*, 5 Cal. 161; *Welsh v. Koch*, 4 Cal. App. 571, 88 Pac. 604.

Ga.—*Southern Marble Co. v. Stegall*, 90 Ga. 236, 15 S. E. 806. Ill.

Teel v. Dunnihoo, 221 Ill. 471, 475, 77 N. E. 906, 112 Am. St. Rep. 192; *Johnson v. Buck*, 220 Ill. 226, 232, 77 N. E. 163; *Lloyd v. Kirkwood*, 112 Ill. 329, 338; *Mauzey v. Dazey*, 114 Ill. App. 652; *Chudleigh v. Chicago, R. I. & P. R. Co.*, 51 Ill. App. 491. Ind.—*Seward v. Clark*, 67 Ind. 289, 300; *Bennett v. East*, 7 Ind. 174; *Young v. Wiley* (Ind. App.), 102 N. E. 54. Ia.—*Harris v. Bigley*, 136 Iowa 307, 312, 111 N. W. 432; *Ralston v. Lahee*, 8 Iowa 17, 24 Am. Dec. 291. Ky.—*Newland v. Gentry*, 18 B. Mon. 666, 671. Neb.—*Kazebeer v. Nunemaker*, 82 Neb. 732, 118 N. W. 616. N. M.—*Bent v. Maxwell Land Grant & Ry. Co.*, 3 N. M. 167, 181. N. Y.—*In re Hawley*, 100 N. Y. 206, 211, 3 N. E. 68; *Wright v. Miller*, 1 Sandf. Ch. 100, 120; *Story v. Dayton*, 22 Hun 450. See *Howell v. Mills*, 53 N. Y. 322; *Bucks' Estate*, 15 Abb. Pr. 12, 46. N. C.—*Becton v. Becton*, 56 N. C. 419, 422. Ohio.—*Massie v. Matthew*, 12 Ohio 351. Tenn.—*Rogers v. Clark*, 5 Sneed 665, 669. Tex.—*Johnson v. Johnson*, 38 Tex. Civ. App. 385, 389, 85 S. W. 1023. Va.—*Zirkle v. McCue*, 26 Gratt. 517. Wash.—*Wilson v. Hubbard*, 39 Wash. 671, 681, 82 Pac. 154. W. Va.—*Plant v. Humphries*, 66 W. Va. 88, 66 S. E. 94, 26 L. R. A. (N. S.) 558; *Poling v. Poling*, 61 W. Va. 78, 80, 55 S. E. 993; *Lafferty v. Lafferty*, 42 W. Va. 783, 26 S. E. 262.

[a] **The fact that the infant had a good defense** which was not presented. *Johnson v. Johnson*, 38 Tex. Civ. App. 385, 390, 85 S. W. 1023.

78. Cal.—*Joyce v. Joyce*, 5 Cal. 161; *Welsh v. Koch*, 4 Cal. App. 571, 88 Pac. 604.

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Teel v. Dunnihoo, 221 Ill. 471, 475, 77 N. E. 906, 112 Am. St. Rep. 192; *Johnson v. Buck*, 220 Ill. 226, 232, 77 N. E. 163; *Lloyd v. Kirkwood*, 112 Ill. 329, 338; *Mauzey v. Dazey*, 114 Ill. App. 652; *Chudleigh v. Chicago, R. I. & P. R. Co.*, 51 Ill. App. 491. Ind.—*Seward v. Clark*, 67 Ind. 289, 300; *Bennett v. East*, 7 Ind. 174; *Young v. Wiley* (Ind. App.), 102 N. E. 54. Ia.—*Harris v. Bigley*, 136 Iowa 307, 312, 111 N. W. 432; *Ralston v. Lahee*, 8 Iowa 17, 24 Am. Dec. 291. Ky.—*Newland v. Gentry*, 18 B. Mon. 666, 671. Neb.—*Kazebeer v. Nunemaker*, 82 Neb. 732, 118 N. W. 616. N. M.—*Bent v. Maxwell Land Grant & Ry. Co.*, 3 N. M. 167, 181. N. Y.—*In re Hawley*, 100 N. Y. 206, 211, 3 N. E. 68; *Wright v. Miller*, 1 Sandf. Ch. 100, 120; *Story v. Dayton*, 22 Hun 450. See *Howell v. Mills*, 53 N. Y. 322; *Bucks' Estate*, 15 Abb. Pr. 12, 46. N. C.—*Becton v. Becton*, 56 N. C. 419, 422. Ohio.—*Massie v. Matthew*, 12 Ohio 351. Tenn.—*Rogers v. Clark*, 5 Sneed 665, 669. Tex.—*Johnson v. Johnson*, 38 Tex. Civ. App. 385, 389, 85 S. W. 1023. Va.—*Zirkle v. McCue*, 26 Gratt. 517. Wash.—*Wilson v. Hubbard*, 39 Wash. 671, 681, 82 Pac. 154. W. Va.—*Plant v. Humphries*, 66 W. Va. 88, 66 S. E. 94, 26 L. R. A. (N. S.) 558; *Poling v. Poling*, 61 W. Va. 78, 80, 55 S. E. 993; *Lafferty v. Lafferty*, 42 W. Va. 783, 26 S. E. 262.

79. Cal.—*Joyce v. Joyce*, 5 Cal. 161; *Welsh v. Koch*, 4 Cal. App. 571, 88 Pac. 604.

Ga.—*Southern Marble Co. v. Stegall*, 90 Ga. 236, 15 S. E. 806. Ill.

Teel v. Dunnihoo, 221 Ill. 471, 475, 77 N. E. 906, 112 Am. St. Rep. 192; *Johnson v. Buck*, 220 Ill. 226, 232, 77 N. E. 163; *Lloyd v. Kirkwood*, 112 Ill. 329, 338; *Mauzey v. Dazey*, 114 Ill. App. 652; *Chudleigh v. Chicago, R. I. & P. R. Co.*, 51 Ill. App. 491. Ind.—*Seward v. Clark*, 67 Ind. 289, 300; *Bennett v. East*, 7 Ind. 174; *Young v. Wiley* (Ind. App.), 102 N. E. 54. Ia.—*Harris v. Bigley*, 136 Iowa 307, 312, 111 N. W. 432; *Ralston v. Lahee*, 8 Iowa 17, 24 Am. Dec. 291. Ky.—*Newland v. Gentry*, 18 B. Mon. 666, 671. Neb.—*Kazebeer v. Nunemaker*, 82 Neb. 732, 118 N. W. 616. N. M.—*Bent v. Maxwell Land Grant & Ry. Co.*, 3 N. M. 167, 181. N. Y.—*In re Hawley*, 100 N. Y. 206, 211, 3 N. E. 68; *Wright v. Miller*, 1 Sandf. Ch. 100, 120; *Story v. Dayton*, 22 Hun 450. See *Howell v. Mills*, 53 N. Y. 322; *Bucks' Estate*, 15 Abb. Pr. 12, 46. N. C.—*Becton v. Becton*, 56 N. C. 419, 422. Ohio.—*Massie v. Matthew*, 12 Ohio 351. Tenn.—*Rogers v. Clark*, 5 Sneed 665, 669. Tex.—*Johnson v. Johnson*, 38 Tex. Civ. App. 385, 389, 85 S. W. 1023. Va.—*Zirkle v. McCue*, 26 Gratt. 517. Wash.—*Wilson v. Hubbard*, 39 Wash. 671, 681, 82 Pac. 154. W. Va.—*Plant v. Humphries*, 66 W. Va. 88, 66 S. E. 94, 26 L. R. A. (N. S.) 558; *Poling v. Poling*, 61 W. Va. 78, 80, 55 S. E. 993; *Lafferty v. Lafferty*, 42 W. Va. 783, 26 S. E. 262.

80. Brick's Estate, 15 Abb. Pr. (N. Y.) 12, 46; *Poling v. Poling*, 61 W. Va. 78, 80, 66 S. E. 94; *Lafferty v. Lafferty*, 42 W. Va. 783, 26 S. E. 262.

81. *Becton v. Becton*, 56 N. C. 419, 422; *Gregory v. Molesworth*, 3 Atk. 626, 26 Eng. Reprint 1160. See *In re Hawley*, 100 N. Y. 206, 211, 3 N. E. 68, interpreting §2481, N. Y. Code Civ. Proc., as to the relief granted to a minor against a decree of the surrogate.

82. Colo.—See *Fillmore v. Russell*, 6 Colo. 171, 174. N. C.—*Harris v. Bennett*, 160 N. C. 339, 344, 76 S. E. 217; *Hughes v. Pritchard*, 153 N. C. 135, 146, 69 S. E. 3, 138 Am. St. Rep. 649; *Syme v. Trice*, 96 N. C. 243, 1 S. E. 480; *Morris v. White*, 96 N. C. 91, 2 S. E. 254; *Hare v. Hollomon*, 92 N. C. 236, 239; *England v. Garner*, 90 N. C. 197, 201. Tex.—*Wichita Land & Cattle Co. v. Ward*, 1 Tex. Civ. App. 307, 313, 21 S. W. 128.

[a] **Every judgment affected in any degree, directly or indirectly, by irregularities** will not be set aside; each case is governed by its own circumstances. *Williamson v. Hartman*, 92 N. C. 236, 239. See *Day v. Johnson*, 32 Tex. Civ. App. 107, 112, 72 S. W. 426, facts in the case do not constitute an irregularity sufficient to set aside a sale under the decree.

[b] **An irregular appointment of a guardian** is not per se a ground for setting aside the decree. *Story v. Dayton*, 22 Hun (N. Y.) 450. See also *Tabor v. Lorance*, 53 Ala. 543, 546; *Manayunk Trust Co. v. Platt*, 221 Pa. 248, 70 Atl. 721, where minor or next of kin was not served with notice of application to appoint guardian ad litem.

83. U. S.—*Bank of United States v. Ritchie*, 8 Pet. 128, 145, 146, 8 L. ed. 890. Ark.—*Ryan v. Fielder*, 9 Ark. 374, 138 S. W. 973. Colo.—*Barker v. Hamilton*, 3 Colo. 291. Ga.—*Groce v. Field*, 13 Ga. 24, 31. Ill.—*Teel v. Dunnihoo*, 221 Ill. 471, 475, 77 N. E. 906, 112 Am. St. Rep. 192; *Johnson v. Buck*, 220 Ill. 226, 232, 77 N. E. 163; *Lloyd*

80. Brick's Estate, 15 Abb. Pr. (N. Y.) 12, 46; *Poling v. Poling*, 61 W. Va. 78, 80, 66 S. E. 94; *Lafferty v. Lafferty*, 42 W. Va. 783, 26 S. E. 262.

81. *Becton v. Becton*, 56 N. C. 419, 422; *Gregory v. Molesworth*, 3 Atk. 626, 26 Eng. Reprint 1160. See *In re Hawley*, 100 N. Y. 206, 211, 3 N. E. 68, interpreting §2481, N. Y. Code Civ. Proc., as to the relief granted to a minor against a decree of the surrogate.

82. Colo.—See *Fillmore v. Russell*, 6 Colo. 171, 174. N. C.—*Harris v. Bennett*, 160 N. C. 339, 344, 76 S. E. 217; *Hughes v. Pritchard*, 153 N. C. 135, 146, 69 S. E. 3, 138 Am. St. Rep. 649; *Syme v. Trice*, 96 N. C. 243, 1 S. E. 480; *Morris v. White*, 96 N. C. 91, 2 S. E. 254; *Hare v. Hollomon*, 92 N. C. 236, 239; *England v. Garner*, 90 N. C. 197, 201. Tex.—*Wichita Land & Cattle Co. v. Ward*, 1 Tex. Civ. App. 307, 313, 21 S. W. 128.

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Failure To Appoint Guardian Ad Litem.—10 STANDARD PROC. 703. See *Byrnes v. Byrnes*, 109 App. Div. 535, 96 N. Y. Supp. 306.

83. U. S.—*Bank of United States v. Ritchie*, 8 Pet. 128, 145, 146, 8 L. ed. 890. Ark.—*Ryan v. Fielder*, 9 Ark. 374, 138 S. W. 973. Colo.—*Barker v. Hamilton*, 3 Colo. 291. Ga.—*Groce v. Field*, 13 Ga. 24, 31. Ill.—*Teel v. Dunnihoo*, 221 Ill. 471, 475, 77 N. E. 906, 112 Am. St. Rep. 192; *Johnson v. Buck*, 220 Ill. 226, 232, 77 N. E. 163; *Lloyd*

error⁸⁴ and the disability of the infant⁸⁵ do not appear in the record.

It has been held that a judgment will not be vacated because of mere misfortune,⁸⁶ casualty,⁸⁷ or misnomer of an infant party.⁸⁸

v. Kirkwood, 112 Ill. 329, 338; *Kirchenbeiser v. Beckert*, 41 Ill. 172; *Mauzy v. Dazey*, 114 Ill. App. 652. **Ind. Ter.** *Cook v. Edson Keith & Co.*, 5 Ind. Ter. 595, 82 S. W. 918. **Ia.**—*Dillivan v. Bank*, 124 N. W. 350, 355. **Ky.**—*Leavell v. Carter*, 112 S. W. 1118; *Eversole v. Bank*, 136 Ky. 362, 366, 124 S. W. 360; *Berryhill v. Holland*, 124 Ky. 615, 618, 99 S. W. 902; *Spradlin v. Stanley's Admr.*, 30 Ky. L. Rep. 928, 99 S. W. 965. **Md.**—*Pruzman v. Pitesell*, 3 Har. & J. 77. **Miss.**—*Mayo v. Clancy*, 57 Miss. 674; *Enochs v. Harrelson*, 57 Miss. 465; *Sledge v. Boone*, 57 Miss. 222. **N. M.**—*Bent v. Maxwell Land Grant & Ry. Co.*, 3 N. M. 167, 182. **N. Y.**—See *Tucker v. Manhattan R. Co.*, 78 Hun 439, 443, 29 N. Y. Supp. 202. **N. C.** *McLarty v. Broom*, 67 N. C. 311, 321. **Ohio.**—*Roberts v. Roberts*, 61 Ohio St. 96, 112, 55 N. E. 411; *Palmer v. Palmer*, 25 Ohio C. C. 660. **Okla.**—*Sawyer v. Ware*, 36 Okla. 139, 128 Pac. 273. **Tenn.** *Rogers v. Clark*, 5 Sneed 665, 669. **Va.** *Zirkle v. McCue*, 26 Gratt. 517. **Wash.** *Wilson v. Hubbard*, 39 Wash. 671, 681, 82 Pac. 154. **W. Va.**—*Poling v. Poling*, 61 W. Va. 78, 80, 66 S. E. 94; *Lafferty v. Lafferty*, 42 W. Va. 783, 26 S. E. 262. **Eng.**—*Gregory v. Molesworth*, 3 Atk 626, 26 Eng. Reprint 1160.

[a] **Character of Errors To Justify Setting Aside Judgment.**—The errors which will authorize the court to vacate a judgment must be such as would be a ground of reversal on appeal. **Ia.** *Webster v. Page*, 54 Iowa 461, 6 N. W. 716; *Bickel v. Erskine*, 43 Iowa 213. **Miss.**—*Doe v. Bradley*, 6 Smed. & M. 485, 493. **Tex.**—*Johnson v. Johnson*, 38 Tex. Civ. App. 385, 390, 85 S. W. 1023. **Wash.**—*Wilson v. Hubbard*, 39 Wash. 671, 681, 82 Pac. 154.

[b] **That the evidence was not such as would have been found sufficient on an appeal from the decree**, is not determinative of an action to set it aside. *Harris v. Bigley*, 136 Iowa 307, 312, 111 N. W. 432.

84. **Ala.**—*Stammers v. McNaughton*, 57 Ala. 277, 281. **Ark.**—*Ryan v. Fielder*, 99 Ark. 374, 138 S. W. 973; *Jones v. Pond & D. Mfg. Co.*, 79 Ark. 194, 200, 96 S. W. 756. **Ind. Ter.**—*Cook v. Edson Keith & Co.*, 5 Ind. Ter. 595, 82 S. W.

918. **Ia.**—*Dillivan v. Bank*, 124 N. W. 350, 355. **Kan.**—*Delashmutt v. Parrent*, 39 Kan. 548, 554, 18 Pac. 712. **Ky.** *Leavell v. Carter*, 112 S. W. 1118; *Berryhill v. Holland*, 124 Ky. 615, 618, 99 S. W. 902; *Spradlin v. Stanley's Admr.*, 30 Ky. L. Rep. 928, 99 S. W. 965; *Bunnell v. Bunnell*, 23 Ky. L. Rep. 800, 808, 64 S. W. 420. **Neb.** *Manfull v. Graham*, 55 Neb. 645, 76 N. W. 19. **Okla.**—*Sawyer v. Ware*, 36 Okla. 139, 128 Pac. 273. **V. Va.**—*Lafferty v. Lafferty*, 42 W. Va. 783, 26 S. E. 262.

[a] **The court has no power to vacate or modify a judgment after the term at which it was rendered unless the error complained of is outside of the proceeding in which it was rendered, and the infancy of the defendant does not appear in the record.** **Ark.**—*Ryan v. Fielder*, 99 Ark. 374, 138 S. W. 973. **Ky.**—*Berryhill v. Holland*, 124 Ky. 615, 99 S. W. 902. **Neb.**—*Manfull v. Graham*, 55 Neb. 645, 76 N. W. 19. **Ohio.** *Carey v. Kemper*, 45 Ohio St. 93, 11 N. E. 130. See *Roberts v. Roberts*, 61 Ohio St. 96, 55 N. E. 411; *Palmer v. Palmer*, 25 Ohio C. C. 660. **Okla.**—*Sawyer v. Ware*, 36 Okla. 139, 128 Pac. 273.

Where error is apparent judgment may be avoided on appeal or by bill of review, petition in error, certiorari, writ of error. See *infra*, I, G, 9, c; I, I.

85. **Ark.**—*Ryan v. Fielder*, 99 Ark. 374, 138 S. W. 973; *Jones v. Pond & D. Mfg. Co.*, 79 Ark. 194, 200, 96 S. W. 756. **Ind. Ter.**—*Cook v. Edson Keith & Co.*, 5 Ind. Ter. 595, 82 S. W. 918. **Kan.**—*Delashmutt v. Parrent*, 39 Kan. 548, 554, 18 Pac. 712. **Ky.**—*Berryhill v. Holland*, 124 Ky. 615, 99 S. W. 902; *Spradlin v. Stanley's Admr.*, 30 Ky. L. Rep. 928, 99 S. W. 965. **Neb.**—*Manfull v. Graham*, 55 Neb. 645, 76 N. W. 19. **Ohio.**—See *Carey v. Kemper*, 45 Ohio St. 93, 11 N. E. 130. **Okla.**—*Sawyer v. Ware*, 36 Okla. 139, 128 Pac. 273.

86. *Webster v. Page*, 54 Iowa 461, 6 N. W. 716.

87. *Webster v. Page*, 54 Iowa 461, 6 N. W. 716.

88. *Tomblin v. Peek*, 73 W. Va. 336, 80 S. E. 450.

c. *Method of Proceeding*.—While the method of proceeding depends somewhat upon local practice and statutory provisions, an infant may in general attack a decree rendered against him, by a bill of review,⁸⁹ a supplemental bill in the nature of a bill of review,⁹⁰ by writ of error coram nobis or coram vobis.⁹¹ He may also, subject to

89. **U. S.**—Gillespie v. Pocahontas C. & C. Co., 162 Fed. 742, 747. See White v. Joyce, 158 U. S. 128, 140, 15 Sup. Ct. 788, 39 L. ed. 921; also Bank of United States v. Ritchie, 8 Pet. 128, 146, 8 L. ed. 890. **Ala.**—Mitchell v. Hardie, 84 Ala. 349, 4 So. 182; Ashford v. Patton, 70 Ala. 479. **Ark.**—Woodall v. Moore, 55 Ark. 22, 17 S. W. 268. **Cal.**—Waterman v. Lawrence, 19 Cal. 210, 79 Am. Dec. 212. **Ill.**—Hunter v. Empire State S. Co., 261 Ill. 335, 103 N. E. 1052 (consent decree may be so set aside); Allison v. Drake, 145 Ill. 500, 32 N. E. 537. **Ind.**—Bennett v. East, 7 Ind. 174, 177. **Ia.**—Ralston v. Lahee, 8 Iowa 17, 74 Am. Dec. 291. **Md.**—Hunter v. Hatton, 4 Gill 115, 45 Am. Dec. 117, 120. **Mich.**—Lowe v. Lowe, 127 Mich. 307, 309, 86 N. W. 820. **Miss.**—Vaughn v. Hudson, 59 Miss. 421; Mayo v. Clancy, 57 Miss. 674; Enochs v. Harrelson, 57 Miss. 465. **Mo.**—Ruby v. Strother, 11 Mo. 417, 423. **N. M.**—Bent v. Maxwell Land Grant & Ry. Co., 3 N. M. 167, 182. **Ohio.**—Carey v. Kemper, 45 Ohio St. 93, 97, 11 N. E. 130. **Tenn.**—Crawford v. Woodward, 1 Tenn. Ch. App. 274, 322. **Tex.**—Day v. Johnson, 32 Tex. Civ. App. 107, 110, 72 S. W. 426. **Va.**—Lee v. Braxton, 5 Call 459. **Wash.**—Ball v. Clothier, 34 Wash. 299, 308, 75 Pac. 1099. **W. Va.**—Poling v. Poling, 61 W. Va. 78, 80, 66 S. E. 94; Stewart v. Tennant, 52 W. Va. 559, 565, 44 S. E. 223; Seymour v. Alkire, 47 W. Va. 302, 34 S. E. 953; Lafferty v. Lafferty, 42 W. Va. 783, 26 S. E. 262; Ewing v. Winters, 39 W. Va. 489, 20 S. E. 572. **Eng.**—Gregory v. Molesworth, 3 Atk. 626, 26 Eng. Reprint 1160.

See the title "Bills of Review."

[a] *Lies Where Error Is Apparent*. Ashford v. Patton, 70 Ala. 479. See Spradlin v. Stanley's Admr., 30 Ky. L. Rep. 928, 99 S. W. 965.

[b] *Not Confined to Error Apparent*. In the case of a bill of review an infant would not be confined to merely such matters, to show error, as appear on the face of the decree, as in ordinary cases. Lafferty v. Lafferty, 42 W. Va. 783, 785, 26 S. E. 262. But see Enochs v. Harrelson, 57 Miss. 465; 4 STANDARD

PROC. 436, 438, n. 90, and supplement thereto.

90. **U. S.**—Bank of United States v. Ritchie, 8 Pet. 128, 146, 8 L. ed. 890. **Ky.**—Hanna v. Spotts, 5 B. Mon. 362, 365, 43 Am. Dec. 132. **N. M.**—Bent v. Maxwell Land Grant & Ry. Co., 3 N. M. 167. **Tenn.**—Andrews v. Andrews, 7 Heisk. 234, 236, 246. **W. Va.**—Poling v. Poling, 61 W. Va. 78, 80, 55 S. E. 993; Stewart v. Tennant, 52 W. Va. 559, 565, 44 S. E. 223; Lafferty v. Lafferty, 42 W. Va. 783, 26 S. E. 262.

See 4 STANDARD PROC. 456.

91. **U. S.**—Tucker v. Moreland, 10 Pet. 58, 72, 9 L. ed. 345. **Ark.**—Jones v. Pond & D. Mfg. Co., 79 Ark. 194, 200, 96 S. W. 756, where error is apparent. **Ill.**—Chambers v. Jones, 72 Ill. 276 (where error is apparent); McClay v. Norris, 9 Ill. 370, 382. **Md.**—Kemp v. Cook, 18 Md. 130, 137, 79 Am. Dec. 681; Hawkins v. Bowie, 9 Gill & J. 428, 437. **Mass.**—Swan v. Horton, 14 Gray 179. See Crockett v. Drew, 5 Gray 399; Austin v. Seminary, 8 Met. 196, 204, 41 Am. Dec. 497; Valier v. Hart, 11 Mass. 300. **Miss.**—Robb v. Halsey, 11 Smed. & M. 140, 146. **Mo.**—See Townsend v. Cox, 45 Mo. 401, 403; Powell v. Gott, 13 Mo. 458, 53 Am. Dec. 153. **N. Y.**—McMurray v. McMurray, 60 Barb. 117, 127; Swain v. Heartt, 2 How. Pr. 90; Higbie v. Comstock, 1 Denio 652; Duncan v. Sandford, 14 Johns. 417. **Tenn.**—McLemore v. Durivage, 92 Tenn. 482, 22 S. W. 207; Andrews v. Andrews, 7 Heisk. 234, 246. **Vt.**—Chase v. Scott, 14 Vt. 77.

See generally the title "Writ of Error."

[a] *Where upon scire facies a judgment has been taken against a minor his proper remedy is by a writ of error and not by a bill in equity*. Clark v. Bond, Wright (Ohio) 282.

[b] *To correct error of fact writ of error coram vobis is proper*. Duncan v. Sandford, 14 Johns. (N. Y.) 417, 423.

[c] *Writ of error coram nobis is not demandable of right by an infant but will be allowed only upon cause shown but it will not be refused even though*

the conditions and limitations imposed by local statutes, seek relief against a judgment, by motion to set it aside.⁹²

The infant may show cause against a decree or seek to have it set aside, by filing a verified⁹³ petition⁹⁴ or complaint,⁹⁵ or by filing an original bill in equity,⁹⁶ or its substitute under the reformed pro-

the infant is guilty of fraud. *Higbie v. Comstock*, 1 Denio (N. Y.) 652.

[d] In Ohio, the procedure authorized under §5354 conferring upon the courts authority to vacate or modify a judgment in behalf of an infant is in the nature of a proceeding coram nobis. *Carey v. Kemper*, 45 Ohio St. 93, 97, 11 N. E. 130.

[e] Where Infant Was Not Served. Where by accident or mistake in serving process, the infant and his guardian failed to receive, without fault or negligence on their part, such notice of the pendency of the suit as would have enabled them to make a defense a writ of error coram nobis will lie to reverse the decree depriving him of lands to which his title is perfect. *McLemore v. Durivage*, 92 Tenn. 482, 22 S. W. 207.

[f] After affirmance in the appellate court, writ of error coram nobis will not lie. A petition in the circuit court to vacate and set aside a judgment is submitted, in Illinois, in place of a writ of error coram nobis and is governed by the same rule. *Wettrick v. Martin*, 181 Ill. App. 94.

92. Ark.—*Martin v. Gwynn*, 90 Ark. 44, 49, 117 S. W. 754. Cal.—*Fanning v. Foley*, 99 Cal. 336, 33 Pac. 1098. Colo.—*Filmore v. Russell*, 6 Colo. 171, 173. Ill.—*Achison, T. & S. F. R. Co. v. Elder*, 149 Ill. 173, 181, 36 N. E. 565. Mo.—*Stupp v. Holmes*, 48 Mo. 89, 92. See *Townsend v. Cox*, 45 Mo. 401, 403; *Powell v. Gott*, 13 Mo. 458, 53 Am. Dec. 153. N. Y.—*McMurray v. McMurray*, 60 Barb. 117, 125; *Higbie v. Comstock*, 1 Denio 652, 653. See *Byrnes v. Byrnes*, 109 App. Div. 535, 96 N. Y. Supp. 306. N. C.—*Ferrell v. Broadway*, 127 N. C. 404, 37 S. E. 504; *Smith v. Gray*, 116 N. C. 311, 21 S. E. 200; *Syme v. Trice*, 96 N. C. 243, 1 S. E. 480; *Morris v. White*, 96 N. C. 91, 2 S. E. 254; *Williamson v. Hartman*, 92 N. C. 236, 239. S. C.—*Robertson v. Blair*, 56 S. C. 96, 108, 34 S. E. 11, 76 Am. St. Rep. 543; *Haigler v. Way*, 2 Rich. L. 324. W. Va. *Curtis v. Deepwater R. Co.*, 68 W. Va. 762, 70 S. E. 776.

[a] To set aside a judgment for ir-

regularity, a motion in the cause is proper. *Syme v. Trice*, 96 N. C. 243, 1 S. E. 480; *Morris v. White*, 96 N. C. 91, 2 S. E. 254; *Fowler v. Poor*, 93 N. C. 466; *Williamson v. Hartman*, 92 N. C. 236.

[b] Motion by Guardian.—A judgment may be set aside upon the motion of an infant by her statutory guardian. *Booker v. Kennerly*, 96 Ky. 415, 29 S. W. 323.

[c] Consent decree cannot be set aside at a subsequent term on motion. *Jones v. McKenna*, 4 Lea (Tenn.) 630.

[d] A rule takes the record as it is and litigates no new facts. *Seymour v. Alkire*, 47 W. Va. 302, 34 S. E. 953.

[e] Error of law cannot be raised by rule. *Seymour v. Alkire*, 47 W. Va. 302, 34 S. E. 953.

93. *Berryhill v. Holland*, 124 Ky. 615, 619, 99 S. W. 902; *Wilson v. Hubbard*, 39 Wash. 671, 680, 82 Pac. 154.

94. Ia.—*Dillivan v. Bank*, 124 N. W. 350, 356. Ky.—*Leavell v. Carter*, 112 S. W. 1118; *Arnold v. Lawson*, 146 Ky. 365, 367, 142 S. W. 684; *Berryhill v. Holland*, 124 Ky. 615, 619, 99 S. W. 902. Md.—*Hunter v. Hatton*, 4 Gill 115, 122, 45 Am. Dec. 117. Mo.—*Ruby v. Strother*, 11 Mo. 417, 423. N. C.—*Williamson v. Hartman*, 92 N. C. 236, 242. S. D.—*In re Nelson's Estate*, 26 S. D. 615, 621, 129 N. W. 113. Wash.—See *Ball. Code*, ch. 17, §5156; *Wilson v. Hubbard*, 39 Wash. 671, 680, 82 Pac. 154. W. Va.—*Poling v. Poling*, 61 W. Va. 78, 80, 66 S. E. 94; *Stewart v. Tennant*, 52 W. Va. 559, 565, 44 S. E. 223; *Seymour v. Alkire*, 47 W. Va. 302, 305, 34 S. E. 953; *Lafferty v. Lafferty*, 42 W. Va. 783, 26 S. E. 262; *Ewing v. Winters*, 39 W. Va. 489, 20 S. E. 572.

[a] A petition, which is another name for a bill, is proper. *Lafferty v. Lafferty*, 42 W. Va. 783, 26 S. E. 262.

95. *Ryan v. Fielder*, 99 Ark. 374, 138 S. W. 973; *Martin v. Gwynn*, 90 Ark. 44, 49, 117 S. W. 754; *Johnson v. Campbell*, 52 Ark. 316, 12 S. W. 578; *Cook v. Edson Keith & Co.*, 5 Ind. Ter. 595, 82 S. W. 918.

96. U. S.—*Kingsbury v. Buckner*, 134 U. S. 650, 10 Sup. Ct. 638, 33 L. ed. 1047. Cal.—*Welsh v. Koch*, 4 Cal. App.

cedure.⁹⁷ It has been held that the infant, unlike an adult, may file an original bill to set aside a decree against him without applying for rehearing or filing a bill of review.⁹⁸

d. *In What Court Instituted.*—The proceedings to attack and set aside a judgment against an infant must ordinarily be brought in the same court which rendered the decree.⁹⁹

571, 88 Pac. 604. See *Eichhoff v. Eichhoff*, 107 Cal. 42, 48, 40 Pac. 235, 48 Am. St. Rep. 110; *Joyce v. Joyce*, 5 Cal. 161. **Ill.**—*Hunter v. Empire State S. Co.*, 261 Ill. 335, 103 N. E. 1052; *Johnson v. Buck*, 220 Ill. 226, 232, 77 N. E. 163; *Teel v. Dunnihoo*, 221 Ill. 471, 475, 77 N. E. 906, 112 Am. St. Rep. 192; *Clark v. Shawen*, 190 Ill. 47, 60 N. E. 116; *Grimes v. Grimes*, 143 Ill. 550, 32 N. E. 847; *Lloyd v. Kirkwood*, 112 Ill. 329, 337; *Kirchenbeiser v. Beckett*, 41 Ill. 172, 177; *Loyd v. Malone*, 23 Ill. 41, 74 Am. Dec. 179. **Ind.**—*Seward v. Clark*, 67 Ind. 289, 301. **Ia.**—*Ralston v. Lahee*, 8 Iowa 17, 74 Am. Dec. 291. **Miss.**—*Mayo v. Clancy*, 57 Miss. 674; *Enochs v. Harrelson*, 57 Miss. 465; *Sledge v. Boone*, 57 Miss. 222. **Neb.** *Manfull v. Graham*, 55 Neb. 645, 76 N. W. 19. **N. M.**—*Bent v. Maxwell Land Grant & R. Co.*, 3 N. M. 167, 182. **N. Y.**—*Wright v. Miller*, 1 Sandf. Ch. 103, 120. **Tenn.**—*Jones v. McKenna*, 4 Lea 630; *Crawford v. Woodward*, 1 Tenn. Ch. App. 274, 322. See *Andrews v. Andrews*, 7 Heisk. 234, 236, 246. **Wash.**—*Morrison v. Morrison*, 25 Wash. 466, 65 Pac. 779. **W. Va.**—*Poling v. Poling*, 61 W. Va. 78, 80, 66 S. E. 94; *Stewart v. Tennant*, 52 W. Va. 559, 565, 44 S. E. 223; *Seymour v. Alkire*, 47 W. Va. 302, 34 S. E. 953; *Lafferty v. Lafferty*, 42 W. Va. 783, 26 S. E. 262; *Ewing v. Winters*, 39 W. Va. 489, 20 S. E. 572.

See the title "Judgments."

[a] **When Proper.**—(1) An original bill is proper to present facts not shown by the record, such as fraud or mistake (**Cal.**—*Welsh v. Koch*, 4 Cal. App. 571, 88 Pac. 604. **Miss.**—*Mayo v. Clancy*, 57 Miss. 674. **W. Va.**—*Seymour v. Alkire*, 47 W. Va. 302, 306, 34 S. E. 953; *Lafferty v. Lafferty*, 42 W. Va. 783, 26 S. E. 262. See *Syme v. Trice*, 96 N. C. 243, 1 S. E. 480; *Morris v. White*, 96 N. C. 91, 2 S. E. 254; *Fowler v. Poor*, 93 N. C. 466; *Williamson v. Hartman*, 92 N. C. 236). (2) although other cases hold an original bill is proper to present fraud or errors apparent on the face of the record. *Teel v. Dunnihoo*, 221 Ill. 471, 77 N. E. 906,

112 Am. St. Rep. 192; *Johnson v. Buck*, 220 Ill. 226, 77 N. E. 163; *Enochs v. Harrelson*, 57 Miss. 465. Compare *Mayo v. Clancy*, 57 Miss. 674. But see *supra*, I, G, 9, b, and the title "Judgments."

[b] **Where Decree Entered by Consent of Guardian.**—A minor may bring a bill to impeach a decree even though it was rendered by agreement and consent of his guardian. *Gooch v. Green*, 102 Ill. 507.

[c] A consent decree on behalf of infants cannot be set aside at a subsequent term upon motion or petition nor will an appeal lie, but an original bill must be brought. *Jones v. McKenna*, 4 Lea (Tenn.) 630.

[d] **An action of rescission or nullity** is a proper method of impeaching a judgment against an infant. *Greenwood v. New Orleans*, 12 La. Ann. 426, 430.

[e] **Audita Querela.**—An infant has been allowed to attack a decree by a writ of audita querela. *Tucker v. Moreland*, 10 Pet. (U. S.) 58, 72, 9 L. ed. 345; *Fuller v. Smith*, 49 Vt. 253. See *Chase v. Scott*, 14 Vt. 77. But see *Barber v. Graves*, 18 Vt. 290; *Priest v. Hamilton*, 2 Tyler (Vt.) 44, 50.

97. **An original suit** under our reformed procedure is the substitute for an original bill and is a proper method of attacking judgment. *Carey v. Kemper*, 45 Ohio St. 93, 97, 11 N. E. 130; *Rammelsberg v. Mitchell*, 29 Ohio St. 22; *Long v. Mulford*, 17 Ohio St. 484, 93 Am. Dec. 638.

98. *Grimes v. Grimes*, 143 Ill. 550, 32 N. E. 847; *Hess v. Voss*, 52 Ill. 472, 479; *Loyd v. Malone*, 23 Ill. 41; *Mauzey v. Dazey*, 114 Ill. App. 652.

99. **Ga.**—*Lowe v. Equitable Mtg. Co.*, 102 Ga. 103, 29 S. E. 148. **Ind.** *Bennett v. East*, 7 Ind. 174. **Ky.** *Hanna v. Spotts*, 5 B. Mon. 362, 367, 43 Am. Dec. 132. **Ohio.**—*Carey v. Kemper*, 45 Ohio St. 93, 97, 11 N. E. 130.

But see the title "Judgments."

[a] Where an infant after attaining the age of twenty-one years, filed his petition asking to be permitted to show cause, in the supreme court of ap-

e. *Leave of Court*.—The infant may attack a decree without obtaining leave of court.¹ But it has been held that after attaining his majority he cannot assail a decree in any mode he may choose, but he must apply to the court for its leave and direction.²

f. *When Proceeding Instituted*.—The infant may attack the judgment during minority,³ or after majority.⁴

The right of an infant to attack a judgment rendered against him is limited by statute in a great many jurisdictions to a definite time after he attains his majority,⁵ and must be exercised within that time

peals, it was held that this court had no original jurisdiction in such case, and the application was refused. *Ewing v. Winters*, 39 W. Va. 489, 20 S. E. 572.

1. **Ill.**—*Grimes v. Grimes*, 143 Ill. 550, 32 N. E. 847. **Va.**—*Lee v. Braxton*, 5 Call 459. **W. Va.**—*Lafferty v. Lafferty*, 42 W. Va. 783, 785, 26 S. E. 262.

See also 4 STANDARD PROC. 420.

[a] Unlike an adult, an infant may attack a decree without obtaining leave of court for a rehearing or filing a bill of review. *Grimes v. Grimes*, 143 Ill. 550, 32 N. E. 847.

[b] A bill of review may be brought without leave of court where a decree was taken against an infant by default. *Lee v. Braxton*, 5 Call (Va.) 459.

2. *Field v. Williamson*, 4 Sandf. Ch. (N. Y.) 613.

3. **U. S.**—*Kingsbury v. Buckner*, 134 U. S. 650, 10 Sup. Ct. 638, 33 L. ed. 1047. **Fla.**—*Gibbons v. McDermott*, 19 Fla. 852. **Ill.**—*Teel v. Dunnihoo*, 221 Ill. 471, 475, 77 N. E. 906, 112 Am. St. Rep. 192; *Grimes v. Grimes*, 143 Ill. 550, 32 N. E. 847; *Lloyd v. Kirkwood*, 112 Ill. 329-337; *Kirchenbeiser v. Beckert*, 41 Ill. 172; *Loyd v. Malone*, 23 Ill. 41, 74 Am. Dec. 179; *Mauzey v. Dazey*, 114 Ill. App. 652. **Ia.**—*Ralston v. Lahee*, 8 Iowa 17, 74 Am. Dec. 291. **Ky.**—*Newland v. Gentry*, 18 B. Mon. 666; *Bohannon v. Tarbin*, 25 Ky. L. Rep. 515, 76 S. W. 46; *Park v. Bolinger*, 10 Ky. L. Rep. 303, 8 S. W. 914. **Miss.**—*Sledge v. Boone*, 57 Miss. 222. **N. M.**—*Bent v. Maxwell Land Grant & Ry. Co.*, 3 N. M. 167, 182. **Va.**—*Harrison v. Wallton's Exr.*, 95 Va. 721, 30 S. E. 372, 64 Am. St. Rep. 830, 41 L. R. A. 703. **W. Va.**—*Poling v. Poling*, 61 W. Va. 78, 80, 66 S. E. 94. **Eng.**—*Dan. Ch. Pr.* (8th ed.), p. 116; *Richmond v. Taveur*, 1 P. Wms. 735, 24 Eng. Reprint 591. See *Bennett v. Lee*, 2 Atk. 487, 26 Eng. Reprint 694.

Contra, *Boudreaux v. Lower Terre-*

bonne R. & Mfg. Co., 127 La. 98, 114, 116, 53 So. 456, if brought during minority, the suit will be dismissed without prejudice.

[a] **After Appeal**.—(1) After a judgment or decree against an infant has been affirmed on appeal, it cannot be impeached for non-jurisdictional defects or errors apparent on the face of the record (*Kingsbury v. Buckner*, 134 U. S. 650, 10 Sup. Ct. 638, 33 L. ed. 1047), (2) but it may still be impeached by the infant upon any other proper ground. *Vaughn v. Hudson*, 59 Miss. 421, 428.

4. *Ralston v. Lahee*, 8 Iowa 17, 74 Am. Dec. 291.

[a] **When he has attacked it during minority** he cannot after attaining majority attack it again. *Bohannon v. Tarbin*, 25 Ky. L. Rep. 515, 76 S. W. 46; *McLemore v. Chicago, etc. R. Co.*, 58 Miss. 514. See *Kingsbury v. Buckner*, 134 U. S. 650, 10 Sup. Ct. 638, 33 L. ed. 1047.

[b] **The statute limiting the time in which an infant must bring his writ of error** applies to the correction of errors of law, and hence a writ of error coram vobis to correct an error of fact, as infancy, may be brought after he becomes of age. *Powell v. Gott*, 13 Mo. 458, 461, 53 Am. Dec. 153.

[c] **A dormancy statute** runs notwithstanding the minority of the judgment creditor. *Williams v. Merritt*, 109 Ga. 213, 34 S. E. 312.

5. **U. S.**—*Kingsbury v. Buckner*, 134 U. S. 650, 10 Sup. Ct. 638, 33 L. ed. 1047; *Gillespie v. Pocahontas C. & C. Co.*, 162 Fed. 742, 747. **Ala.**—*Kennedy v. Kennedy*, 2 Ala. 571, 631; *Cato v. Easley*, 2 Stew. 214. **Ark.**—*Martin v. Gwynn*, 90 Ark. 44, 49, 117 S. W. 754; *Rankin v. Schofield*, 81 Ark. 440, 463, 98 S. W. 674; *Jones v. Pond & D. Mfg. Co.*, 79 Ark. 194, 96 S. W. 756; *Blanton v. Rose*, 70 Ark. 415, 68 S. W. 674; *Woodall v. Moore*, 55 Ark. 22, 17 S. W. 268. **Cal.**

or it will be lost to the infant,⁶ and his children,⁷ and heirs at law.⁸ That some of the plaintiffs are within the statutory period, is

- See Code Civ. Proc., §1806; *Reed v. Ring*, 93 Cal. 96, 108, 28 Pac. 851. See *Welsh v. Koch*, 4 Cal. App. 571, 576, 88 Pac. 604. **Ill.**—*Teel v. Dunnihoo*, 221 Ill. 471, 475, 77 N. E. 906, 112 Am. St. Rep. 192; *Johnson v. Buck*, 220 Ill. 226, 232, 77 N. E. 163; *Allison v. Drake*, 145 Ill. 500, 513, 32 N. E. 537; *Lloyd v. Kirkwood*, 112 Ill. 329, 337; *Barnes v. Hazleton*, 50 Ill. 429; *Enos v. Capp*, 15 Ill. 277. **Ind.**—*Zerger v. Flattery*, 83 Ind. 399; *Seward v. Clark*, 67 Ind. 289, 300; *Bennett v. East*, 7 Ind. 174, 176. **Ind. Ter.**—*Cook v. Edson Keith & Co.*, 5 Ind. Ter. 595, 82 S. W. 918. **Ia.**—*Ringstad v. Hanson*, 150 Iowa 324, 130 N. W. 145; *Dillivan v. Bank*, 124 N. W. 350, 355; *Wise v. Schloesser*, 111 Iowa 16, 82 N. W. 439; *Dahms v. Alston*, 72 Iowa 411, 34 N. W. 182; *Bickel v. Erskine*, 43 Iowa 213. **Kan.**—*Delashmutter v. Parrent*, 39 Kan. 548, 18 Pac. 712. **Ky.**—*Back v. Combs*, 96 Ky. 522, 29 S. W. 352; *Booker v. Kennerly*, 96 Ky. 415, 29 S. W. 323; *Richards v. Richards*, 10 Bush 617; *Speak v. Mattingly*, 4 Bush 310; *Bohannon v. Tarbin*, 25 Ky. L. Rep. 515, 76 S. W. 46; *Park v. Bolinger*, 10 Ky. L. Rep. 303, 8 S. W. 914. **La.**—*Boudreaux v. Lower Terrebonne R. & Mfg. Co.*, 127 La. 98, 111, 53 So. 456. **Minn.**—*Hoyt v. Lightbody*, 93 Minn. 249, 101 N. W. 304. **Miss.**—*McLemore v. Chicago, etc. R. Co.*, 58 Miss. 514; *Mayo v. Clancy*, 57 Miss. 674; *Sledge v. Boone*, 57 Miss. 222; *Cocks v. Simmons*, 57 Miss. 183. **Neb.**—*McCreary v. Creighton*, 76 Neb. 179, 107 N. W. 240, 243; *Manfull v. Graham*, 55 Neb. 645, 76 N. W. 19, 70 Am. St. Rep. 412. **N. Y.**—See §§1283, 1290, 1291, Code Civ. Proc.; *McMurray v. McMurray*, 60 Barb. 117; *Byrnes v. Byrnes*, 109 App. Div. 535, 96 N. Y. Supp. 306. **Ohio.**—*Roberts v. Roberts*, 61 Ohio St. 96, 55 N. E. 411; *Carey v. Kemper*, 45 Ohio St. 93, 11 N. E. 130. **Okla.**—*Sawyer v. Ware*, 36 Okla. 139, 128 Pac. 273. **Tenn.**—*Vaccaro v. Cicalla*, 89 Tenn. 63, 75, 14 S. W. 43; *Rhodes v. Crutchfield*, 7 Lea 518; *Winchester v. Winchester*, 1 Head 460; *Crawford v. Woodward*, 1 Tenn. Ch. App. 274, 323. **Va.**—*Harrison v. Wallton's Exr.*, 95 Va. 721, 30 S. E. 372, 64 Am. St. Rep. 830, 41 L. R. A. 703; *Zirkle v. McCue*, 26 Gratt. 517; *Wills v. Spraggins*, 3 Gratt. 555; *Brown v. Armistead*, 6 Rand. 594, 602. **Wash.**—*Wilson v. Hubbard*, 39 Wash. 671, 680, 82 Pac. 154; *Ball v. Clothier*, 34 Wash. 299, 75 Pac. 1099; *Morrison v. Morrison*, 25 Wash. 466, 65 Pac. 779. **W. Va.**—*McSwegin v. Howard*, 63 W. Va. 92, 96, 59 S. E. 894; *Poling v. Poling*, 61 W. Va. 78, 80, 66 S. E. 94; *Seymour v. Alkire*, 47 W. Va. 302, 34 S. E. 953; *Lafferty v. Lafferty*, 42 W. Va. 783, 26 S. E. 262.
- [a] It is not necessary that the infant file the bill of review itself within the statutory period after attaining his majority but the application to file it must be made within that time. *Mitchel v. Hardie*, 84 Ala. 349, 4 So. 182.
6. **U. S.**—*Gillespie v. Pocahontas C. & C. Co.*, 162 Fed. 742, 747. **Cal.**—*Reed v. Ring*, 93 Cal. 96, 108, 28 Pac. 851. **Ia.**—*Dahms v. Alston*, 72 Iowa 411, 34 N. W. 182. **Kan.**—*Delashmutter v. Parrent*, 39 Kan. 548, 18 Pac. 712. **Ky.**—*Leavell v. Carter*, 112 S. W. 1118; *Arnold v. Lawson*, 146 Ky. 365, 367, 142 S. W. 684; *Back v. Combs*, 96 Ky. 522, 29 S. W. 352; *Cox v. Story*, 80 Ky. 64, 67. **Miss.**—*Mayo v. Clancy*, 57 Miss. 674. **Mo.**—*Ruby v. Strother*, 11 Mo. 417, 423. **Neb.**—*McCreary v. Creighton*, 76 Neb. 179, 107 N. W. 240, 243. **N. Y.**—*In re Tilden*, 98 N. Y. 434. **Wash.**—*Morrison v. Morrison*, 25 Wash. 466, 471, 65 Pac. 779. **W. Va.**—*Curtis v. Deepwater R. Co.*, 68 W. Va. 762, 70 S. E. 776; *McSwegin v. Howard*, 63 W. Va. 92, 96, 59 S. E. 894.
- [a] A judgment against a minor can be set aside after the running of the time allowed by statute to the infant to attack the judgment, only upon practically the same showing required of an adult. *McCreary v. Creighton*, 76 Neb. 179, 107 N. W. 240. See also *Mayo v. Clancy*, 57 Miss. 674.
- [b] A bill of review, for errors apparent on the face of the record, will not lie after the time when a writ of error could be brought. *Grimes v. Grimes*, 143 Ill. 550, 32 N. E. 847; *Creath v. Smith*, 20 Mo. 113, 116.
7. *Gillespie v. Pocahontas C. & C. Co.*, 162 Fed. 742, 747; *Cox v. Story*, 80 Ky. 64, 67.
8. *Cox v. Story*, 80 Ky. 64. See *Gillespie v. Pocahontas C. & C. Co.*, 162 Fed. 742, 747.

not available to those against whom the statute has run.⁹

Laches.—Likewise if the minor is guilty of laches he cannot impeach a judgment rendered against him.¹⁰

g. Parties.—In proceedings to set aside a judgment the infant should not be represented by one who was guilty of the alleged misconduct in the proceedings.¹¹

When an infant attempts to impeach a decree ordering the sale of his property he must make a party to the proceedings him who holds the property under the decree;¹² but in attacking a judgment against him he need not join in his action parties who have no further interest in the litigation and against whom no relief is sought.¹³

h. Notice to Adverse Parties.—Proceedings to set aside a decree by the infant, on coming of age, can only be had on notice to the other parties to the decree.¹⁴ But a want of notice is waived by filing

9. *Mitchel v. Hardie*, 84 Ala. 349, 352, 4 So. 182; *Figg v. Richardson*, 6 Ky. L. Rep. 49.

10. **Cal.**—*Reed v. Ring*, 93 Cal. 96, 108, 28 Pac. 851. **Ia.**—*Ralston v. Lahee*, 8 Iowa 17, 74 Am. Dec. 291. **Ky.**—*Arnold v. Lawson*, 146 Ky. 365, 367, 142 S. W. 684. **Md.**—*Kemp v. Cook*, 18 Md. 130, 139, 79 Am. Dec. 681. **Mich.** *Schimpf v. Wayne Circ. Judge*, 129 Mich. 103, 88 N. W. 384. **Minn.**—*Eisenmenger v. Murphy*, 42 Minn. 84, 43 N. W. 784, 18 Am. St. Rep. 493; *Goodnow v. Empire Lumb. Co.*, 31 Minn. 468, 18 N. W. 283, 47 Am. Rep. 798. **N. Y.** *Clemens v. Clemens*, 37 N. Y. 59; *Barnes v. Gill*, 13 Abb. Pr. (N. S.) 169; *Feitner v. Hoeger*, 14 Daly 470. **N. C.** *Williams v. Williams*, 94 N. C. 732; *Williamson v. Hartman*, 92 N. C. 236, 241; *Howell v. Barnes*, 64 N. C. 626. **Ohio.**—*Clark v. Bond*, *Wright* 282. **Pa.** *Ziegler v. Evans*, 8 Kulp 180. **S. C.** *Robertson v. Blair*, 56 S. C. 96, 34 S. E. 11, 76 Am. St. Rep. 543. See *Haigler v. Way*, 2 Rich. L. 324. **W. Va.**—*Plant v. Humphries*, 66 W. Va. 88, 66 S. E. 94, 26 L. R. A. (N. S.) 558; *McSwegin v. Howard*, 63 W. Va. 92, 96, 59 S. E. 894. See *Stewart v. Tennant*, 52 W. Va. 559, 565, 44 S. E. 223.

[a] A fraudulent decree may be attacked at any time, if there has been diligence in discovering it and promptness in proceeding to attack it. *Plant v. Humphries*, 66 W. Va. 88, 94, 66 S. E. 94, 26 L. R. A. (N. S.) 558.

[b] Laches of trustee having title, may be imputed to infant beneficiaries, no fraud appearing. *Salter v. Salter*, 80 Ga. 178, 4 S. E. 391, 12 Am. St. Rep. 249.

[c] **Three Years After Majority.**—It

was held in *Williams v. Williams*, 94 N. C. 732, that where an infant fails to assert his rights in a proceeding up to three years after attaining majority he cannot open the cause even though a final decree has not been rendered.

[d] **Where Barred by Statute of Limitations.**—Where the minor has slept upon his legal rights until they are barred by the statute of limitations chancery will not afford him redress. *Clark v. Bond*, *Wright* (Ohio) 282.

[e] It is not an excuse for laches that the party did not know that his non-age would have enabled him to avoid the bond by plea, or that the judgment might be vacated, and his plea let in. *Howell v. Barnes*, 64 N. C. 626, 628.

11. When a minor attempts to have a judgment set aside on the ground that he was not properly represented in the suit, the suit in rescission cannot be maintained by the same tutor who was tutor at the time the judgment was rendered. *Boudreaux v. Lower Terrebonne R. & Mfg. Co.*, 127 La. 98, 114, 53 So. 456.

12. *McLemore v. Chicago, etc. R. Co.*, 58 Miss. 514, 526. See *infra*, III, A, 9, c, (III.)

13. *Morrison v. Morrison*, 25 Wash. 466, 472, 65 Pac. 779.

14. *Ruby v. Strother*, 11 Mo. 417, 424.

[a] Notice of his application to file the bill of review must be served on the adverse parties. *Mitchel v. Hardie*, 84 Ala. 349, 4 So. 182.

[b] If he fails to serve such notice the proceeding is irregular and subjects his bill to a demurrer or to a

answer, even though the want of notice is pleaded therein.¹⁵

i. *Pleadings*.—The bill or complaint of the infant should disclose his right to show cause against the judgment;¹⁶ it should show that the action is brought within the time allowed by statute,¹⁷ the grounds upon which the attack is made,¹⁸ and must show a good defense to the original action.¹⁹ The judgment or order, it has been held, should be set forth.²⁰

The adverse party is entitled to meet the case made by the infant, with appropriate pleadings.²¹

j. *Review and Determination*.—The whole record will be examined for error.²² The court will not, however, set aside the judgment or decree for error or irregularity which did not prejudice the infant's substantial rights.²³ When the court vacates a decree it will place the parties in statu quo as nearly as can be conveniently done,²⁴ and

motion to be taken off the file. *Mitchel v. Hardie*, 84 Ala. 349, 4 So. 182.

15. *Mitchel v. Hardie*, 84 Ala. 349, 4 So. 182.

16. *Poling v. Poling*, 61 W. Va. 78, 84, 66 S. E. 94.

[a] *Contents of Petition*.—The proceedings to vacate or modify a judgment on the grounds of infancy shall be by petition verified by affidavit, setting forth the judgment, the grounds to vacate or modify it, and the defense to the action if the party applying was defendant. On the petition the proceedings shall be the same as those in the action in which the judgment was rendered. *Berryhill v. Holland*, 124 Ky. 615, 619, 99 S. W. 902.

17. *Back v. Combs*, 96 Ky. 522, 29 S. W. 352; *Poling v. Poling*, 61 W. Va. 78, 84, 66 S. E. 94.

18. *Ryan v. Fielder*, 99 Ark. 374, 138 S. W. 973; *Mayo v. Clancy*, 57 Miss. 674.

19. *Ryan v. Fielder*, 99 Ark. 374, 138 S. W. 973; *Martin v. Gwynn*, 90 Ark. 44, 117 S. W. 754; *Johnson v. Campbell*, 52 Ark. 316, 12 S. W. 578; *Manfull v. Graham*, 55 Neb. 645, 76 N. W. 19.

[a] *New and different defense permitted*. *Booker v. Kennerly*, 96 Ky. 415, 29 S. W. 323; *Lafferty v. Lafferty*, 42 W. Va. 783, 26 S. E. 262. *Contra*, *Dillivan v. German Sav. Bank* (Iowa), 124 N. W. 350. See *supra*, I, G, 8.

[b] *The special grounds for which new trials are granted to adults need not be alleged*. *Allen v. Troutman*, 10 Bush (Ky.) 61; *House v. Greathouse*, 10 Ky. L. Rep. 317.

[c] *Petition in error setting up ex-*

trinsic facts should be verified as to such facts. *Roberts v. Roberts*, 61 Ohio St. 96, 55 N. E. 411.

20. *Ryan v. Fielder*, 99 Ark. 374, 138 S. W. 973.

21. *Answer*.—The adversary party, where the infant attacks the judgment on errors of fact as well as law, has a right to answer. *Park v. Bolinger*, 10 Ky. L. Rep. 303, 8 S. W. 914, but it was not decided whether he would be limited to a demurrer or a plea of subsequent release of error if the attack was on errors of law only.

22. *On application in any form* showing cause against a decree, by an infant, the whole record will be examined to find such error, just as on an appeal by an adult. *Lafferty v. Lafferty*, 42 W. Va. 783, 26 S. E. 262.

23. See *Hebron v. Kelly*, 77 Miss. 48, 23 So. 641, 25 So. 877.

[a] *Showing Required*.—A judgment should not be vacated on motion or complaint until it is adjudged that there is a valid defense to the action in which the judgment was rendered, since the statute contemplates setting aside a judgment only for such errors as affect the substantial rights of the infant, and where actual injustice has been done him. *Martin v. Gwynn*, 90 Ark. 44, 117 S. W. 754; *Richards v. Richards*, 10 Bush (Ky.) 617.

[b] *When the rights of third parties without notice have intervened* and the infant has suffered no substantial wrong an irregular judgment against him will not be set aside. *Harris v. Bennett*, 160 N. C. 339, 344, 76 S. E. 217; *Syme v. Trice*, 96 N. C. 243, 246, 1 S. E. 480.

24. *U. S.*—See *Bank of United States*

will render such a decree as should have been rendered in the first instance even to changing property and possession, although the inconvenience to others may be considerable.²⁵

10. **Enforcement of Judgment.**²⁶—An execution may issue against an infant's property upon a judgment rendered against him, as in the case of an adult;²⁷ but an execution against the infant's property on a judgment against the guardian is void.²⁸ If there is a guardianship proceeding pending, the judgment instead of directing the issuance of execution may decree that the amount be paid through that proceeding.²⁹

The probate court may issue an order commanding the guardian to pay a judgment against his ward.³⁰ The execution should follow the form of the judgment,³¹ but a variance between the judgment and execution is cured by statute in some states.³²

v. Ritchie, 8 Pet. 128, 146, 8 L. ed. 890. **Ala.**—*Mitchel v. Hardie*, 84 Ala. 349, 352, 4 So. 182. **Ia.**—*Ralston v. Lahee*, 8 Iowa 17, 74 Am. Dec. 291. **Ky.**—*Pope v. Lemaster*, 5 Litt. 76. **W. Va.**—*Poling v. Poling*, 61 W. Va. 78, 82, 66 S. E. 94; *Stewart v. Tenant*, 52 W. Va. 559, 578, 44 S. E. 223. 25. **U. S.**—See *Bank of United States v. Ritchie*, 8 Pet. 128, 146, 8 L. ed. 890. **Ala.**—*Mitchel v. Hardie*, 84 Ala. 349, 352, 5 So. 182. **Ky.**—*Pope v. Lemaster*, 5 Litt. 76, 80.

[a] Where a judgment decreeing the sale of lands is set aside in behalf of infants, the sale under the judgment should also be set aside. See *Bank of United States v. Ritchie*, 8 Pet. (U. S.) 128, 146, 8 L. ed. 890; *District of Clifton v. Pfrman*, 33 Ky. L. Rep. 529, 110 S. W. 406, 408.

26. See generally the title "Judgments and Decrees, Enforcement of." **Attachment of Infant's Property.** See 3 STANDARD PROC. 263.

27. **Ind.**—*Shaffner v. Briggs*, 36 Ind. 55, 10 Am. Rep. 1. **Ind. Ter.**—*Cook v. Edson Keith & Co.*, 5 Ind. Ter. 595, 82 S. W. 918. **Ia.**—*Hawk v. Harris*, 112 Iowa 543, 84 N. W. 664, 84 Am. St. Rep. 352; *Albee v. Winterink*, 55 Iowa 184, 7 N. W. 497. **La.**—*Broussard v. Mallet*, 8 Mart. N. S. 269. **N. C.**—*Howett v. Alexander*, 12 N. C. 431. **Tex.**—*Laughter v. Seela*, 59 Tex. 177; *Simmons v. Arnim* (Tex. Civ. App.), 172 S. W. 184.

[a] **On a Judgment for Costs.**—(1) An execution may issue upon a judgment for costs against a minor in an action brought by him by his next friend. *Albee v. Winterink*, 55 Iowa 184, 7 N. W. 497. (2) Upon a judgment

of non-suit against an infant a fieri facias may issue against his property for the costs of suit. *Howett v. Alexander*, 12 N. C. 431.

[b] **An infant's lands may be sold under an execution** against him. *Shaffner v. Briggs*, 36 Ind. 55, 10 Am. Rep. 1; *Laughter v. Seela*, 59 Tex. 177.

[c] **Immovables and Slaves Exempt.** *Broussard v. Mallet*, 8 Mart. (N. S.) (La.) 269.

[d] **After Stay and Upon Motion.** The execution should appear upon its face to have issued after a stay of twelve months and upon motion. *Bank of Newbern v. Stanley*, 13 N. C. 476, under statute. See *Ricks v. Blount*, 15 N. C. 128.

28. *Tobin v. Addison*, 2 Strobbh. L. (S. C.) 3.

29. *Simmons v. Arnim* (Tex. Civ. App.), 172 S. W. 184. Compare *Hawk v. Harris*, 112 Iowa 543, 84 N. W. 664, 84 Am. St. Rep. 352.

30. *Coffin v. Eisiminger*, 75 Iowa 30, 39 N. W. 124. Compare *Hawk v. Harris*, 112 Iowa 543, 84 N. W. 664, 84 Am. St. Rep. 352.

31. *Tobin v. Addison*, 2 Strobbh. L. (S. C.) 3; *Galveston City R. Co. v. Hewitt*, 67 Tex. 473, 3 S. W. 705, 60 Am. Rep. 32. See *Simmons v. Arnim* (Tex. Civ. App.), 172 S. W. 184 (setting out an execution which was held sufficient); *Day v. Johnson*, 32 Tex. Civ. App. 107, 112, 72 S. W. 426.

[a] **Where a judgment is rendered without mentioning the next friend** an execution may properly issue in the name of the infant. *Thomason v. Gray*, 84 Ala. 559, 4 So. 394.

32. Act of Assembly, 1848; *Marshall v. Fisher*, 46 N. C. 111, 117.

Restraining or Staying Enforcement.³³ — An infant may procure an injunction suspending the levy of an execution until he can go before the court in which the judgment was rendered and show error in it.³⁴ And it has been held that an execution sale of the infant's property may be enjoined where a sale under authority of the probate court would prevent loss to the ward's creditors.³⁵ The court may withhold the issuance of the execution or prevent any step toward the collection of a judgment in favor of the infant until there is a proper person authorized to receive the money for him.³⁶ But the fact that the court has ordered the next friend to give bond before receiving the proceeds of the execution does not prevent the officer from enforcing the execution.³⁷

H. NEW TRIAL.³⁸ — New trial, in actions to which infants are parties, is governed by the general rules applicable to this subject,³⁹ except where there are statutory provisions specially applicable to infants, as there are in some jurisdictions.⁴⁰

I. APPEAL AND REVIEW.⁴¹ — **1. Generally.** — The remedies by way of appeal,⁴² petition in error,⁴³ and certiorari⁴⁴ are available to an infant against whom a judgment has been rendered.

33. See generally the title "Judgments and Decrees, Enforcement of."

34. *Cook v. Edson Keith & Co.*, 5 Ind. Ter. 595, 82 S. W. 918; *Vansyckle v. Rorback*, 6 N. J. Eq. 234. Compare *McNary v. Bailey*, 17 Ky. L. Rep. 60, 30 S. W. 392.

[a] **Limitation on Right To Restrain.** — Where an infant was personally served but no guardian ad litem was appointed to represent him, and the record was silent as to his non-age and a default judgment was taken against him, he is not entitled to restrain the levy of an execution issued upon the judgment without taking steps to vacate or modify the same. *Cook v. Edson Keith & Co.*, 5 Ind. Ter. 595, 82 S. W. 918, 920.

35. *Adrianee v. Brooks*, 13 Tex. 279, where the execution sale would make the infant insolvent.

36. *Mason v. Mason*, 5 Bush (Ky.) 187, 198; *Wileman v. Metropolitan St. R. Co.*, 80 App. Div. 53, 80 N. Y. Supp. 233.

[a] **Payment Into Court.** — The suspension of the execution until a statutory guardian is appointed does not injure the judgment debtor as he can pay the money into court. *Mason v. Mason*, 5 Bush (Ky.) 187, 198.

37. *Oxford K. Mills v. Sutton*, 127 Ga. 162, 56 S. E. 298, as payment to the lawfully authorized officer will be protection for the defendant, and the officer must see that the bond has been

given before he delivers the proceeds.

38. **Rehearing after attaining majority**, see *supra*, I, G, 8.

39. See the title "New Trial."

[a] **That a minor was not represented by a guardian or guardian ad litem is ground for new trial.** *Wettrick v. Martin*, 181 Ill. App. 94.

[b] **A motion in arrest of judgment made in behalf of an infant may be used by the court as a basis to set aside a verdict and grant a new trial.** *Ryan v. Fielder*, 99 Ark. 374, 138 S. W. 973.

40. See *Richards v. Richards*, 10 Bush (Ky.) 617; *Jamison v. Petit*, 6 Bush (Ky.) 669.

41. See generally the titles "Appeals;" "Review;" "Writ of Error;" and other titles dealing with particular phases of appellate practice.

42. *Greenwood v. New Orleans*, 12 La. Ann. 426; *Peters v. Peters*, 8 Cush. (Mass.) 529, 543, from decree of probate court affecting infant's property.

43. *Roberts v. Roberts*, 61 Ohio St. 96, 112, 55 N. E. 411; *Palmer v. Palmer*, 25 Ohio C. C. 660. See generally the title "Writ of Error."

[a] **Where Error Is Apparent.** — If the infant's disability or the error appears in the record or proceedings then he must proceed by a petition in error. *Manfull v. Graham*, 55 Neb. 645, 76 N. W. 19. See following note, and *supra*, I, G, 9, b, (II).

44. *Jones v. Pond & D. Mfg. Co.*, 79 Ark. 194, 200, 96 S. W. 756, where

The right of appeal may in general be exercised by an infant party under the same circumstances that it may be resorted to by an adult.⁴⁵ An appeal by a party adverse to an infant follows the general rules elsewhere discussed.⁴⁶

error is apparent. See generally the title "**Certiorari.**"

[a] **Contra as to Probate Decrees.** *Peters v. Peters*, 8 Cush. (Mass.) 529.

[b] **A writ of certiorari will not be issued on the application of a minor** whose guardian ad litem, duly appointed for the occasion, assented to the proceedings sought to be quashed. *Peters v. Peters*, 8 Cush. (Mass.) 529.

[c] **Affidavit for Writ.**—A minor who has sufficient discretion not only to understand an oath and its obligations but to form and entertain a rational opinion as to his own rights and interests, is competent to make an affidavit verifying a petition for certiorari brought for him by a guardian ad litem, and in the affidavit he may depose to his own inability, by reason of poverty, to pay costs and give security. *Bowers v. Kanaday*, 94 Ga. 209, 21 S. E. 458.

45. **U. S.**—*Kingsbury v. Buckner*, 134 U. S. 650, 10 Sup. Ct. 638, 33 L. ed. 1047. **Conn.**—*Williams v. Cleaveland*, 76 Conn. 426, 56 Atl. 850; *Davidson v. Minor*, 1 Root 275. **Ill.**—*McClay v. Norris*, 9 Ill. 370. **Ind.**—*Hood v. Pearson*, 67 Ind. 368. **Ia.**—*First Nat. Bank v. Casey*, 158 Iowa 349, 138 N. W. 897. **Kan.**—*Schnee v. Schnee*, 61 Kan. 643, 60 Pac. 738. **Ky.**—*Ogden v. Stevens*, 93 Ky. 564, 33 S. W. 932. **N. H.**—*Robbins v. Cutler*, 26 N. H. 173. **Okla.**—*Sawyer v. Ware*, 36 Okla. 139, 128 Pac. 273. **Tex.**—*Tanner v. Ames' Estate*, 37 S. W. 373. **Vt.**—*Somers v. Rogers*, 26 Vt. 585. **Wis.**—*Jones v. Roberts*, 96 Wis. 427, 70 N. W. 685, 71 N. W. 883; *Tyson v. Tyson*, 94 Wis. 225, 68 N. W. 1015.

See 10 STANDARD PROC. 876.

[a] **Appeal Lies Where Error Is Apparent.**—**Ala.**—*Ashford v. Patton*, 70 Ala. 479, 482. **Ark.**—*Jones v. Pond & D. Mfg. Co.*, 79 Ark. 194, 200, 96 S. W. 756. **Ky.**—*Berryhill v. Holland*, 124 Ky. 615, 618, 99 S. W. 902; *Ogden v. Stevens*, 98 Ky. 564, 567, 33 S. W. 932; *Figg v. Richardson*, 6 Ky. L. Rep. 49. **N. H.**—*Simmons v. Goodell*, 63 N. H. 458.

See *supra*, I, G, 9, b, (II).

[b] **Appeal is the only method of** correcting error apparent on the face of the record. *Ogden v. Stevens*, 98 Ky.

564, 33 S. W. 932; *Figg v. Richardson*, 6 Ky. L. Rep. 49; *Simmons v. Goodell*, 63 N. H. 458. See *supra*, I, G, 9, b, (II).

[c] **Infants who are not parties cannot appeal** from the decree, even though their property interests are involved, but they have their remedy in ejectment and an action to remove a cloud upon their title. *Poling v. Poling*, 61 W. Va. 78, 82, 66 S. E. 94. But see *Gibbons v. McDermott*, 19 Fla. 852.

[d] **An infant cannot appeal from an interlocutory decree** but by consent of the adverse party. *Jameson v. Moseley*, 4 T. B. Mon. (Ky.) 414, 415.

[e] **The failure of the guardian ad litem to object in the court below to an error on the record does not prevent the infant from having his appeal.** *Jones v. Jones*, 56 Ala. 612.

[f] **Where a judgment was rendered by a justice of the peace against an infant, in an action upon contract, error lies in the supreme court, since the infant cannot appeal.** *Valier v. Hart*, 11 Mass. 300. See *Austin v. Seminary*, 8 Met. (Mass.) 196, 204, 41 Am. Dec. 497.

[g] **An order of the court refusing to dismiss an action upon motion made on the ground that the affidavit of the next friend showing his right to sue was not filed, is not appealable.** *Spicer v. Holbrook*, 23 Ky. L. Rep. 1812, 66 S. W. 180.

[h] **Although the infant did not have a day in court, where he was named in the petition, the record and court order, he was a party and had a right to have the order of the probate court affecting his rights reversed.** *Roberts v. Roberts*, 61 Ohio St. 96, 117, 55 N. E. 411.

46. See the titles "**Appeals;**" "**Writ of Error.**"

[a] **The omission of a next friend to give a bond to secure the proceeds of a judgment to be recovered cannot be assigned as error by the defendant on appeal as the bond is required only for the protection of the minor and the defendant is in no way prejudiced or injured.** *Neal v. Spooner*, 20 Fla. 38.

2. Parties.—All persons who appear by the record to be interested in the action should be made parties to the appeal or writ of error.⁴⁷ An infant should prosecute his appeal by his next friend or guardian ad litem,⁴⁸ who may appeal without any appointment or permission

47. *Wiley v. Jones*, 129 Ga. 635, 59 S. E. 709; *McKee's Heirs v. Hann*, 9 Dana (Ky.) 526.

Minor as Necessary Party.—See 10 STANDARD PROC. 876.

Guardian as Necessary Party.—See 10 STANDARD PROC. 876.

[a] **The guardian ad litem** is a necessary party to a bill of exceptions. *Wiley v. Jones*, 129 Ga. 635, 59 S. E. 709.

[b] **Appeal From Order Appointing Guardian.**—In *Underhill v. Dennis*, 9 Paige Ch. (N. Y.) 202, the chancellor said that on an appeal from an order appointing a guardian there was no absolute necessity for making the infant a party. See *In re Van Vranken*, 50 Hun 607, 3 N. Y. Supp. 445; 10 STANDARD PROC. 805.

[c] **Appeal on Behalf of Several.** An appeal should not be dismissed because not joined in by certain interested minors where the body of the notice includes their names as appealing by their guardian ad litem, P., although it is signed by P. on behalf of all the parties as "their attorney" only, since he thereby purports to represent all the parties as attorney and it was not essential that he also sign as guardian ad litem for part of them. *Noble v. Whitten*, 34 Wash. 507, 76 Pac. 95.

48. **U. S.**—*Kingsbury v. Buckner*, 134 U. S. 650, 10 Sup. Ct. 638, 33 L. ed. 1047. **Conn.**—*Williams v. Cleaveland*, 76 Conn. 426, 56 Atl. 850. **Ill.**—*Ames v. Ames*, 148 Ill. 321, 36 N. E. 110; *McClay v. Norris*, 9 Ill. 370; *Sprague v. Beamer*, 45 Ill. App. 17. **Ind.**—*Harlan v. Watson*, 39 Ind. 393. **Kan.**—*Schnee v. Schnee*, 61 Kan. 613, 60 Pac. 738. **Ky.**—*Staggenborg v. Bailey*, 118 Ky. 301, 80 S. W. 1109; *Reed v. Louisville B. Co.*, 71 Ky. 69; *Ramsey v. Keith's Admr.*, 25 Ky. L. Rep. 1302, 77 S. W. 693. **Md.**—*Thomas v. Safe-Dep. & Tr. Co.*, 73 Md. 451, 21 Atl. 367, 23 Atl. 3. **Ohio.**—*Harper v. Cilley*, 25 Ohio C. C. 770. **Tenn.**—*Loftis v. Loftis*, 94 Tenn. 232, 28 S. W. 1091; *Ridgely v. Bennett*, 13 Lea 206. **Tex.**—*Tanner v. Ames' Estate*, 37 S. W. 373; *Carlton v. Miller*, 2 Tex. Civ. App. 619, 21 S. W. 697. **Wash.**—*Noble v. Whitten*, 34

Wash. 507, 76 Pac. 95. **Wis.**—*Hepp v. Huefner*, 61 Wis. 148, 20 N. W. 923.

See 10 STANDARD PROC. 771.

[a] **It is irregular for a minor to appeal by himself** instead of through his guardian but the court acquires jurisdiction regardless of §§3480, 3482 of the code which require an infant to sue and defend by guardian, and he affirms his action by resisting a motion to dismiss after attaining his majority. *First Nat. Bank v. Casey*, 158 Iowa 349, 138 N. W. 897.

See *infra*, I, K, 1, b.

[b] **Where the statute is silent as to the method** in which an infant shall appeal the rules of the common law govern. *Cook v. Adams*, 27 Ala. 294.

[c] **Appeal Alone as Poor Person.** Under the Indiana code an infant plaintiff may prosecute his appeal as a poor person without a next friend. *Hood v. Pearson*, 67 Ind. 368.

[d] **Appeal by Third Person.**—By statute the general guardian or guardian ad litem may appeal for an infant, but a third person cannot in his individual capacity take an appeal in behalf of such minor from an order denying his petition for the removal of their general guardian. *In re McLaughlin*, 101 Wis. 672, 78 N. W. 144.

[e] **In Tennessee** any person who will give the bond required by law may sue out a writ of error for an infant as his next friend. *Ridgely v. Bennett*, 13 Lea (Tenn.) 206.

[f] **When an appeal is taken by a general guardian appointed in another state** he will be regarded as a next friend, even though he does not so designate himself. *Tanner v. Ames' Estate* (Tex.), 37 S. W. 373.

[g] **Where Appeal Taken Prior to Appointment of Representative.**—An appeal will not be dismissed because a guardian ad litem for the infant appellant was not appointed until after the appeal was taken but before the hearing. *Hepp v. Huefner*, 61 Wis. 148, 20 N. W. 923.

[h] **If the infant sues out a writ of error in his own name** (1) and the appellee joins in error, the infant's disability is waived. **Ill.**—*McClay v. Nor-*

on the part of the appellate court.⁴⁹ The guardian ad litem cannot, however, appeal in his own name.⁵⁰ If the guardian fails to appeal on behalf of the infant, some one as next friend may do so.⁵¹

Since the prosecution of a writ of error is in the nature of a new suit, the minor may select a different person to represent him than the guardian ad litem or next friend in the lower court,⁵² and a guardian whose interests are adverse to those of the infant will not be permitted to appeal for him.⁵³ The authority of a next friend to represent the minor expires on the majority of the infant;⁵⁴ he cannot thereafter sue out writ of error.⁵⁵

3. Time for Instituting.—Statutes in some states permit an infant to take appropriate proceedings for the review of a judgment against him, at any time during his minority⁵⁶ and within a given time after attaining majority.⁵⁷ In the absence of such statute, how-

ris, 9 Ill. 370. **Ia.**—First Nat. Bank v. Casey, 158 Iowa 349, 138 N. W. 897. **Ky.**—Ramsey v. Keith's Admr., 25 Ky. L. Rep. 1302, 77 S. W. 693. (2) If the appellee does not join in error the appeal will be dismissed on motion. Cook v. Adams, 27 Ala. 294.

49. **Ky.**—Easy Property P. Co. v. Vonderheide, 29 Ky. L. Rep. 540, 93 S. W. 911. **Ohio.**—Harper v. Cilley, 25 Ohio C. C. 770. **Wis.**—Jones v. Roberts, 96 Wis. 427, 70 N. W. 685, 71 N. W. 883; Tyson v. Tyson, 94 Wis. 225, 68 N. W. 1015.

As to the power of a guardian ad litem or next friend to appeal see 10 STANDARD PROC. 771.

50. Harlan v. Watson, 39 Ind. 393. 51. Givens v. Clem, 107 Va. 435, 59 S. E. 413.

52. **Ill.**—Ames v. Ames, 148 Ill. 321, 36 N. E. 110. **Tenn.**—Ridgely v. Bennett, 13 Lea 206. **Tex.**—Carlton v. Miller, 2 Tex. Civ. App. 619, 21 S. W. 697.

53. An appeal by a guardian whose interests are adverse to those of the ward's will not be considered, the guardian ad litem not having appealed and no cross-appeals having been taken. Battyany v. McNeley (Wash.), 145 Pac. 978.

54. See *infra*, I, K. **Right of guardian ad litem to appeal**, see 10 STANDARD PROC. 771, 773.

55. Staggenborg v. Bailey, 26 Ky. L. Rep. 188, 80 S. W. 1109; Spell v. William Cameron & Co. (Tex. Civ. App.), 131 S. W. 637.

56. **Conn.**—Williams v. Cleaveland, 76 Conn. 426, 56 Atl. 850. **Miss.**—Sledge v. Boone, 57 Miss. 222. **Tenn.**—Ridgely v. Bennett, 13 Lea 206.

See also 10 STANDARD PROC. 877.

57. See 2 STANDARD PROC. 308; 10 STANDARD PROC. 877; and *supra*, I, G, 9, f. See also Tyson v. Tyson, 94 Wis. 225, 68 N. W. 1015.

[a] **Statute of Limitations Does Not Run Pending Disability.**—The statute of limitations cannot be pleaded in bar to writs of error prosecuted by infant plaintiffs unless the statutory limit of time has expired since the infant arrived at his majority. McKee v. Hann, 9 Dana (Ky.) 526.

[b] Where judgment is rendered against an infant and adult defendants and error is brought by all after the expiration of a year from the rendition of judgment but within a year from the time that the infant attained his majority, such writ of error is not barred by the statute of limitations but is within the saving clause. Priest v. Hamilton, 2 Tyler (Vt.) 44, 50.

[c] Where the proceedings in laying out a street over land belonging to minors, were erroneous for failure to give any previous notice, and to make any estimate of the amount of damages sustained by the owners, and where more than a year elapsed before either of the owners came of age, a writ of certiorari was ordered on a petition filed by one of the owners at the first term after he came of age, although notice had been given to the tenant in possession to remove the buildings from the land, and he had communicated that notice to the guardian of said minors within a year after the street was thus laid out. Stone v. City of Boston, 2 Mete. (Mass.) 220.

ever, his rights in this respect are governed by the general laws applicable to adults.⁵⁸

4. **Bond.**—The person representing the infant must give the required security for costs unless the statute otherwise provides.⁵⁹ He may waive an appeal bond by the adverse party.⁶⁰

5. **Service of Process and Papers.**—Service of notice or other process pertaining to an appeal to which an infant is a party respondent, should be made upon the latter's representative,⁶¹ or otherwise as provided by statute.⁶²

6. **Dismissal of Appeal.**—It has been held that an infant's appeal, being an act voidable by the infant, may be dismissed on motion of the guardian ad litem.⁶³ An infant's appeal will not ordinarily be

58. When the statute has no saving or exception clause in regard to infants they must take proceedings for the direct attack upon motion for a new trial, appeal or similar proceedings within the same time that is required of adults. *Welsh v. Koch*, 4 Cal. App. 571, 88 Pac. 604.

[a] Consent decree cannot be set aside by appeal at subsequent term; the only remedy available is an original bill in the nature of a bill of review. *Jones v. McKenna*, 4 Lea (Tenn.) 630.

59. *Ridgely v. Bennett*, 13 Lea (Tenn.) 206; *Daniel v. Mason*, 90 Tex. 162, 37 S. W. 1061; *Tanner v. Ames' Estate* (Tex.), 37 S. W. 373; *Simon v. Blanchett* (Tex. Civ. App.), 37 S. W. 346. See also *Swain v. Follows*, 18 Q. B. D. 585. See in general the titles "Appeal Bonds;" "Undertakings."

[a] In Texas (1) a guardian ad litem is not required to give bond to perfect appeal or writ of error taken by him in his fiduciary capacity. *Simon v. Blanchett* (Tex. Civ. App.), 37 S. W. 346. (2) But in *Daniel v. Mason*, 90 Tex. 162, 37 S. W. 1061, it was held that art. 2106, *Vernons Sayle's Tex. Civ. St.*, 1914, applies only to appeals and writs of error to the court of civil appeals and not to proceedings on error from the court of civil appeals to the supreme court.

[b] The infant need not join with the next friend in an appeal bond. *Biggins v. Gulf, C. & S. F. R. Co.* (Tex. Civ. App.), 110 S. W. 561.

[c] A guardian ad litem is liable individually on an appeal bond, whether or not he has authority to bind the estate of the infant. *Harper v. Cilly*, 25 Ohio C. C. 770.

[d] The infant plaintiff does not lose his right of appeal by reason of the

fact that his guardian ad litem has become insolvent and hence unable to pay defendant's costs. *Wice v. Commercial Ins. Co.*, 7 Daly (N. Y.) 258.

[e] **Effect of Failure To File Bond.** Instead of dismissing the appeal for the guardian ad litem's failure to file the required bond, the court may retain the record for a reasonable length of time and to enable appellant to serve the undertaking, file it below, and have it properly certified up by amended return. *Tyson v. Tyson*, 94 Wis. 225, 68 N. W. 1015. See generally the title "Undertakings."

60. A guardian ad litem or next friend may waive the execution of an appeal bond by the opposite party. *Kingsbury v. Buckner*, 134 U. S. 650, 10 Sup. Ct. 638, 33 L. ed. 1047.

61. *Vickers v. Hawkins*, 128 Ga. 794, 58 S. E. 44.

62. The Oklahoma statute (1) provides for service of process upon a petition in error as in the commencement of an action, or upon the infant's attorney of record. *Rev. Laws, 1910, §5238*; *Bruner v. Nordmier* (Okla.), 150 Pac. 159; *Groves Nat. Bank v. Baker* (Okla.), 148 Pac. 714; *Scott v. Brown*, 40 Okla. 184, 137 Pac. 113. (2) Service on the next friend (*Groves Nat. Bank v. Baker* [Okla.], 148 Pac. 714), (3) or guardian only (*Scott v. Brown*, 40 Okla. 184, 137 Pac. 113), is insufficient.

[a] The infant's attorney may waive in writing the issuing or service of process. *Bruner v. Nordmier* (Okla.), 150 Pac. 159, *construing* *Rev. Laws, 1910, §5239*.

63. Such motion made by the guardian at the term next after that at which he was appointed was held to have been seasonably made because he had not, at the term when he was appointed,

dismissed because he is not properly represented,⁶⁴ or because of irregularity in perfecting it.⁶⁵

7. Hearing and Determination.—An appeal by the infant brings up the whole record for review.⁶⁶

It is the duty of an appellate court to protect the rights of infants and to give them the benefit of every ground of defense of which they might have availed themselves in the court below, either in the way of pleading or objections to incompetent or illegal evidence, even though the infants have not appealed from the decree below or assigned or argued any errors in the appellate court,⁶⁷ but this rule is not always strictly adhered to.⁶⁸ Thus, where the infant is represented by a guardian ad litem and by competent counsel, errors not affecting

had opportunity to consider his position and the rights of his ward. *Robbins v. Cutler*, 26 N. H. 173.

64. See *supra*, I, I, 2.

65. See *Tyson v. Tyson*, 94 Wis. 225, 68 N. W. 1015, and *supra*, I, I, 4.

66. 10 STANDARD PROC. 877.

Generally as to the proposition that questions not raised below will not be considered on appeal, see the title "Appeals," vol. 2, p. 247, et seq.

67. *Ala.*—*Clark v. Gilmer*, 28 Ala. 265. *Ark.*—*Kempner v. Dooley*, 60 Ark. 526, 31 S. W. 145; *Branch v. Mitchell*, 24 Ark. 431; *Trapnall v. Burton*, 24 Ark. 371. *Fla.*—*Parken v. Safford*, 48 Fla. 290, 37 So. 567. *Ill.*—*Jespersion v. Mech*, 213 Ill. 488, 72 N. E. 1114; *Barnard v. Barnard*, 119 Ill. 92, 8 N. E. 320. *Ia.*—*Cavender v. Smith*, 5 Iowa 157. *Mich.*—*Smith v. Smith*, 13 Mich. 258. *Miss.*—*Westbrook v. Munger*, 64 Miss. 575, 1 So. 750. *N. J.*—See *Middle-ditch v. Williams*, 47 N. J. Eq. 585, 21 Atl. 290. *N. Y.*—*Boerum v. Schenck*, 41 N. Y. 182; *Frost v. Frost*, 15 Misc. 167, 37 N. Y. Supp. 18. See *In the Matter of New York, W. S. & B. R. Co.*, 35 Hun 575. *S. C.*—*Barrett v. Moise*, 61 S. C. 569, 39 S. E. 755. *Tex.*—*Taylor v. Rowland*, 26 Tex. 298. *W. Va.*—*Glade Coal Min. Co. v. Harris*, 65 W. Va. 152, 63 S. E. 873.

Compare Byrnes v. Butte Brew. Co., 44 Mont. 328, 119 Pac. 788, referring to some of the above cases and distinguishing them by saying in every instance the errors affected the fundamental rights of the infant.

[a] **Finding Against Infancy.**—In an action before a justice the defendant pleaded infancy, and the justice from examination was of the opinion that he was not an infant and did not appoint a guardian, and the jury found

that the defendant was not an infant. On appeal it was held that the infancy of the defendant could not be assigned for error, it being against the record, and the fact as found by the jury. *Ingersoll v. Wilson*, 3 Johns. (N. Y.) 437.

[b] **Where the evidence is conflicting** the judgment will not be reversed for insufficiency of evidence, following the general rule in such cases. *Webster v. Page*, 54 Iowa 461, 6 N. W. 716.

[c] **Absence of Evidence.**—(1) A reversal of a decree against an infant simply because the evidence is not in the record, will not be ordered. *McEndree v. McEndree*, 12 Ind. 97; *Alexander v. Frary*, 9 Ind. 481. (2) But where the record is silent, and no proof of plaintiff's claim against the infant appears to have been offered, the error is fundamental and will be considered although it has not been specifically assigned. *Stammers v. McNaughten*, 57 Ala. 277. See also *Footall's Succession*, 32 La. Ann. 97.

[d] **Release or Waiver of Errors.** Where a writ of error is brought to reverse a judgment recovered on a note against an infant, who appeared by attorney, a promise, made by him after he became of age to pay the note, is neither a release nor a waiver of the error, nor a bar to a writ of error. *Goodridge v. Ross*, 6 Mete. (Ky.) 487. See generally the titles "Appeals," vol. 2, p. 472; "Writ of Error."

68. *Ind.*—*Hawkins v. McDougal*, 126 Ind. 539, 25 N. E. 820. *Ky.*—*Behan v. Warfield*, 90 Ky. 151, 13 S. W. 439; *Curd v. Williams*, 13 Ky. L. Rep. 855, 18 S. W. 634. *Compare Spradlin v. Stanley's Admr.*, 124 Ky. 701, 99 S. W. 965. *La.*—*Smith v. Brown*, 37 La. Ann. 225.

the substantial rights of the infant which were not saved by objection and exception will not justify a reversal, in the absence of fraud or collusion.^{68a} If the infant does not appeal the court cannot, on the appeal of an adverse party, grant relief to the infant, though it may make such disposition of the case as will permit the infant to protect his rights in the court below.⁶⁹

Where the record fails to show that the infant was properly represented in the action below, the judgment may be reversed.⁷⁰ But the failure to have a guardian ad litem appointed for the appeal may be cured by an appointment in the appellate court.⁷¹

A judgment may be affirmed as to an infant and reversed as to his adult co-parties,⁷² or affirmed as to the latter and reversed as to the infant,⁷³ unless the judgment is necessarily joint as to all the parties.⁷⁴

J. COSTS.⁷⁵ — 1. In General. — As a general rule, infant plaintiffs⁷⁶

Compare *Butler v. Winchester Home for Aged Women*, 216 Mass. 567, 104 N. E. 451.

68a. **U. S.**—*Kingsbury v. Buckner*, 134 U. S. 650, 10 Sup. Ct. 638, 33 L. ed. 1047. **Mont.**—*Byrnes v. Butte Brew. Co.*, 44 Mont. 328, 119 Pac. 788. **Wash.**—*Kromer v. Friday*, 10 Wash. 621, 39 Pac. 229, 32 L. R. A. 671.

[a] In *Leach v. Sneydy*, 58 Miss. 681, the appellate court refused to reverse a decree rendered against an infant when the record shows that he had a guardian ad litem in the court below and no objection was there made to the evidence in question.

69. Where the court dismisses a bill and likewise the cross-bill of the infant defendant and the complainant appeals, the upper court has no power to re-instate the cross-bill or to grant any relief upon it. But the court may reverse and remand the cause so that the guardian ad litem of the infant may file another cross-bill, if necessary to protect his rights. *Parks v. Parks*, 66 Ala. 326.

70. See 10 STANDARD PROC. 728, 731.

71. *In re Sanborn's Estate*, 109 Mich. 191, 67 N. W. 128.

72. *Arnold v. Lane*, 71 Conn. 61, 40 Atl. 921.

73. *Wilford v. Grant*, Kirby (Conn.) 114.

[a] Where a decree pro confesso against an infant and adults is reversed as to the infant, the pro confesso as to the adults will not be set aside but will be left to be dealt with by the court below according to its

legal discretion. *Ingersoll v. Ingersoll*, 42 Miss. 155, 164.

74. See 2 STANDARD PROC. 481.

[a] In *Cruikshank v. Gardner*, 2 Hill (N. Y.) 333, it was held that in an action of assumpsit against a minor and an adult jointly there may be a severance before judgment, and a recovery against the adult; but after a joint judgment there can be no severance on a writ of error.

75. **Costs in guardianship proceedings**, see the title "Guardian and Ward."

76. **Ala.**—*Cook v. Adams*, 27 Ala. 294; *Perryman v. Burgster*, 6 Port. 99. **Ind.**—*Holmes v. Adkins*, 2 Ind. 398; *Bouche v. Ryan*, 3 Blackf. 472. **N. Y.**—*Waring v. Crane*, 2 Paige Ch. 79; *Imhoff v. Wurtz*, 9 Civ. Proc. 48.

See the title "Costs," 5 STANDARD PROC. 825.

[a] **Reason for the Rule.**—"Costs come in lieu of the common-law amercement of the plaintiff pro falso clamore, and the infant could not be subject to an amercement, and of course could not be liable to its substitute." *Cook v. Adams*, 27 Ala. 294.

[b] **If Without Guardian.**—The infant plaintiff will not be taxed for costs even if he sues without the aid of a guardian or next friend. *Kleffel v. Bullock*, 8 Neb. 336.

[c] **Appeal.**—Where the appellees, "being infants, were not . . . represented by a guardian or next friend," the cost of this appeal would be taxed against the appellants, though reversed. *Ex parte Cooper*, 136 N. C. 130, 48 S. E. 581.

and infant defendants are not liable for costs,⁷⁷ but the next friend or guardian ad litem may be taxed with costs.⁷⁸ In some jurisdictions, however, an infant plaintiff⁷⁹ or defendant⁸⁰ is liable for the costs of suit.

In equity cases costs against an infant follow the general rule and rest in the court's discretion.⁸¹ Whether an infant will be allowed his costs against the adverse party depends upon the general rules governing the allowance of costs.⁸²

Attainment of Majority Pendente Lite.—If the infant elects to proceed in the case after he is of age, he will be liable in the same manner

77. **Ill.**—Tuttle v. Garrett, 74 Ill. 444; Fleming v. McHale, 47 Ill. 282. **Md.**—Annapolis, etc. R. Co. v. Hickox, 104 Md. 659, 65 Atl. 434. **Neb.**—Clark v. Clark, 21 Neb. 402, 32 N. W. 157. **N. C.**—Bogey v. Shute, 57 N. C. 174.

[a] Where it is the duty of whoever represents the infant's interests to present their claim to the court, it is erroneous to award costs against the infants. Smith v. Smith, 13 Mich. 258.

78. 10 STANDARD PROC. 768.

[a] **Statute Construed as Holding Next Friend Personally Liable.**—Biggins v. Gulf, C. & S. F. R. Co. (Tex. Civ. App.), 110 S. W. 561.

[b] **Guardian ad litem on withdrawing** will be required to pay taxable costs to date. Sullivan v. Hoe, 164 App. Div. 930, 149 N. Y. Supp. 558. See *infra*, I, J, 2.

A general guardian, however, who acts in good faith and upon reasonable grounds, will not ordinarily be charged personally with costs. 10 STANDARD PROC. 878.

79. **Ill.**—Myers v. Rehkopf, 30 Ill. App. 209, the statute makes no exceptions in favor of unsuccessful infant plaintiffs. **Me.**—Sanborn v. Merrill, 41 Me. 467; Leavitt v. Bangor, 41 Me. 458. **Mass.**—Crandall v. Slaid, 11 Mete. 288; Smith v. Floyd, 1 Pick. 275. **N. C.**—Howett v. Alexander, 12 N. C. 431.

[a] "The minor was the real party in interest in the suit," and any judgment including judgment for costs "being against the plaintiff binds the minor." Albee v. Winterink, 55 Iowa 184, 7 N. W. 497, *distinguishing* Vance v. Fall, 48 Iowa 364.

[b] **The prochain ami**, as such is not liable for costs. Soule v. Winslow, 64 Me. 518; Sanborn v. Merrill, 41 Me. 467; Leavitt v. Bangor, 41 Me. 458; Crandall v. Slaid, 11 Mete. (Mass.) 288.

80. Sproule v. Botts, 5 J. J. Marsh. (Ky.) 162 (*overruling* Wilson v. Mc-

Gee, 2 A. K. Marsh. (Ky.) 600, and *compare* Yeizer v. Stone's Heirs, 7 Mon. (Ky.) 189); Lane v. Gover, 1 H. & McH. (Md.) 459.

[a] **In a tort action** minority will not avail an infant defendant. Perryman v. Burgster, 6 Port. (Ala.) 99.

[b] **Contribution from minors** may probably be required in a proper case. Case v. Case, 103 Ill. App. 177.

81. Infants who prosecute an unjust claim at law and thus compel the defendant to go to equity for relief and there set up an inequitable defense shall pay costs. Price v. Sykes, 8 N. C. 87.

82. See the title "Costs."

[a] **Where defendant pleads infancy** and a nolle prosequi is entered as to him, costs are within the discretion of court. *Ex parte* Nelson, 1 Cow. (N. Y.) 417.

[b] Where an unsuccessful defendant did not raise the issue of infancy in the lower court, he will not be allowed his costs although successful in avoiding the judgment on error based on that ground. Maynard v. Downer, 13 Wend. (N. Y.) 575.

[c] **Where Plaintiff Ignorant of Infancy.**—In Knapp v. Crosby, 1 Mass. 479, the court would not award costs to the infant plaintiff in error "because it did not appear that the original plaintiff knew that the defendant was an infant at the time of the recovery of the judgment."

[d] **An infant who incurred a liability by holding himself out as an adult copartner**, and who recovers judgment relieving him of liability because of his infancy will not be allowed his costs, costs being within the court's discretion under Code Civ. Proc., §3229. Yamato Trading Co. v. Hoexter, 44 Hun (N. Y.) 491.

[e] **An infant administrator** cannot recover costs of filing a cross-bill filed

as if he had been an adult when the suit was commenced,⁸³ and his representative will be released from any liability;⁸⁴ but if on reaching majority, he disclaims all benefit of the proceeding he cannot be held liable for costs.⁸⁵

Compensation of a guardian ad litem or next friend is sometimes taxable as an item of costs.⁸⁶

2. Security for Costs.—At common law the right to demand security for costs when there is an infant plaintiff is denied,⁸⁷ for the reasons that the infant did not choose his next friend and that the court which is always anxious to have cases in which infants were concerned brought to its notice has jurisdiction to stay such suits if not for the infant's benefit,⁸⁸ but this rule does not apply to appeals by the infant.⁸⁹

A next friend who seeks to withdraw, however, will be required to give security for costs.⁹⁰ And in some jurisdictions a guardian or next friend cannot commence a suit on behalf of an infant without first giving bond and security for costs.⁹¹ While in others, the requiring of security rests in the discretion of the court.⁹²

for his own convenience. *Carow v. Mowatt*, 2 Edw. Ch. (N. Y.) 57.

83. *Sparmann v. Keim*, 6 Abb. N. C. (N. Y.) 353; *Waring v. Crane*, 2 Paige Ch. (N. Y.) 79.

84. *Sparmann v. Keim*, 6 Abb. N. C. (N. Y.) 353.

[a] **Discharge of Next Friend.**—It is competent for the court to discharge the *prochein ami*, and give the plaintiff control over the suit; but it must make such equitable order as will protect the *prochein ami* from costs already incurred, and relieve her from liability in the future. *Wainwright v. Wilkinson*, 62 Md. 146.

85. *Kleffel v. Bullock*, 8 Neb. 336.

86. *Pope v. Lyttle*, 157 Ky. 659, 163 S. W. 1121; *Simmons v. Arnim* (Tex. Civ. App.), 172 S. W. 184; *Pryor v. Krause* (Tex. Civ. App.), 168 S. W. 498; 10 STANDARD PROC. 766.

87. **III.**—*Budd v. Rutherford*, 4 Ill. App. 386, 30 N. E. 1111. *Compare St. Louis, etc. R. Co. v. Reagan*, 52 Ill. App. 488, holding "The court had the power, upon the showing made, to permit the suit to be prosecuted without the giving of any bond whatever. . . . The court was not required sua sponte to compel the filing of the next friend's personal bond." **N. Y.**—*Linner v. Crouse*, 61 Barb. 289. See *Grantman v. Thrall*, 29 How. Pr. 344. For old cases where security may be required, see *Ten Broeck v. Reynolds*, 13 How. Pr. 462; *Hulbert v. Newell*, 4 How. Pr. 92; *McDonald v. Brass Goods Mfg. Co.*, 2 Abb.

N. C. 434; *Coldon v. Haskins*, 3 Edw. Ch. 311; *Fulton v. Roosevelt*, 1 Paige Ch. 178; *Hayes v. Second Ave. R. Co.*, 5 Civ. Proc. 155. **Eng.**—*Hind v. Whitmore*, 2 K. & J. 458, 69 Eng. Reprint 862.

[a] **At common law**, a next friend is appointed by the court to represent an infant plaintiff, and such infant cannot be required to furnish security for costs even when the next friend, who is solely liable therefor, is utterly insolvent. All the law undertakes to assure the defendant in such cases is that he shall have an adversary who will be concluded by the judgment, and one against whom a judgment for costs may be rendered. *Budd v. Rutherford*, 4 Ind. App. 386, 30 N. E. 1111.

88. *Hind v. Whitmore*, 2 K. & J. 458, 69 Eng. Reprint 862.

89. *Swain v. Follows*, 18 Q. B. D. 585. See *supra*, I, I, 4.

90. *Witts v. Campbell*, 12 Ves. Jr. 493, 33 Eng. Reprint 186.

91. *Sharer v. Gill*, 6 Lea (Tenn.) 495; *Green v. Harrison*, 3 Sneed (Tenn.) 131.

[a] **In admiralty**, as a general rule, guardians ad litem cannot be excused from giving the ordinary stipulations. *Brown v. The Henry Pratt*, 4 Fed. Cas. No. 2,010.

[b] **Bond To Be Filed Within Time Prescribed in the Court's Order.**—*Kingsbury v. Buckner*, 134 U. S. 650, 678, 10 Sup. Ct. 638, 33 L. ed. 1047.

92. **In Illinois** the filing of the cost

A statute exempting guardians from giving security for costs, includes guardians ad litem.⁹³

3. Suit in Forma Pauperis.⁹⁴—At common law and in the absence of statute an infant cannot commence an action⁹⁵ or appeal⁹⁶ as a poor person. But this rule did not obtain in equity,⁹⁷ and in some jurisdictions statutes permit an infant to either bring⁹⁸ or defend⁹⁹ an action in forma pauperis.

The application may be made during the pendency of the action,¹ after the appointment of a guardian ad litem,² and after defendant moves for an order compelling security for costs.³

bond is not a "prerequisite and jurisdictional necessity" and the statute is satisfied if the bond is filed "when the court shall so order." *Illinois Cent. R. Co. v. Latimer*, 128 Ill. 163, 21 N. E. 7.

[a] In **Michigan**, the question whether or not the *procchein ami* shall file security for taxable costs is left to the discretion of the court. *Rabidon v. Muskegon Circ. Judge*, 110 Mich. 297, 68 N. W. 147.

93. *Silvas v. Arizona Copper Co.*, 220 Fed. 116.

94. See generally the title "**Paupers.**"

95. *U. S.*—*Roy v. Louisville*, 34 Fed. 276. *Contra*, *Ferguson v. Dent*, 15 Fed. 771. **Tenn.**—*Cargle v. Railroad Co.*, 7 Lea 717. **Eng.**—*Anonymous*, 1 Ves. Jr. 409, 30 Eng. Reprint 410; *Lindsay v. Tyrrell*, 2 De G. & J. 7, 44 Eng. Reprint 889, under special circumstances, *quaere*.

[a] In **admiralty**, "if it be necessary to assign a guardian by the court, the party not being able to produce a responsible person, the court would confer the trust on some standing officer, and then discharge him of the liabilities for costs." *Brown v. The Henry Pratt*, 4 Fed. Cas. No. 2,010.

96. *Sharer v. Gill*, 6 Lea (Tenn.) 495; *Musgrove v. Lusk*, 5 Baxt. (Tenn.) 684.

[a] An affidavit of poverty by the next friend need not show the inability of the minor to pay costs of appeal or give security therefor, for the reason he is not required to execute such security. *Biggins v. Gulf, C. & S. F. R. Co.* (Tex. Civ. App.), 110 S. W. 561.

97. *Erickson v. Poey*, 5 N. Y. Civ. Proc. 379.

98. *Ind.*—*Britton v. State ex rel. Rowe*, 115 Ind. 55, 17 N. E. 254; *Wright v. McLarinan*, 92 Ind. 103; *Hood v. Pearson*, 67 Ind. 368; *Budd v. Ruther-*

ford, 4 Ind. App. 386, 30 N. E. 1111. **Kan.**—*Missouri Pac. R. Co. v. Cooper*, 57 Kan. 185, 45 Pac. 587. **Ky.**—*Westerfield v. Wilson*, 12 Bush 125; *Richardson v. Hunt*, 5 Ky. L. Rep. 931. **N. Y.** *Hotaling v. McKenzie*, 7 Civ. Proc. 320; *Erickson v. Poey*, 5 Civ. Proc. 379; *Irving v. Garrity*, 13 Abb. N. C. 182; *Friedman v. Fischer*, 5 N. Y. St. 913; *Harris v. Mutual Life Ins. Co.*, 10 N. Y. Supp. 473. **N. C.**—*Brendle v. Heron*, 68 N. C. 496. **Tenn.**—*Cargle v. Nashville, C. & St. L. R. Co.*, 7 Lea 717; *Sharer v. Gill*, 6 Lea 495; *Green v. Harrison*, 2 Sneed 131.

[a] The financial responsibility of the guardian does not affect the right. *Muller v. Bammann*, 77 App. Div. 212, 78 N. Y. Supp. 1022; *Tobias v. Broadway & Seventh Ave. R. Co.*, 14 N. Y. Supp. 641.

[b] **Ability of Father.**—If the infant have no means whatever, the mere fact that his father, shown to be worth more than \$100 and to be of sufficient financial responsibility, is appointed guardian ad litem will not deprive the infant of the right to sue in forma pauperis. *Larsen v. Interurban St. R. Co.*, 97 App. Div. 150, 89 N. Y. Supp. 649; *Shapiro v. Burns*, 7 Misc. 418, 27 N. Y. Supp. 980; *Bonadua v. Third Ave. R. Co.*, 30 N. Y. Supp. 410.

99. *Ferguson v. Dent*, 15 Fed. 771.

1. *Shapiro v. Burns*, 7 Misc. 418, 27 N. Y. Supp. 980.

2. In the Matter of *Byrne*, 1 Edw. Ch. (N. Y.) 41.

3. *Erickson v. Poey*, 5 N. Y. Civ. Proc. 379; *Trimble v. Kilgannon*, 12 Misc. 459, 34 N. Y. Supp. 256. *Contra*, *Kleinpeter v. Enell*, 2 N. Y. Civ. Proc. 21, 22; *Friedman v. Fischer*, 5 N. Y. St. 913.

[a] On motion "to dismiss the cause because security for costs had not been given, a cross-motion for leave to prosecute as a poor person . . . supported

4. Enforcement of Cost Award.—Where the infant is not liable for costs execution for costs lies, not against the infant,⁴ but against the next friend.⁵

Under statute, costs may be collected by an attachment against the guardian of an infant plaintiff.⁶ Where the infant is liable or his representative is entitled to reimbursement for costs, the court may direct them to be paid out of his property or estate.⁷

K. EFFECT OF ATTAINMENT OF MAJORITY PENDING ACTION.⁸—1. Infant Plaintiff.—a. *Where Represented.*—On arrival of the infant plaintiff at full age the action does not abate,⁹ and the plaintiff may elect to prosecute the suit commenced by his next friend or to stop the proceedings.¹⁰ In case he elects to prosecute the suit he

by satisfactory proof that "both plaintiff and his next friend were insolvent, may be allowed. *Consolidated Coal Co. v. Gruber*, 188 Ill. 584, 59 N. E. 251; *Chicago & I. R. Co. v. Lane*, 130 Ill. 116, 22 N. E. 513; *Stilzer v. Warder*, 109 Ill. App. 137; *Consolidated Coal Co. v. Gruber*, 91 Ill. App. 15; *Chicago & I. R. Co. v. Lane*, 30 Ill. App. 437.

4. *Cook v. Adams*, 27 Ala. 294; *Green v. Harrison*, 3 Sneed (Tenn.) 131.

5. Judgment should be rendered in such manner that it shall be collectible in the first instance, by execution, from the *prochein ami*. *Holmes v. Adkins*, 2 Ind. 398.

6. *Grantman v. Thrall*, 31 How. Pr. (N. Y.) 464; *Ten Broeck v. Reynolds*, 13 How. Pr. (N. Y.) 462.

[a] **Incarceration of Guardian.**

Under a statute holding the guardian responsible for costs awarded against an infant plaintiff and permitting its enforcement by attachment, it was held that the incarceration of the guardian upon motion to show cause was without legal warrant. *Granholt v. Sweigle*, 3 N. D. 476, 57 N. W. 509.

7. *Mowatt v. Carow*, 7 Paige Ch. (N. Y.) 328, 32 Am. Dec. 641; *Waring v. Crane*, 2 Paige Ch. (N. Y.) 79, 21 Am. Dec. 70.

[a] **Costs of an appeal** may be adjudged against the infant's estate. *Biggins v. Gulf, C. & S. F. R. Co.* (Tex. Civ. App.), 110 S. W. 561. See *Barron v. Barron*, 122 Ala. 194, 25 So. 55 (which holds, that the guardian will be reimbursed for all costs on appeal from the estate of the minor); *Laughter v. Seehn*, 59 Tex. 177.

[b] **Where the funds of the minor are in the hands of a receiver**, the court will not order costs to be paid out of them. *Ferguson v. Dent*, 15 Fed. 771.

8. Effect upon liability for costs, see *infra*, 1, J. 1; and 10 STANDARD PROC. 770.

Effect Upon Right of Next Friend To Prosecute Writ of Error.—See *infra*, I, 1, 2.

9. Miss.—*Tucker v. Wilson*, 68 Miss. 693, 9 So. 898. **Pa.**—*Mahoney v. Park Steel Co.*, 217 Pa. 20, 66 Atl. 90. **S. C.**—*Connor v. Ashley*, 57 S. C. 305, 35 S. E. 546; *Shuttlesworth v. Hughey*, 6 Rich. L. 329, 60 Am. Dec. 130. **Tex.**—*Spell v. William Cameron & Co.* (Tex. Civ. App.), 131 S. W. 637.

10. Mich.—*Bernard v. Pittsburg Coal Co.*, 137 Mich. 279, 100 N. W. 396. **S. C.**—*Shuttlesworth v. Hughey*, 6 Rich. L. 329, 60 Am. Dec. 130. **Tex.**—*Spell v. William Cameron Co.* (Tex. Civ. App.), 131 S. W. 637.

See 1 Dan. Ch. Pr. (8th ed.) 107.

[a] Although the court had decided to grant a reargument of the appeal, where one of the infants having reached majority requested the former decision be allowed to stand, the court said they thought they ought to accede to his request, and did so. *Dow v. Dow*, 66 Hun 631, 21 N. Y. Supp. 487.

[b] **A co-plaintiff (1) who was an infant** at the commencement of the action may stop the prosecution of the action as to himself by having his name struck out of the bill on motion (*Acres v. Little*, 7 Sim. 138, 58 Eng. Reprint 788; *Bicknell v. Bicknell*, 32 Beav. 381, 55 Eng. Reprint 149; *Cooke v. Fryer*, 4 Beav. 13, 49 Eng. Reprint 242. See also *Guy v. Guy*, 2 Beav. 460, 48 Eng. Reprint 1259); (2) made on notice (*Millson v. Smale*, 25 Ont. [Can.] 144), (3) or he may be allowed to come in and sue as an adult co-plaintiff. *Robinson v. Hood*, 67 Mo. 660.

[c] **The receipt of the fruits of the**

should be thereupon substituted as sole plaintiff,¹¹ the next friend dismissed,¹² and subsequent proceedings carried on in his own name.¹³

The record may on motion¹⁴ be amended to show that the suit is prosecuted by the plaintiff himself,¹⁵ by striking out the name of the next friend,¹⁶ or this fact may be shown by a suggestion upon the record that the plaintiff has attained full age.¹⁷ A failure to show this

judgment entered after attaining full age sufficiently manifests the infant's election to proceed with the action. *Connor v. Ashley*, 57 S. C. 305, 35 S. E. 546.

Effect Upon Guardian's Right To Prosecute the Action.—See 10 STANDARD PROC. 866.

11. *Colo.*—*Missouri Pac. R. Co. v. Leib*, 23 *Colo. App.* 364, 129 *Pac.* 569. *Ga.*—*Sims v. Renwick*, 25 *Ga.* 58. *Ky.* *Clements v. Ramsey*, 9 *Ky. L. Rep.* 172, 4 *S. W.* 311. *La.*—*Chisolm v. Skillman*, 2 *La.* 289, the minor may make himself a party. *Nev.*—*Ricord v. C. P. R. R. Co.*, 15 *Nev.* 167.

See 10 STANDARD PROC. 866.

[a] **A joinder of the next friend and the infant plaintiff** as co-plaintiffs constitutes error as they have no joint interest. *Ricord v. C. P. R. R. Co.*, 15 *Nev.* 167. See 10 STANDARD PROC. 866.

12. *Del.*—*Flint v. Flint*, 3 *Boyce* 155, 82 *Atl.* 538. *Mo.*—*Renfro v. Metropolitan Life Ins. Co.*, 148 *Mo. App.* 258, 129 *S. W.* 444. *Okla.*—*Webb v. Harris*, 32 *Okla.* 491, 121 *Pac.* 1082.

Authority of Next Friend Ceases With Majority.—10 STANDARD PROC. 773.

Protecting Next Friend From Liability for Costs.—See 10 STANDARD PROC. 770.

[a] **The tutrix cannot take the place of the undertutor** when the late minor causes himself to be made a party. *Chisolm v. Skillman*, 2 *La.* 289.

13. *Del.*—*Flint v. Flint*, 3 *Boyce* 155, 82 *Atl.* 538. *Ga.*—*Phillips v. Taber*, 83 *Ga.* 565, 10 *S. E.* 270. *Ky.*—See *Clements v. Ramsey*, 9 *Ky. L. Rep.* 172, 4 *S. W.* 311. *Okla.*—*Webb v. Harris*, 32 *Okla.* 491, 121 *Pac.* 1082. *S. C.*—*Seigler v. Southern Ry.*, 85 *S. C.* 345, 67 *S. E.* 296; *Connor v. Ashley*, 57 *S. C.* 305, 35 *S. E.* 546; *Shuttlesworth v. Hughey*, 6 *Rich. L.* 329, 60 *Am. Dec.* 130. *Tex.* *Spell v. William Cameron & Co.* (*Tex. Civ. App.*), 131 *S. W.* 637.

1 *Dan. Ch. Pr.* (8th ed.) 107.

14. *Shattuck v. Wolf*, 72 *Kan.* 366, 83

Pac. 1093; *Mahoney v. Park Steel Co.*, 217 *Pa.* 20, 66 *Atl.* 90. See 10 STANDARD PROC. 866, note 2.

15. *Bernard v. Pittsburg Coal Co.*, 137 *Mich.* 279, 100 *N. W.* 396.

16. *Ga.*—*Phillips v. Taber*, 83 *Ga.* 565, 10 *S. E.* 270; *Lasseter v. Simpson*, 78 *Ga.* 61, 3 *S. E.* 243; *Sims v. Renwick*, 25 *Ga.* 58. *Mich.*—*Bernard v. Pittsburg Coal Co.*, 137 *Mich.* 279, 100 *N. W.* 396. *Tex.*—*Spell v. William Cameron & Co.* (*Tex. Civ. App.*), 131 *S. W.* 637.

[a] **The only amendment necessary** is to strike those parts of the declaration in which the name of the guardian appeared and profert of his letters of guardianship was made. *Sims v. Renwick*, 25 *Ga.* 58.

[b] **The proper procedure** is to strike from the complaint the allegation of non-age and the appointment of a guardian ad litem. *Seigler v. Southern Ry. Co.*, 85 *S. C.* 345, 67 *S. E.* 296.

[c] **Where the husband sued as next friend of his minor wife**, and pending suit she became of age, the declaration could be amended so as to strike out the representative character of the husband, and leave the suit to proceed in the names of the husband and wife. *Bryant v. Helton*, 66 *Ga.* 477.

[d] **Where there were several minor plaintiffs**, some of whom had reached majority, an amendment inserting their names as plaintiffs in their own right was allowed in *Stanton v. United States*, 4 *Ct. Cl.* (*U. S.*) 456.

17. *Del.*—*Flint v. Flint*, 3 *Boyce* 155, 82 *Atl.* 538. *Ind.*—*Holmes v. Adkins*, 2 *Ind.* 398. *Ky.*—See *Clements v. Ramsey*, 9 *Ky. L. Rep.* 172, 4 *S. W.* 311. *Mich.*—*Bernard v. Pittsburg Coal Co.*, 137 *Mich.* 279, 100 *N. W.* 396. *N. Y.*—*Breese v. Metropolitan Life Ins. Co.*, 37 *App. Div.* 152, 55 *N. Y. Supp.* 775. *S. C.*—*Connor v. Ashley*, 57 *S. C.* 305, 35 *S. E.* 546; *Shuttlesworth v. Hughey*, 6 *Rich. L.* 329, 60 *Am. Dec.* 130.

See 10 STANDARD PROC. 866, note 2.

fact in some manner is not, however, reversible error unless the defendant was prejudiced thereby.¹⁸

There is no necessity for an intervention on the part of the late infant, the amendment of the record or suggestion of majority thereon being sufficient for this purpose.¹⁹ It is not required that the plaintiff file an amended petition.²⁰

b. *Where Unrepresented.* — If pending the action of an infant who is not represented by guardian, he reaches majority, he may adopt the action thus erroneously commenced and ratify what has been done therein,²¹ upon which the action will proceed with the same effect as if it had been properly commenced.²² There is no necessity for any amendment of the record.²³

2. **Infant Defendant.** — The arrival of an infant defendant at the age of majority pending the action does not abate the suit as to him.²⁴ He is then entitled to the control and management of his defense.²⁵ If he is not represented by a guardian or guardian ad litem the case stands as though he had been of full age at the commencement of the proceedings.²⁶ If dissatisfied with the answer of the guardian he may

18. *Bernard v. Pittsburg Coal Co.*, 137 Mich. 279, 100 N. W. 396.

19. *Mahoney v. Park Steel Co.*, 217 Pa. 20, 66 Atl. 99.

20. *Clements v. Ramsey*, 9 Ky. L. Rep. 172, 4 S. W. 311.

21. *Germain v. Sheehan*, 25 Minn. 338; *Woodman v. Rowe*, 59 N. H. 453. See 10 STANDARD PROC. 749.

[a] **The adoption or ratification may be inferred from any conduct on the part of the infant evincing his recognition of the action as prosecuted for him, as, for instance, by knowingly suffering it to be carried on in his name, without repudiating it.** *Germain v. Sheehan*, 25 Minn. 338.

[b] **An action commenced without guardian or next friend should not be dismissed over plaintiff's objection after he has become of age.** *Philpot v. Bengé*, 5 Ky. L. Rep. 690.

[c] **An appeal by an infant without representation by guardian is ratified by his resisting a motion to dismiss.** *First Nat. Bank v. Casey*, 158 Iowa 349, 138 N. W. 897.

22. *Germain v. Sheehan*, 25 Minn. 338; *Moore v. Moore*, 74 N. J. Eq. 733, 70 Atl. 684.

[a] **Binding Effect of Judgment.** Where an infant institutes an action in his own name, if before judgment he attains full age, the judgment is binding on both the infant and the defendant. *Hicks v. Baum*, 112 N. C. 642, 17 S. E. 499, 34 Am. St. Rep. 521.

23. *Moore v. Moore*, 74 N. J. Eq. 733, 70 Atl. 684.

24. *Deering v. Hurt* (Tex.), 2 S. W. 42. See *Logan v. Robertson* (Tex. Civ. App.), 83 S. W. 395; *Lawrason v. Buckley*, 2 Ch. Chamb. (Can.) 477.

Effect on Authority of Guardian. See 10 STANDARD PROC. 866.

25. *In re Rousos*, 119 N. Y. Supp. 34. See *Simpson v. Belvin*, 37 Tex. 674.

[a] **It is the duty of the infant to inform the court of the fact of his full age and to ask the removal of the guardian ad litem and the substitution of himself in his own right.** *Lancaster v. Barton*, 92 Va. 615, 24 S. E. 251.

[b] **A judgment is binding upon an infant defendant who had reached majority at the rendition thereof and who did not seek to avoid it by reason of his infancy for three years after having unsuccessfully moved for new trial and appealed.** *Childs v. Lanterman*, 103 Cal. 387, 37 Pac. 382, 42 Am. St. Rep. 121.

26. *Patton v. Furthmeyer*, 16 Kan. 29; *In re Rousos*, 119 N. Y. Supp. 34.

[a] **The appointment of a guardian ad litem for a defendant who has become of age is error.** *Patton v. Furthmeyer*, 16 Kan. 29; *Marshall v. Wing*, 50 Mo. 62.

[b] **Arrival at Majority Pending Action of Ejectment.** — It is provided in Tennessee that a judgment in ejectment is concluding upon persons not under disability, but that if the losing party

apply for leave to file a new or amended answer,²⁷ and upon a showing that a further answer is necessary to protect his rights, is entitled as a matter of course to put in a new defense.²⁸ The infant cannot, however, delay the cause upon a mere petition without an answer.²⁹

II. JUDICIAL EMANCIPATION.—A. IN GENERAL.—Provision is sometimes made for the removal of the disabilities of non-age by a petition in equity, but courts of chancery have such power only when conferred by statute.³⁰

B. COMPLIANCE WITH STATUTE.—The proceeding being purely statutory should be in substantial conformance with the requirements of the statute;³¹ a literal compliance, however, is not necessary.³²

C. BY WHOM PETITION FILED.—The petition should be made by the minor seeking to have his disabilities removed,³³ through his next

be under disability the judgment rendered is no bar to an action brought within three years after removal of disability. A judgment in an action of ejectment against a person who reaches majority after verdict and before judgment is no bar to a subsequent action where the record does not show any entry or proceeding making him a party to the action. *Boro v. Harris*, 13 Lea (Tenn.) 36.

27. *Ky.*—*Shields' Heirs v. Bryant*, 2 A. K. Marsh. 342. *N. M.*—*Thompson v. Maxwell L. G. & R. Co.*, 3 N. M. 320, 334. *Va.*—*Winston v. Campbell*, 4 Hen. & M. 477. *Eng.*—*Snow v. Hole*, 15 Sim. 161, 60 Eng. Reprint 578.

[a] The defendant having attained majority, discharged his solicitor. Afterwards the solicitor was served with a subpoena to hear judgment but he returned it stating the facts. The defendant was not served and the judgment was rendered in his absence. Under these circumstances it was held in *Snow v. Hole*, 15 Sim. 161, 60 Eng. Reprint 578, that the defendant was entitled to put in a new answer.

[b] If the application be delayed, it may be refused. *Bennet v. Leigh*, Dick. 89, 21 Eng. Reprint 202.

[c] If an infant who has made an offer in his answer, desires to retract it on reaching majority, he must apply therefor immediately on arriving of age. *Cecil v. Salisbury*, 2 Vern. 224, 23 Eng. Reprint 745.

28. *Stephenson v. Stephenson*, 6 Paige Ch. (N. Y.) 353.

[a] In equity, an infant, who attains his full age pending a suit, may generally be allowed to come in, as of course, and demur, plead or answer. *Marshall v. Wing*, 50 Me. 62.

29. *Shields' Heirs v. Bryant*, 2 A. K. Marsh. (Ky.) 342.

30. *Ala.*—*Boykin v. Collins*, 140 Ala. 407, 37 So. 248. *Ark.*—*Hindman v. O'Connor*, 54 Ark. 627, 643, 16 S. W. 1052, 13 L. R. A. 490. *Miss.*—*Jackson v. Jackson*, 105 Miss. 868, 63 So. 275.

[a] Not an Ordinary Proceeding. The proceeding to remove an infant's disability is not an ordinary proceeding in equity, but is addressed to the chancery court because of its guardianship of minors. *Jackson v. Jackson*, 105 Miss. 868, 63 So. 275.

[b] The parish court had jurisdiction to emancipate a minor notwithstanding that his property was worth more than \$500. *Cooper v. Rhodes*, 30 La. Ann. 533.

[c] The statute applies to female minors, notwithstanding the use of the masculine pronoun. *Texas Central R. Co. v. Wheeler*, 52 Tex. Civ. App. 603, 116 S. W. 83.

[d] Effect in Sister State.—A minor so emancipated, however, cannot bring as an adult an action in another state which has no provision for removal of disabilities. *Gilbreath v. Bunce*, 65 Mo. 349.

31. *Boykin v. Collins*, 140 Ala. 407, 37 So. 248; *Brown v. Wheelock*, 75 Tex. 385, 12 S. W. 111, 841; *Stewart v. Robbins*, 27 Tex. Civ. App. 188, 65 S. W. 899.

32. *Brown v. Wheelock*, 75 Tex. 385, 12 S. W. 111, 841.

33. *Miss. Code*, 1906, §544; *Jackson v. Jackson*, 105 Miss. 868, 63 So. 275.

[a] In Alabama, a minor has no right to file the application except when he has no living parent or guardian, and this is true whether or not the

friend.³⁴ The minor must be a resident of the county or district of the court to whom the petition is addressed.³⁵

D. PARTIES DEFENDANT. — The parents if living are necessary parties defendant to the petition.³⁶

E. PETITION. — The petition should comply substantially with the requirements of the particular statute under which it is filed.³⁷

Verification. — The petition need not be verified in the absence of statute requiring it.³⁸

F. NOTICE. — Notice to designated persons is ordinarily required.³⁹ The publication of notice, although directed, is not essential to the jurisdiction of the court.⁴⁰ It has been held that where the father is dead, notice should be given to the officer most likely to know the minor's capabilities and environment.⁴¹

G. HEARING. — The proceeding may be heard at the term during which the application is filed.⁴²

H. ORDER OR DECREE. — An order removing the disabilities of a minor cannot in strict language be deemed a judgment of a court because it fixes no rights, settles no disputes and acts merely upon the status of the minor.⁴³ Such an order cannot, however, be attacked

parent is a non-resident. *Ex parte* Singleton (Ala.), 68 So. 253.

[b] Where the statute requires the signature of the minor to the petition, a petition without such signature confers no jurisdiction. *Cox v. Johnson*, 80 Ala. 22. But see *Stewart v. Robbins*, 27 Tex. Civ. App. 188, 65 S. W. 899.

34. Miss. Code, 1906, §544; *Jackson v. Jackson*, 105 Miss. 868, 63 So. 275.

[a] A petition by the minor himself and by his mother and father is not a compliance with the statute requiring the petition to be filed by the minor by his next friend. *Jackson v. Jackson*, 105 Miss. 868, 63 So. 275.

35. *Young v. Hiner*, 72 Ark. 299, 79 S. W. 1062 (court in determining its jurisdiction must find the minor a resident of its district); *Hindman v. O'Connor*, 54 Ark. 627, 642, 16 S. W. 1052, 13 L. R. A. 490; *Durrill v. Robinson* (Tex.), 138 S. W. 107; *Cunningham v. Robinson* (Tex.), 136 S. W. 441; *Rainer v. Durrill* (Tex. Civ. App.), 156 S. W. 589 (it appearing on the record the minor was but a temporary resident, the order was void); *Gulf, C. & S. F. R. Co. v. Lemons* (Tex. Civ. App.), 152 S. W. 1189; *Buckley v. Herder* (Tex. Civ. App.), 133 S. W. 703.

36. *Lake v. Perry*, 95 Miss. 550, 49 So. 569.

37. *Boykin v. Collins*, 140 Ala. 407,

37 So. 248; *Stewart v. Robbins*, 27 Tex. Civ. App. 188, 65 S. W. 899.

[a] An averment that the granting of the relief prayed for would subserve the interest of the minor, would be the mere averment of a conclusion, and as a consequence is not essential. *Boykin v. Collins*, 140 Ala. 407, 37 So. 248.

38. *Stewart v. Robbins*, 27 Tex. Civ. App. 188, 65 S. W. 899.

39. In Texas the person notified should be served with a copy of the petition. But the presentation of a petition to such person, an examination thereof by him, the acceptance of notice in writing and waiver of a copy is equivalent to actual service. *Brown v. Wheelock*, 75 Tex. 385, 12 S. W. 111, 841.

40. *Boykin v. Collins*, 140 Ala. 407, 37 So. 248, a failure of the register to publish requisite notice affects the regularity of the proceedings but does not render them void.

41. *Brown v. Wheelock*, 75 Tex. 385, 12 S. W. 111, 841.

42. *Brown v. Wheelock*, 75 Tex. 385, 12 S. W. 111, 841.

[a] The presence of the county judge is not essential to the validity of the proceeding. *Brown v. Wheelock*, 75 Tex. 385, 12 S. W. 111, 841, this appearance is a matter within his own discretion.

43. *Brown v. Wheelock*, 75 Tex. 385, 12 S. W. 111, 841; *Lemons v. Gulf, C.*

collaterally.⁴⁴ It should show that the necessary preliminary steps were taken.⁴⁵ In some states the proceedings terminate in a decree, the form of which, however, is not fixed by the statute.⁴⁶

I. FILING OF DECREE.—In the absence of statute to the contrary the decree is effective when rendered, and not upon the filing of a copy.⁴⁷ But where it is required that the decree or copy thereof be recorded to give it effect, an unrecorded decree is of no force whatever,⁴⁸ or if recorded in but one county only, its effect is limited to that county.⁴⁹

J. RECORD OF PROCEEDINGS.—1. Generally.—The record must show the necessary jurisdictional facts,⁵⁰ such as for example, residence of the minor,⁵¹ and that the minor is of the age specified in the statute.⁵²

2. Presumptions.—As a consequence of the fact that the proceedings are statutory and that the jurisdiction of the chancery court when emancipating a minor is limited,⁵³ no presumptions in aid of the order are indulged.⁵⁴

III. SALES, MORTGAGES AND LEASES OF INFANT'S PROPERTY.

—A. SALE OF INFANT'S REAL ESTATE.—1. Jurisdiction To Authorize Sale.—*a. Inherent Jurisdiction of Courts of Chancery.* The courts are not in harmony as regards the power of a court of chancery to authorize the sale of an infant's property in the absence of statute. The rule in some states may be stated broadly, that the court of chancery, in the exercise of its guardianship over the person and property of minors, has authority to order the sale of the whole, or a portion of the estate of an infant, or to order the estate of an infant to be incumbered by mortgage whenever the interest of the

& S. F. R. Co. (Tex. Civ. App.), 134 S. W. 742.

44. *Johnson v. Alden*, 15 La. Ann. 505; *Ries v. Ries*, Man. Unrep. Cas. (La.) 175.

45. *Brown v. Wheelock*, 75 Tex. 385, 12 S. W. 111, 841.

46. *Ketchum v. Faircloth-Segrest Co.*, 155 Ala. 256, 46 So. 476.

[a] **Form of Decree.**—A decree "that petitioner is entitled to relief, and said minor, S. C. K., is authorized to sue and be sued, contract and be contracted with, buy and sell and convey real estate, and generally do and perform all acts which said minor could lawfully perform, if he were 21 years of age," is valid. But if it had merely been that said minor is relieved of the disabilities of non-age, the effect would have been the same. *Ketchum v. Faircloth-Segrest Co.*, 155 Ala. 256, 46 So. 476. See also *Young v. Hiner*, 72 Ark. 299, 79 S. W. 1062.

47. *Ketchum v. Faircloth-Segrest Co.*, 155 Ala. 256, 46 So. 476. Compare Wil-

kinson *v. Buster*, 124 Ala. 574, 26 So. 940, by statute.

48. *Wilkinson v. Buster*, 124 Ala. 574, 26 So. 940.

49. *Wilkinson v. Buster*, 124 Ala. 574, 26 So. 940.

50. See *Hindman v. O'Connor*, 54 Ark. 627, 643, 16 S. W. 1052, 13 L. R. A. 490.

51. *Hindman v. O'Connor*, 54 Ark. 627, 16 S. W. 1052, 13 L. R. A. 490; *Cunningham v. Robison* (Tex.), 136 S. W. 441.

52. *Cunningham v. Robison* (Tex.), 136 S. W. 441, that he is over nineteen years of age.

53. *Cox v. Johnson*, 80 Ala. 22.

54. **Ala.**—See *Cox v. Johnson*, 80 Ala. 22. **Ark.**—*Hindman v. O'Connor*, 54 Ark. 627, 16 S. W. 1052, 13 L. R. A. 490. **Miss.**—*Lake v. Perry*, 95 Miss. 550, 49 So. 569; *Marks v. McElroy*, 67 Miss. 545, 7 So. 408. **Tex.**—*Cunningham v. Robison*, 136 S. W. 441; *Brown v. Wheelock*, 75 Tex. 385, 12 S. W. 111, 841; *Lemons v. Gulf, C. & S. F. R. Co.*

infant demands it,⁵⁵ and this authority extends over both legal and

(Tex. Civ. App.), 134 S. W. 742; Buckley v. Herder (Tex. Civ. App.), 133 S. W. 703.

55. **U. S.**—Reed v. Alabama & Ga. Iron Co., 107 Fed. 586, interpreting the law of Georgia. **Ala.**—Gassenheimer v. Gassenheimer, 108 Ala. 651, 18 So. 520; Thorington v. Thorington, 82 Ala. 489, 490, 1 So. 716; Goodman v. Winter, 64 Ala. 410, 38 Am. Rep. 13; Rivers v. Durr, 46 Ala. 418, 421. **Ark.**—Shumard v. Phillips, 53 Ark. 37, 43, 13 S. W. 510; Myrick v. Jacks, 33 Ark. 425. **Ga.**—Richards v. East Tennessee, etc. R. Co., 106 Ga. 614, 622, 33 S. E. 193, 45 L. R. A. 712; Dampier v. McCall, 78 Ga. 607, 609, 3 S. E. 563. **Ill.**—Roberts v. Roberts, 259 Ill. 115, 102 N. E. 239, 242; Hale v. Hale, 146 Ill. 227, 249, 33 N. E. 858, 20 L. R. A. 247; Allman v. Taylor, 101 Ill. 185, 191; Smith v. Sackett, 10 Ill. 534, 545; Mason v. Wait, 5 Ill. 127, 134. But see Whitman v. Fisher, 74 Ill. 147. **La.**—Dauterive v. Shaw, 47 La. Ann. 882, 888, 17 So. 345. **Md.**—Roche v. Waters, 72 Md. 264, 269, 19 Atl. 535; Davis v. Helbig, 27 Md. 452, 462; Dorsey v. Gilbert, 11 Gill & J. 87, 90; Williams' Case, 3 Bland 186, 200. **Mo.**—Heady v. Crouse, 203 Mo. 100, 100 S. W. 1052, 120 Am. St. Rep. 643; Kearney v. Vaughan, 50 Mo. 284, 287. **N. J.**—Day v. Devitt, 79 N. J. Eq. 342, 353, 81 Atl. 368; Rockwell v. Morgan, 13 N. J. Eq. 384, 387; Snowhill v. Snowhill, 3 N. J. Eq. 20. **N. C.**—Sutton v. Schonwald, 86 N. C. 198, 201, 41 Am. Rep. 455; Rowland v. Thompson, 73 N. C. 504; Williams v. Harrington, 33 N. C. 616, 620, 53 Am. Dec. 421. **S. C.**—Bulow v. Witte, 3 S. C. 308, 321; Stapleton v. Vanderhorst, 3 Desaus. Eq. 22; Clifford's Exr. v. Clifford, 1 Desaus. Eq. 115. **Tenn.**—Holt v. Hamlin, 120 Tenn. 496, 522, 111 S. W. 241; Ricardi v. Gaboury, 115 Tenn. 484, 491, 89 S. W. 98; Hurt v. Long, 90 Tenn. 445, 461, 16 S. W. 968; Thompson v. Mebane, 4 Heisk. 370, 372 (statute declaratory of inherent power of court of chancery); Morris v. Richardson, 11 Humph. 389, 394; Martin v. Keeton, 10 Humph. 538; Case of G. C. Brown, 8 Humph. 200, 207. But see Singleton v. Love, 1 Head 357, 362.

[a] "In this country, from an early day, courts of the highest respectability have refused to follow the English rule,

and have held that, where it is for the benefit of the minor, courts of equity have the power, by virtue of their general jurisdiction over the estates of minors and others under disability, to authorize a change from real to personal and from personal to real, this question arose in 1809, in Huger v. Huger, 3 Dessausure 18, decided by the Court of Chancery of South Carolina, and the court, after showing that the reason upon which the English rule was based did not exist in this country, reached the conclusion that it had the undoubted jurisdiction to authorize the change." Hale v. Hale, 146 Ill. 227, 250, 33 N. E. 858, 20 L. R. A. 247.

[b] A court of equity, as the guardian of infants, has full power in its discretion to authorize or confirm a private sale of lands belonging to such a person. Sutton v. Schonwald, 86 N. C. 198, 202; Rowland v. Thompson, 73 N. C. 504.

[c] "The principal reason for denying this jurisdiction in England appears to be, that by changing the nature of the minor's estate from real to personal or from personal to real, the rights of third persons who will be entitled in case of the minor's death will be materially affected, as in that country real and personal property descend in different channels. That reason, it is very manifest, does not obtain in this country, as here, both species of property go by descent or distribution to the same persons. The interference of the court, therefore, in sanctioning a conversion of the property from real to personal or from personal to real, does not materially affect the rights of the persons who, in case of the minor's death, may become entitled to succeed to his estate. But even in England, cases are to be found where the power to authorize a change in the nature of the estate of minors has been exercised and upheld, where such changes were manifestly for the minor's benefit." Hale v. Hale, 146 Ill. 227, 33 N. E. 858, 20 L. R. A. 247.

[d] "The chancery proceedings now under consideration cannot be considered a nullity, even if the court went beyond its powers. That court has always had jurisdiction over the person and estates of minors, and while it must be exercised according to law,

equitable estates of minors.⁵⁶ So it is held that courts of equity have full power to authorize the conversion of property contrary to the provisions of a will and differing from the purpose and plans of the testator, where there is a necessity for such conversion for the preservation of the estate.⁵⁷

But in other jurisdictions courts of chancery are held not to have any inherent power to sell the real estate of minors, their powers in this respect being only statutory,⁵⁸ since the inherent power of the court

yet if the court exceeds its powers under the law, it is not a naked assumption of power, as might be the case if the tribunal had no such jurisdiction. Its actions, then, being not a nullity, but, if void at all, only relatively so, strangers cannot disregard it." *Kearney v. Vaughan*, 50 Mo. 284, 288.

[e] **Infants Whose Parents Are Living.**—Property belonging to the minor, both of whose parents are living, may be sold or mortgaged, or any other step taken affecting their interest, in the same manner and with the same forms as in case of minors represented by tutors, the father occupying the place and being clothed with the powers of the tutor. *Dauterive v. Shaw*, 47 La. Ann. 882, 888, 17 So. 345.

[f] **Order of Sale at Chambers or in Vacation.**—A court of chancery has no power to grant at chambers an order for the sale of the legal estate of minors. *Richards v. East Tennessee*, etc. R. Co., 106 Ga. 614, 634, 33 S. E. 193, 45 L. R. A. 712; *Rogers v. Pace*, 75 Ga. 436; *Pughsley v. Pughsley*, 75 Ga. 95, 96.

[g] **Unborn Children.**—(1) Apart from legislative authority, a court has no power to decree the sale of property of minor heirs so as to affect the rights of unborn children in the same property. A decree affecting the property rights of unborn children is absolutely void as to them. *Rome Land Co. v. Eastman*, 80 Ga. 683, 6 S. E. 586. (2) "Even the power of the legislature to enact laws authorizing sales of land to affect the title of parties not in being has been questioned almost as often as it has been exerted; and it was only after a serious contest and struggle that such laws have been finally sustained by the courts as constitutional and valid." *Downin v. Sprecher*, 35 Md. 474, 482.

56. Ill.—*Gorman v. Mullins*, 172 Ill. 349, 353, 50 N. E. 222; *Allman v. Tay-*

lor, 101 Ill. 185, 191; *Whitman v. Fisher*, 74 Ill. 147, 155; *Smith v. Sackett*, 10 Ill. 534, 545. N. C.—*Sutton v. Schonwald*, 86 N. C. 198, 201, 41 Am. Rep. 455; *Williams v. Harrington*, 33 N. C. 616, 620, 53 Am. Dec. 421. Tenn.—*Martin v. Keeton*, 10 Humph. 536, 538; *The Case of G. C. Brown*, 8 Humph. 200, 207.

[a] "The exercise of this jurisdiction, through the process of petition, however originating, has been sanctioned and confirmed by long established practice; and the right of the court in this respect is no more to be disputed than its right to order the sale of property for investment under the more expensive procedure, by bill." *Bulow v. Witte*, 3 S. C. 308, 321.

57. *Johnson v. Buck*, 220 Ill. 226, 236, 77 N. E. 163.

[a] "A conversion is not justified by the mere fact that the court may conclude some other plan than that of the testator would have been better." *Johnson v. Buck*, 220 Ill. 226, 236, 77 N. E. 163.

[b] Impossibility to carry out a last will and testament is, and was in 1887, a ground for decreeing a sale of real estate devised to minors, although the will itself directs that no sale take place until the youngest one attains majority. *Southern Marble Co. v. Stegall*, 90 Ga. 236, 237, 15 S. E. 806.

58. Ind.—*Indiana*, etc. Ry. Co. v. *Brittingham*, 98 Ind. 294. Ky.—*Caulder v. Chenault's Exr.*, 154 Ky. 777, 781, 159 S. W. 578; *Williams v. Mann*, 134 Ky. 63, 68, 119 S. W. 232; *Bayne v. Stratton*, 131 Ky. 494, 500, 115 S. W. 728; *Walker v. Smyser's Exrs.*, 80 Ky. 620, 627; *Liter v. Fishback*, 25 Ky. L. Rep. 260, 75 S. W. 232, 233; *Posey v. Dugan*, 22 Ky. L. Rep. 1104, 59 S. W. 862. But see *Thompson v. Pettibone*, 79 Ky. 319. Minn.—*Montour v. Purdy*, 11 Minn. 278. Mo.—See *Kearney v. Vaughan*, 50 Mo. 284. N. M.—*Bent v.*

of chancery to order a sale of the property of minors extends only to personalty.⁵⁹ These courts follow the English rule.⁶⁰

Equitable Estates.—But a court of equity has inherent power and jurisdiction to order the sale of the equitable estate of an infant, even in those states where such jurisdiction over the legal estate is denied,⁶¹

Maxwell Land Grant & Ry. Co., 3 N. M. 167, 184. **N. Y.**—*Losey v. Stanley*, 147 N. Y. 560, 570, 42 N. E. 8 (disapproving 5 Johns. Ch. 163, 3 Johns. Ch. 163); *Dodge v. St. John*, 96 N. Y. 260, 263; *Horman v. Marsh*, 11 N. Y. 544, 551; *Onderdonk v. Mott*, 34 Barb. (N. Y.) 106, 113; *Muller v. Struppman*, 6 Abb. N. C. 343, 55 How. Pr. 521, 522; *Warren v. Union Bank of Rochester*, 23 App. Div. 7, 14, 51 N. Y. Supp. 27. **R. I.**—*Thurston v. Thurston*, 6 R. I. 296, 301. **Tex.**—*Messner v. Giddings*, 65 Tex. 301, 309. **Va.**—*Rhea v. Shields*, 103 Va. 305, 309, 49 S. E. 70; *Faulkner v. Davis*, 18 Gratt. 651, 663, 98 Am. Dec. 698, following *Pierce's Admr. v. Trigg's Heirs*, 10 Leigh 406, 423. **W. Va.**—*Hoback v. Miller*, 44 W. Va. 635, 638, 29 S. E. 1014.

[a] "There is no inherent power to dispose of or alter the estate itself, except in cases of election and partition, . . . where a sale is the only protection against foreclosure." *Thurston v. Thurston*, 6 R. I. 296, 301.

[b] "With reference to the real estate of an infant, it may be said that neither a court of law nor equity has any inherent jurisdiction to direct a sale of it." *Bent v. Maxwell Land Grant & Ry. Co.*, 3 N. M. 167, 184.

59. *Stansbury v. Inglehart*, 9 Mackey (D. C.) 134, 152.

[a] "The management and disposition of the estates of infants, which I have thus referred to, and briefly stated, with the authorities, are among the mass of powers upon this subject which belong to the original and inherent jurisdiction of the Court of Chancery. They relate to their personal, and the income of their real-estate, the court having no inherent power to direct a sale of the latter for their maintenance or education; that power rests with the Legislature. It will be seen, therefore, that the only additional authority conferred upon the Chancellor, by the Acts of the Legislature in question, was the power to direct the sale of the real-estate,—to convert it into personalty for the purposes mentioned."

Williamson v. Berry, 8 How. (U. S.) 495, 556, 12 L. ed. 1170.

[b] "In *Taylor v. Philips*, 2 Ves. (Sr.) Sec. 23 (Anno. 1750), Lord Chancellor Hardwicke said: 'There is no instance of this court's binding the inheritance of an infant by any discretionary act of the Court. As to personal things, as in the composition of debts, it has been done; but never as to the inheritance; for that would be taking on the Court a legislative authority, doing that which is properly the subject of a private bill.' This observation was subsequently approved by Lord Chancellor Hart in *Russell v. Russell*, 1 Moll. 525." *Stansbury v. Inglehart*, 9 Mackey (D. C.) 134, 152; *Hale v. Hale*, 146 Ill. 227, 249, 33 N. E. 858, 20 L. R. A. 247.

60. *Lee v. Brown*, 4 Ves. Jr. 362, 368, 21 Eng. Reprint 184; *Calvert v. Godfrey*, 6 Beav. 97, 49 Eng. Reprint 761. See *Hale v. Hale*, 146 Ill. 227, 249, 33 N. E. 858, 20 L. R. A. 247.

[a] In *Northwestern Guaranty Loan Co. v. Smith*, 15 Mont. 101, 104, 38 Pac. 224, 48 Am. St. Rep. 662, the court said: "This doctrine seems to be a relic of the English doctrine of primogeniture, and was born of the desire to preserve for the infant the integrity of the corpus of the real estate."

61. **Ala.**—*Crawford v. Creswell*, 55 Ala. 497, 502. **Ill.**—*Allman v. Taylor*, 101 Ill. 185. **Mo.**—*Kearney v. Vaughan*, 50 Mo. 284. **N. M.**—*Bent v. Miranda*, 8 N. M. 78, 42 Pac. 91. **N. Y.**—*Anderson v. Mather*, 44 N. Y. 249, affirming *Wood v. Mather*, 38 Barb. 473; *Cochran v. Van Surlay*, 20 Wend. 365, 32 Am. Dec. 570; *Pitcher v. Carter*, 4 Sand. Ch. 1, 15.

[a] "It is a settled principle, that whenever the property of infants consists of real or personal estate, the legal title to which is in trustees, the chancellor, as the general guardian and protector of the rights of all infants, may authorize such a disposition thereof, as he in the exercise of a sound legal discretion, may deem most beneficial to such infants." *Cochran v. Van Surlay*, 20 Wend. (N. Y.) 365, 32 Am.

and the proceeds may be reinvested for the best interest of those who may ultimately become entitled to the estate on final distribution.⁶²

Wards of Chancery.—Whenever an application is presented to the chancellor, seeking a sale or other disposition of land in which minors have an interest, they become wards of chancery,⁶³ and the chancellor himself is in legal contemplation the infant's guardian.⁶⁴

b. *Jurisdiction Conferred by Statute.*—In some states the powers of the courts of equity to sell the real estate of infants and reinvest the proceeds are regulated by statute.⁶⁵ These statutes must be ad-

Dec. 570. See *Bent v. Miranda*, 8 N. M. 78, 87, 42 Pac. 91.

[b] "The power exercised by the Court of Chancery as to the sale of the estate of infants of an equitable nature, is inherent, and not derived from statutory authority. The power conferred by statute relates to lands of which an infant is seized, and not to his equitable estates." *Anderson v. Mather*, 44 N. Y. 249.

[c] "The statutes above referred to, give the court of chancery power over infants' legal estates, only (4 Comst. 266). But the power is ample; and it would be a remarkable anomaly, if the court had not, also, a jurisdiction at least equally extensive, in respect to infants' equitable estates, which, by their very nature, are under its peculiar and exclusive care. There are remarks to be found in some of the reports, to the effect that the power of the court is derived wholly from statute, but so far as I have observed, they occur in cases involving sales of legal estates, and should be understood as referring to such estates only." *Wood v. Mather*, 38 Barb. (N. Y.) 473, 484. See *Bent v. Miranda*, 8 N. M. 78, 87, 42 Pac. 91.

62. *Roberts v. Roberts*, 259 Ill. 115, 102 N. E. 239, 242; *Hale v. Hale*, 146 Ill. 227, 255, 256, 33 N. E. 858, 20 L. R. A. 247.

63. *Richards v. East Tennessee, etc. R. Co.*, 106 Ga. 614, 623, 33 S. E. 193, 45 L. R. A. 712; *Sharp v. Finley*, 71 Ga. 654, 665; *In re Axtell*, 95 Mich. 244, 248, 54 N. W. 889.

[a] "The very minute this petition came before this chancellor and disclosed the fact that the land of infants was involved, his wards were before him, and the case was concerning 'an estate of the wards of chancery.'" *Richards v. East Tennessee, etc. R. Co.*, 106 Ga. 614, 624, 33 S. E. 193, 45 L. R. A. 712; *Sharp v. Finley*, 71 Ga. 654, 665. To the same effect *McGowan v.*

Lufburrow, 82 Ga. 523, 532, 9 S. E. 427, 14 Am. St. Rep. 178.

[b] "The infant is the ward of the court in which the proceeding is taken." *In re Axtell's Petition*, 95 Mich. 244, 248, 54 N. W. 889.

64. *Richards v. East Tennessee, etc. R. Co.*, 106 Ga. 614, 622, 33 S. E. 193, 45 L. R. A. 712; *In re Axtell's Petition*, 95 Mich. 244, 248, 54 N. W. 889. See also *Thorington v. Thorington*, 82 Ala. 489, 490, 1 So. 716; *Goodman v. Winter*, 64 Ala. 410, 435, 38 Am. Rep. 13.

65. **D. C.**—*Stansbury v. Inglehart*, 9 Mackey 134, 146. **Ill.**—*Whitman v. Fisher*, 74 Ill. 147, 154. **Ky.**—*Caulder v. Chenault's Exr.*, 154 Ky. 777, 781, 159 S. W. 578; *Williamson v. Mann*, 134 Ky. 63, 68, 119 S. W. 232; *Bayne v. Stratton*, 131 Ky. 494, 500, 115 S. W. 728; *Walker v. Smyser's Exrs.*, 80 Ky. 620, 627; *Liter v. Fishback*, 25 Ky. L. Rep. 260, 75 S. W. 232; *Posey v. Dugan*, 22 Ky. L. Rep. 1104, 59 S. W. 862; *Bill v. Burgess*, 15 Ky. L. Rep. 41, 22 S. W. 84. **N. Y.**—*Loosey v. Stanley*, 147 N. Y. 560, 570, 42 N. E. 8 (*disapproving* 5 Johns. Ch. 163, 3 Johns. Ch. 163); *Dodge v. St. John*, 96 N. Y. 260, 263; *Forman v. Marsh*, 11 N. Y. 544, 551; *Baker v. Lorillard*, 4 N. Y. 257, 266; *Onderdonk v. Mott*, 34 Barb. 106, 113; *Muller v. Struppmann*, 6 Abb. N. C. 343, 55 How. Pr. 521, 522; *Warren v. Union Bank of Rochester*, 28 App. Div. 7, 14, 51 N. Y. Supp. 27. **R. I.**—*Thurston v. Thurston*, 6 R. I. 296, 301. **Tenn.** *Singleton v. Love*, 1 Head 357, 362. **Tex.**—*Messner v. Giddings*, 65 Tex. 301, 310. **Va.**—*Rhea v. Shields*, 103 Va. 305, 309, 49 S. E. 70; *Faulkner v. Davis*, 18 Gratt. 651, 664, 98 Am. Dec. 698; *following Pierce's Admr. v. Trigg's Heirs*, 10 Leigh 406, 423. **W. Va.**—*Hoback v. Miller*, 44 W. Va. 635, 638, 29 S. E. 1014.

[a] The court of chancery has never had, except by express legislative enactment, jurisdiction either to sell or

hered to by the courts and strictly followed.⁶⁶ The inherent jurisdiction of chancery courts, where recognized, is not, however, necessarily destroyed by such statutes.⁶⁷

The rights both of guardians and executors to make sales of the property, whether real or personal, of wards and minors, are sometimes regulated by statute, by which particular courts are given jurisdiction.⁶⁸

Probate courts are frequently given certain specified powers with reference to such matters.⁶⁹ Their powers, however, are limited by the statute,⁷⁰ and do not necessarily deprive a chancery court of its

to exchange an infant's real estate on the ground that the transaction would be beneficial to him. *Stansbury v. Inglehart*, 9 Mackey (D. C.) 134, 152.

66. *Bayne v. Stratton*, 131 Ky. 494, 500, 115 S. W. 728; *Bridgeford & Co. v. Beck & Co.*, 11 Bush (Ky.) 539, 542; *Liter v. Fishback*, 25 Ky. L. Rep. 260, 75 S. W. 232, 233; *Hicks v. Jackson*, 24 Ky. L. Rep. 218, 68 S. W. 419; *O'Reilly v. King*, 2 Robt. (N. Y.) 587, 592.

[a] "The power of the court to authorize the sale of the real property of infants is derived from the statute, and is not inherent in the court; hence the statute must be strictly followed, and its terms fully complied with." *O'Reilly v. King*, 2 Robt. (N. Y.) 587, 592.

[b] **Liberal Construction.**—The statutes in relation to the sale of infants' lands are remedial in their nature, and should be construed liberally. *Rhea v. Shields*, 103 Va. 305, 309, 49 S. E. 70; *Faulkner v. Davis*, 18 Gratt. (Va.) 651, 669, 98 Am. Rep. 698.

67. See *Hurt v. Long*, 90 Tenn. 445, 16 S. W. 968.

[a] "The fact that the legislature has provided a summary method of sale of infants' lands does not interfere with nor deprive the court of such inherent power (of chancery courts). *United States Mtg. Co. v. Sperry*, 138 U. S. 313, 34 L. ed. 969, 976; and this without consideration as to whether the summary proceeding does not apply only where the infants have title, and not, as in the case *sub judice*, where the infants have solely an equitable interest." *Day v. Devitt*, 79 N. J. Eq. 342, 354, 81 Atl. 368.

68. See the statutes, and the following: *Ala.*—*Hudson v. Helmes' Exrs.*, 23 Ala. 585, 589. *Ill.*—*Reid v. Morton*, 119 Ill. 118, 127, 6 N. E. 414, giving city court concurrent jurisdiction with cir-

cuit court. *Miss.*—*Gully v. Dunlap*, 24 Miss. 410, 412.

[a] **Court of Common Pleas.**—*McKeever v. Ball*, 71 Ind. 398; *Maxsom v. Sawyer*, 12 Ohio 195.

[b] **Orphans' Court.**—*Thaw v. Falls*, 136 U. S. 519, 10 Sup. Ct. 1037, 34 L. ed. 531; *Appeal of Balliet*, 2 Walk. (Pa.) 268.

[c] **Any material deviation** from the requirements of the statute, as to the court in which the proceeding must be had, is fatal to the jurisdiction of the court. *Spellman v. Dowse*, 79 Ill. 66, 69.

69. See the title "Probate Courts," and the following: *Ark.*—*Shumard v. Phillips*, 53 Ark. 37, 13 S. W. 510; *Beidler v. Friedell*, 44 Ark. 411, 414; *Reid v. Hart*, 45 Ark. 41. *Ill.*—*Winch v. Tobin*, 107 Ill. 212. *Ohio.*—*Ream v. Wells*, 61 Ohio St. 131, 55 N. E. 176. *Wis.*—*Mohr v. Porter*, 51 Wis. 487, 8 N. W. 364.

[a] **Administrator's Sale When Presumed Regular.**—Probate courts are superior courts, and the regularity of their proceedings are presumed; and when the validity, derived under a guardian's or administrator's sale, comes in question, in a collateral suit, this court will only look to see if the probate court had jurisdiction, unless error be patent upon the face of the proceeding. *Fleming v. Johnson*, 26 Ark. 421, 437.

70. *Shumard v. Phillips*, 53 Ark. 37, 13 S. W. 510. See the title "Probate Courts."

[a] **The general jurisdiction** over the persons and property of minors belongs to the chancery court. Courts of probate, by statute, are given limited powers over the estates of minors in the hands of administrators and guardians, but the statute is the limit of their powers, and their orders not authorized by the statute, are void.

general inherent jurisdiction to direct the sale of infant's property.⁷¹

c. Power of Legislature To Authorize Sale.—The legislature has the constitutional power and authority to authorize a guardian to sell the real estate of his ward;⁷² but it has been held that the legislature has no constitutional power to find and determine that there were debts owing, without any judicial inquiry as to the existence of such debts,⁷³ or to authorize the guardian or administrator to sell real estate vested in his minor wards or the minor heirs, without judicial direction and sanction,⁷⁴ as the legislature cannot exercise judicial powers.⁷⁵

2. What Property May Be Sold.—The exercise of the jurisdiction to control the property of infants is not dependent on the nature and quality of the estate of the infant, whether it is an absolute estate of present possession and enjoyment, or a future estate, but extends to estates of every character.⁷⁶

They have no authority to direct an investment of a minor's funds in land. *Myrick v. Jacks*, 33 Ark. 423.

71. *Shumard v. Phillips*, 53 Ark. 37, 13 S. W. 510. See *Harriss v. Richardson*, 15 N. C. 279.

72. **U. S.**—*Stanley v. Colt*, 5 Wall. 119, 161, 18 L. ed. 502. **Ind.**—*Davidson v. Kochler*, 76 Ind. 398. **Ky.**—*Nelson's Heirs v. Lee*, 10 B. Mon. 495, 507. **Md.**—*Davis v. Helbig*, 27 Md. 452, 462. **Miss.**—*Boon v. Bowers*, 30 Miss. 246; *McComb v. Gilkey*, 29 Miss. 146. **Mo.**—*Thomas v. Pullis*, 56 Mo. 211; *Stewart v. Griffith*, 33 Mo. 13. **N. Y.**—*Brevort v. Grace*, 53 N. Y. 245; *Clark v. Van Surlay*, 15 Wend. 436. **Pa.**—*Estep v. Huthman*, 14 Serg. & R. 435.

[a] "The constitutional right of the legislature to pass these special and general laws was conceded, as the state was considered the general guardian and protector of minors who were disabled to act for themselves, and the legislature, exercising this tutelary power over the persons and property of infants, claimed and exercised the right to provide by public or private acts for converting real-estate in which they had vested or contingent interests, into personal property and securities, when necessary for their benefit." *Davis v. Helbig*, 27 Md. 452, 462.

[b] **Non-Resident Infants.**—It is competent for the legislature to pass a law authorizing the guardian of non-resident infants to petition, and a court of chancery to decree the sale of the land of such infants without process against the infant. *Nelson's Heirs v. Lee*, 10 B. Mon. (Ky.) 495, 509.

[c] **Special resolves of the legislature**, authorizing the sale of lands of

minors or of trust estates, and the investing and holding of the proceeds, have been sustained. *Forster v. Forster*, 129 Mass. 559.

[d] The legislature has power by special statute to authorize the sale of the lands of infants, and this power extends to the future contingent interests of those not in being. *Brevort v. Grace*, 53 N. Y. 245.

[e] The legislature of this state, has the constitutional power to enact a private statute, authorizing a guardian appointed in Ohio, to sell the lands of his wards in this state, either at public or at private sale, and to prescribe as a condition precedent to the exercise of such power, that the guardian shall execute a bond according to the laws of Ohio for the faithful application of the proceeds of the sale, with such sureties and conditions and in such penalty, as a judge of the court of common pleas of Ohio may approve and direct. *Boon v. Bowers*, 30 Miss. 246.

[f] **May Authorize Sale by Guardian or Other Person.**—*McComb v. Gilkey*, 29 Miss. 146, 187.

73. *Rozier v. Fagan*, 46 Ill. 404, 405; *Lane v. Dorman*, 4 Ill. 238, 244, 36 Am. Dec. 543.

74. *Rozier v. Fagan*, 46 Ill. 404, 405; *Lane v. Dorman*, 4 Ill. 238, 244, 36 Am. Dec. 543.

75. *Rozier v. Fagan*, 46 Ill. 404, 406; *Mason v. Wait*, 5 Ill. 127, 134; *Lane v. Dorman*, 4 Ill. 238, 242, 36 Am. Dec. 543.

76. **Ala.**—*Gassenheimer v. Gassenheimer*, 108 Ala. 651, 652, 18 So. 520; *Thorington v. Thorington*, 82 Ala. 489, 490, 1 So. 716; *Goodman v. Winter*, 64 Ala. 410, 435, 38 Am. Rep. 13. **Ga.**

3. Authorization of Sale.—a. *Necessity for Order of Court.*

Under the common law there was no right or power vested in the guardian or trustee of an infant to change the nature of the infant's property from personality to realty or from realty to personality,⁷⁷ and the rule is that the property of a minor cannot be sold except under an order of the court in which is vested the control of a minor's property interests.⁷⁸

Richards v. East Tennessee, etc. R. Co., 106 Ga. 614, 629, 33 S. E. 193, 45 L. R. A. 712. **Ky.**—Nutter v. Russell, 3 Mete. 163, 165; Liter v. Fishback, 23 Ky. L. Rep. 260, 75 S. W. 232, 233. **Me.**—Baxter v. Baxter, 62 Me. 540, 543. **Miss.**—Morton v. McCanless, 68 Miss. 810, 812, 10 So. 72. **N. Y.**—Dodge v. St. John, 96 N. Y. 260, 263; Onderdonk v. Mott, 34 Barb. 106, 114. **S. C.**—Bofil v. Fisher, 3 Rich. Eq. 1, 7, 55 Am. Dec. 627.

[a] The infants being properly represented by guardian ad litem and the evidence clearly showing that the sale is beneficial to their interests, at the instance of adult joint owners with the minors, this jurisdiction may be exercised. Thorington v. Thorington, 82 Ala. 489, 1 So. 716.

[b] Usually under the statutes, if not by the inherent powers of a court of chancery, the court has jurisdiction to order the sale of a minor's estate in remainder. Bill v. Burgess, 15 Ky. L. Rep. 41, 22 S. W. 84.

[c] Under the statute authorizing the sale of the real-estate of an infant (2 Rev. St. 194, §70) the court has jurisdiction to direct the sale of a remainder in fee, vested in interest in an infant; the term "real-estate," as used in the statute, includes every freehold estate and interest in lands; and where there is a vested remainder in fee there is a seizin in law, which answers the requirement of the statute that the infant shall be "seized" of the estate. Jenkins v. Fahey, 73 N. Y. 355, 363, 364.

[d] **Effect of Testamentary Restrictions.**—See: **Cal.**—Fitch v. Miller, 20 Cal. 352. **Ga.**—Southern Marble Co. v. Stegall, 90 Ga. 236, 15 S. E. 806. **Miss.**—Shipp v. Wheelless, 33 Miss. 646.

[e] **Infant's Interest in Homestead.** **Ark.**—Merrill v. Harris, 65 Ark. 355, 46 S. W. 538, 67 Am. St. Rep. 929, 41 L. R. A. 714. **Cal.**—*In re Hamilton*, 120 Cal. 421, 52 Pac. 708. **Miss.**—Morton v. McCanless, 68 Miss. 810, 10 So.

72. But see Sloan v. Nance, 45 Ga. 310.

77. **Ala.**—Robinson v. Pebworth, 71 Ala. 240; Goodman v. Winter, 64 Ala. 410, 426, 38 Am. Rep. 13; Rivers v. Durr, 46 Ala. 418, 421; *Ex parte Jewett*, 16 Ala. 409, 410. **Ga.**—Richards v. East Tennessee, etc. R. Co., 106 Ga. 614, 634, 33 S. E. 193, 45 L. R. A. 712; Collins v. Dixon, 72 Ga. 475; Skelton v. Ordinary, 32 Ga. 266. **Ill.**—Roberts v. Roberts, 259 Ill. 115, 102 N. E. 239, 241; Attridge v. Billings, 57 Ill. 489, 494; Mason v. Wait, 5 Ill. 127, 134. **Ia.**—McReynolds v. Anderson, 69 Iowa 208, 28 N. W. 558. **Ky.**—Moore v. Moore, 12 B. Mon. 651, 662. **Mich.**—Matter of Dorr, Walk. 145. **Miss.**—Gully v. Dunlap, 24 Miss. 410. **Mo.**—West v. West, 75 Mo. 204; Woods v. Boots, 60 Mo. 546. **N. J.**—Rockwell v. Morgan, 13 N. J. Eq. 384. **N. Y.**—White v. Parker, 8 Barb. 48. **Pa.**—Davis's Appeal, 60 Pa. 118; Royer's Appeal, 11 Pa. 36. **Tenn.**—*Ex parte Crutchfield*, 3 Yerg. 336. **Va.**—Boisseau v. Boisseau, 79 Va. 73, 52 Am. Rep. 616.

78. **Ala.**—Hudson v. Helmes' Exrs., 23 Ala. 585, 589. **Cal.**—Kendall v. Miller, 9 Cal. 591. **Ill.**—Cooter v. Dearborn, 115 Ill. 509, 514, 4 N. E. 388; Mason v. Wait, 5 Ill. 127, 134. **Kan.**—Shamleffer v. Council Grove, etc. Co., 18 Kan. 24, 32. **La.**—Beard v. Morancy, 3 Rob. 119, 121. **Me.**—Worth v. Curtis, 15 Me. 228. **Md.**—State v. Bishop, 24 Md. 310. **Mich.**—Matter of Dorr, Walk. Ch. 145. **Miss.**—Gully v. Dunlap, 24 Miss. 410, 411. **Nev.**—Henderson v. Coover, 4 Nev. 429. **N. J.**—Day v. Devitt, 79 N. J. Eq. 342, 358, 81 Atl. 368. **Ohio.**—State v. Commissioners, 39 Ohio St. 58. **Pa.**—Johns v. Tiers, 114 Pa. 611, 7 Atl. 923. **S. C.**—Moore v. Hood, 9 Rich. Eq. 311, 70 Am. Dec. 210. **S. D.**—Washabaugh v. Hall, 4 S. D. 168, 56 N. W. 82. **Tex.**—Teague v. Swasey, 46 Tex. Civ. App. 151, 102 S. W. 458. **Vt.**—Doty v. Hubbard, 55 Vt. 278. **Va.**—Boisseau v. Boisseau, 79 Va. 73, 76, 77, 52 Am. Rep. 616.

[a] In Louisiana, (1) in the aliena-

b. *Proceedings To Obtain Order for Sale.*—(I.) **Venue.**—Application for the sale of an infant's real estate should be in the state where it is located,⁷⁹ and in the county prescribed by the statute.⁸⁰ Since the requirements of the statute are jurisdictional, the court can only proceed legally at the place and in the manner prescribed by the statute.⁸¹

(II.) **Who May Petition for Sale.**—The regularly appointed guardian of the minor is the proper party to petition the court for an order of sale,⁸² though it is held that on application of any of the parties in

tion of the property of minors, the advice of a family meeting forms an essential part of the judgment or basis upon which it rests. *Beale v. Walden*, 11 Rob. (La.) 67. See also *Blandin v. Blandin*, 126 La. 819, 53 So. 15; *Beanel v. Stewart*, 117 La. 744, 42 So. 256; *Tobin v. United States Safe Dep. & Sav. Bank*, 115 La. 366, 39 So. 33; *Beard v. Morancy*, 3 Rob. 119, 122. (2) The sale of property of minors without the advice of a family meeting and order of a court being null and void, and the purchaser buying at his own risk as he is in bad faith. *Mallard v. Dejan*, 45 La. Ann. 1270, 14 So. 238; *Lemoine v. Ducote*, 45 La. Ann. 857, 12 So. 939.

79. See *Bouldin v. Miller*, 87 Tex. 359, 28 S. W. 940, holding that a sale may be made for the maintenance of a non-resident infant.

80. **Ark.**—*Reid v. Hart*, 45 Ark. 41, county in which the lands are situate. **Ill.**—*Spellman v. Dowse*, 79 Ill. 66, 68; *Loyd v. Malone*, 23 Ill. 41, 47. **Ky.** See *Phalan v. Louisville Safety Vault, etc. Co.*, 10 Ky. L. Rep. 663, 10 S. W. 10.

[a] **Illinois Statute.**—"Application for the sale of such real estate shall be made in the county where the ward shall reside, although the estate may lie in a different county; but if the ward do not reside in this state, such application shall be made to the court where the whole or a part of the estate shall be situated." *Spellman v. Dowse*, 79 Ill. 66, 68; *Loyd v. Malone*, 23 Ill. 41, 49.

[b] **Jurisdiction.**—It is not necessary for the guardian to institute separate suits in the several counties in which the land is situated. The action is properly instituted in the county in which the ancestor died, the children all live, and much of the real estate is located, which is the jurisdiction to order a partition, if a partition may be had; and that court has power to

grant complete relief, the subject of the action being the division of the proceeds of the land between the heirs. *Phalan v. Louisville Safety Vault & Tr. Co.*, 88 Ky. 24, 27, 10 S. W. 10.

81. *Spellman v. Dowse*, 79 Ill. 66, 69. See *Connell v. Moore*, 70 Kan. 88, 78 Pac. 164.

82. **Ark.**—*Guynn v. McCauley*, 32 Ark. 97. **D. C.**—*Stansbury v. Inglehart*, 19 Wash. L. R. 594. **Ga.**—See *Southern Marble Co. v. Stegall*, 90 Ga. 236, 15 S. E. 806. **Ill.**—*Spellman v. Dowse*, 79 Ill. 66, 70. **Ind.**—*State v. McLaughlin*, 77 Ind. 335. **Ia.**—*Shanks v. Seamonds & Campbell*, 24 Iowa 131, 92 Am. Dec. 465. **Kan.**—*McKee v. Thomas*, 9 Kan. 343; *Higinbotham v. Thomas*, 9 Kan. 328. **Ky.**—*Vowless' Heirs v. Buckman*, 6 Dana 466; *Bell v. Clark*, 2 Mete. 573, 575. **Md.**—*Mumma v. Brinton*, 77 Md. 197, 200, 26 Atl. 184; *Gill v. Wells*, 59 Md. 492, 499; *Bolgiano v. Cooke*, 19 Md. 375, 392. **Neb.**—*Wells v. Steckleberg*, 50 Neb. 670, 70 N. W. 242; *Myers v. McGavock*, 39 Neb. 843, 58 N. W. 522, 42 Am. St. Rep. 627. **N. J.**—*Graham v. Houghtalin*, 30 N. J. L. 552. **N. Y.**—*In re Lansing*, 3 Paige Ch. 265. **Ohio.**—*Dengenhart v. Cracraft*, 36 Ohio St. 549. **Pa.** *Grier's Appeal*, 101 Pa. 412.

[a] **Non-resident guardian** appointed by the court of another state, desiring to bring an action for the sale of real estate of his wards situated in this state, may procure an order from the county court of the county where the estate is situated, authorizing him to act as a guardian appointed in this state (Rev. St., p. 376). *Bell v. Clark*, 2 Mete. (Ky.) 573, 575.

[b] **In Louisiana** by tutor on advice of the family meeting. *Wisenor v. Lindsay*, 33 La. Ann. 1211.

[c] An illegally appointed tutor cannot represent the minors in proceedings to effect a partition at private sale.

interest, a court of equity may decree a sale if it shall appear to be advantageous to the parties concerned.⁸³ As between the guardian of an infant's person and the guardian of his estate, the two offices being distinct, the latter is the proper person to petition for the sale.⁸⁴

(III.) **Parties.**—No persons other than the petitioner need be made parties to a proceeding in rem to sell real estate for a minor's maintenance,⁸⁵ and the minor is not a necessary party to proceedings for a sale and reinvestment of the proceeds,⁸⁶ but where the proceedings

James v. Meyer, 41 La. Ann. 1100, 7 So. 618.

[d] **Guardian or Procchein Ami.**—A decree for sale may pass upon petition of the guardian or procchein ami of such infants, and the appearance and answer of such infants by guardian to be appointed, will make the decree valid. *Mumma v. Brinton*, 77 Md. 197, 200, 26 Atl. 184; *Roche v. Waters*, 72 Md. 264, 19 Atl. 535, 7 L. R. A. 533; *Gill v. Wells*, 59 Md. 492, 499; *Bolgiano v. Cooke*, 19 Md. 375, 392. See also *Henning v. Barringer*, 10 Ky. L. Rep. 674, 10 S. W. 136; *Cole v. Gourley*, 79 N. Y. 527; *O'Reilly v. King*, 28 How. Pr. (N. Y.) 408.

[e] In a proceeding for the sale of real estate belonging to minors, by next friend, it is not necessary that the next friend should be selected or appointed by the court. He would, however, be under its control, and might be removed and another appointed, if the interests of the infants required it. *Ex parte Kirkman*, 3 Head (Tenn.) 517, 519.

[f] **One assuming to act as guardian** of the estate of a minor, who in fact has never qualified as such, has no standing to apply for authority to sell such minor's real estate, and an order made, and a sale thereunder are nullities. *Wells v. Steckleberg*, 50 Neb. 670, 70 N. W. 242.

[g] **Joinder of infant in the petition** (1) unnecessary (*Mumma v. Brinton*, 77 Md. 197, 26 Atl. 184; *Cole v. Gourley*, 79 N. Y. 527), (2) except when he is of the age of fourteen. *Warren v. Union Bank*, 28 App. Div. 7, 51 N. Y. Supp. 27. See *infra*, III, A, 3, b, (III).

[h] **As the father is the natural guardian** of his children and is the proper person to execute the powers of a guardian in relation to the real estate of his children, when he is competent, and they have no other guardian, and no other it seems can be appointed

while he is living, he is within the meaning of the act, and may present a petition for the sale of the real estate of his children; upon which the court may take jurisdiction, and decree the sale. *McKee's Heirs v. Hann*, 9 Dana (Ky.) 526, 530.

[i] **On petition of the mother as natural guardian**, the court may grant the order directing a sale. *In re Whitlock*, 32 Barb. (N. Y.) 48. See also *McKinney v. Jones*, 55 Wis. 39, 11 N. W. 606, 12 N. W. 381.

83. *Newbold v. Schlens*, 66 Md. 585, 587, 9 Atl. 69.

84. *Duncan v. Crook*, 49 Mo. 116. **Notice of application for sale**, see *infra*, III, A, 3, b, (VI), (A).

85. *Mulford v. Beveridge*, 78 Ill. 455; *Campbell v. Harmon*, 43 Ill. 18; *Ellis v. Smith's Guardian*, 147 Ky. 99, 143 S. W. 776. See *Bulow v. Witte*, 3 S. C. 308.

86. *Furr v. Burns*, 124 Ga. 742, 53 S. E. 201; *Dillingham v. Spalding*, 7 Ky. L. Rep. 370.

[a] Where property is owned jointly by and is in the possession of two infants, and cannot be divided without materially impairing its value, it may be sold in an action brought by their common guardian in their behalf, without naming either as a party plaintiff or defendant. In such a case the infants will be deemed and treated as parties plaintiff and the action as brought for them by the guardian. *Ellis v. Smith's Guardian*, 147 Ky. 99, 143 S. W. 776.

[b] **Where a father and mother hold lands in trust for their infant children**, a bill filed in the names of the father and mother in their own right, and as trustees for such infants against the infants, is sufficient compliance with §2616 of the code as to parties. *Lancaster v. Barton*, 92 Va. 615, 24 S. E. 251.

are to sell real estate to pay debts the minors are necessary parties.⁸⁷

(IV.) Appointment of Guardian Ad Litem.—Where the proceeding is regarded as one in rem for the benefit of the infant it is not necessary that a guardian ad litem be appointed,⁸⁸ but in other cases, either because of a statutory requirement or because the proceeding is regarded as adverse to the infant, the court is required to appoint a guardian ad litem to resist the application and take care of the minor's interest.⁸⁹

87. **Ga.**—*Deyton v. Bell*, 81 Ga. 370, 8 S. E. 620. **Ill.**—*Mulford v. Beveridge*, 78 Ill. 455. **Ia.**—*Good v. Norley*, 28 Iowa 188. **Ky.**—*Revill's Heirs v. Claxton's Heirs*, 12 Bush 558. **Tenn.**—*Frazier v. Pankey*, 1 Swan 75.

[a] Where the infants were not named in the caption of the original or amended petition as parties plaintiff or defendant, though their names were in the body; the court said: "In this case the infants were necessary parties, their names appeared in the body of the petition, and they were made to petition for a sale of their interest in the land, and the court recognized and treated them as parties. If their names had appeared in the caption, they would have been there merely as formal parties, speaking by and through their guardian, and, it seems to us, the mere omission of the clerical formality of writing their names at the head of the petition is an objection too unsubstantial to render the solemn judgment of a court a nullity." *Revill's Heirs v. Claxton's Heirs*, 12 Bush (Ky.) 558.

[b] The appearance of the guardian in court will not give the court jurisdiction of the person of the minor; it is essential that the minors be made parties to the proceedings. *Kennedy v. Gaines*, 51 Miss. 625. See also *Frazier v. Pankey*, 1 Swan (Tenn.) 75, guardian ad litem.

88. **Ala.**—*Daughtry v. Thweatt*, 105 Ala. 615, 16 So. 920, 53 Am. St. Rep. 146. **Colo.**—*Orman v. Bowles*, 18 Colo. 463, 33 Pac. 109. **Conn.**—See *Clark v. Platt*, 30 Conn. 282. **Ga.**—*Prine v. Mapp*, 80 Ga. 137, 5 S. E. 66; *Callaway v. Bridges*, 79 Ga. 753, 4 S. E. 687. **Ill.**—*Campbell v. Harmon*, 43 Ill. 18. **Mass.**—*Holmes v. Beal*, 9 Cush. 223. **Mo.**—*Overton v. Johnson*, 17 Mo. 442. **Neb.**—*McClay v. Foxworthy*, 18 Neb. 295, 25 N. W. 86. **N. H.**—*Boody v. Emerson*, 17 N. H. 577. **N. Y.**—*In re Whitlock*, 32 Barb. 48.

See generally the title "Guardian Ad Litem."

[a] In proceedings by a guardian to sell real estate of his ward, the court said: "As the decree was not pronounced upon any admissions contained in his answer . . . the infants need not be made parties, and that the appointment of a guardian ad litem is unnecessary." *Campbell v. Harmon*, 43 Ill. 18, 21.

[b] Where there is no statutory requirement to that effect a guardian ad litem need not be appointed. *Daughtry v. Thweatt*, 105 Ala. 615, 16 So. 920, 53 Am. St. Rep. 146.

[c] Where the infants join as plaintiffs in a suit by their mother, who is also their statutory guardian, for a sale and partition, the appointment of a guardian ad litem is not necessary. *Power v. Power*, 12 Ky. L. Rep. 793, 15 S. W. 523. See also *Smith v. Leavill*, 16 Ky. L. Rep. 609, 29 S. W. 319.

[d] A failure to appoint some one to represent the infant owners, will not vitiate the sale. *Robinson v. Redman*, 2 Duv. (Ky.) 82.

89. **Cal.**—*Townsend v. Tallant*, 33 Cal. 45, 91 Am. Dec. 617. **Colo.**—*Orman v. Bowles*, 18 Colo. 463, 33 Pac. 109, appointment necessary when proceeding is adverse to interest of infant. **Ill.**—*Loyd v. Malone*, 23 Ill. 41, 47. *Contra*, *Campbell v. Harmon*, 43 Ill. 18, 21. **Ind.**—*Timmons v. Timmons*, 6 Ind. 8. **Ia.**—*Good v. Norley*, 28 Iowa 188. **Ky.**—*Paul v. Paul*, 3 Bush 483, 484; *Siler v. Archer's Guardian*, 26 Ky. L. Rep. 557, 82 S. W. 256 (in discretion of the court); *Isert v. Davis*, 17 Ky. L. Rep. 686, 32 S. W. 294. **Miss.**—*M'Allister v. Moye*, 30 Miss. 258. **N. Y.**—*Ackley v. Dygert*, 33 Barb. 176. **N. C.**—*Stancil v. Gay*, 92 N. C. 455, 462. **Va.**—*Talley v. Starke's Admx.*, 6 Gratt. 339. **W. Va.**—*Hull v. Hull's Heirs*, 26 W. Va. 1.

[a] Before guardian ad litem can be appointed, a summons must be served upon the infants, and after the guardian ad litem is appointed in such a special proceeding, a copy of the complaint with the summons must be served

(V.) **Petition or Application.** — (A.) **IN GENERAL.** — To give the court jurisdiction a petition in writing should be presented by the guardian on behalf of the ward,⁹⁰ which should be addressed to the proper court.⁹¹

(B.) **TIME OF APPLICATION.** — Where the application upon an order of sale is made at a different term than the one specified in the notice, the proceedings will be void for want of jurisdiction.⁹²

(C.) **NECESSARY ALLEGATIONS.** — Since before the court will authorize a sale of a minor's estate it must be satisfied from the facts before it, of the necessity and propriety of the measure, the petition should set forth all the facts and circumstances rendering the sale necessary,⁹³

on such guardian. *Moore v. Gidney*, 75 N. C. 34; *Linnville v. Darby*, 1 Baxt. (Tenn.) 306.

90. **Ala.**—*Daughtry v. Thweatt*, 105 Ala. 615, 16 So. 920, 53 Am. St. Rep. 146. **Cal.**—*Fitch v. Miller*, 20 Cal. 352. **Ga.**—*Richards v. East Tennessee*, etc. R. Co., 106 Ga. 614, 626, 33 S. E. 193, 45 L. R. A. 712; *Sharp v. Finley*, 71 Ga. 654, 666. **Ill.**—*Spring v. Kane*, 86 Ill. 580, 582; *Bostwick v. Skinner*, 80 Ill. 147, 157. **Me.**—*Tracy v. Roberts*, 88 Me. 310, 34 Atl. 68, 51 Am. St. Rep. 394. **Mich.**—*Ryder v. Flanders*, 30 Mich. 336. **Neb.**—*Hubermann v. Evans*, 46 Neb. 784, 65 N. W. 1045. **Ohio.**—*Arrowsmith v. Harmoning*, 42 Ohio St. 254. **Okla.**—*Sockey v. Winstock*, 43 Okla. 758, 144 Pac. 372. **R. I.**—*Barry v. Clarke*, 13 R. I. 65.

[a] "The court of chancery is, to some extent, the guardian of infants, and other persons not sui juris. To justify its interposition, however, some proceedings must be had, bringing the question before the court." *Crawford v. Creswell*, 55 Ala. 497, 502.

[b] A petition signed, "Mary M. Oleott, guardian of Lizzie Oleott and Sue Oleott, by Levi Davis, her solicitor," held to be an application of the guardian by petition in writing. *Reid v. Morton*, 119 Ill. 118, 6 N. E. 414.

[c] The jurisdiction of the court depends upon the sufficiency of the averments of the petition, and not upon the truth of those averments. *Fitch v. Miller*, 20 Cal. 352.

[d] A petition in the name of the infant by his guardian, for the sale of real estate, is a conformity with the statute, and equivalent to a petition in the name of the guardian. The uniting of an adult heir is as valid an expression of assent to the sale as an answer would be. *Richardson v. Par-*

rott's Heirs, 7 B. Mon. (Ky.) 379, 381.

[e] Rules of court as to form and substance of the petition should be observed; if they are disregarded the petition is a nullity. *In re Lansing*, 3 Paige Ch. (N. Y.) 265.

91. *In re Bookhout*, 21 Barb. (N. Y.) 348, should be addressed "To the supreme court of the state of New York."

92. *Knickerbocker v. Knickerbocker*, 58 Ill. 399.

93. **Ala.**—*Daughtry v. Thweatt*, 105 Ala. 615, 16 So. 920, 53 Am. St. Rep. 146; *Ex parte Jewett*, 16 Ala. 409. **Cal.**—*In re Hamilton's Estate*, 120 Cal. 421, 52 Pac. 708; *Fitch v. Miller*, 20 Cal. 352. **Ill.**—*Spring v. Kane*, 86 Ill. 580, 582; *Loyd v. Malone*, 23 Ill. 41, 48, 49; *Young v. Lorain*, 11 Ill. 625, 637. **Ia.**—*Bunce v. Bunce*, 59 Iowa 533, 13 N. W. 705. **Ky.**—*Vowless' Heirs v. Buckman*, 6 Dana 466, 468. **Md.**—*Watson v. Godwin*, 4 Md. Ch. 25, 26. **Mich.**—*Ryder v. Flanders*, 30 Mich. 336; *In re Dorr*, *Walk. Ch.* 145, 147. **Mo.**—*Heady v. Crouse*, 203 Mo. 100, 100 S. W. 1052, 120 Am. St. Rep. 643. **Okla.**—*Sockey v. Winstock*, 43 Okla. 758, 144 Pac. 372. **Tenn.**—*Greenlaw v. Greenlaw*, 16 Lea 435, 442; *The Case of G. C. Brown*, 8 Humph. 200, 207; *Simpson v. Alexander*, 6 Coldw. 619, 627. **Tex.**—See *Weems v. Masterson*, 80 Tex. 45, 15 S. W. 590.

[a] The petition is sufficient if it sets forth condition of ward's estate and necessity for sale. *In re Hamilton's Estate*, 120 Cal. 421, 52 Pac. 708.

[b] In *Walker v. Goldsmith*, 14 Ore. 125, 12 Pac. 537, the court said: "Counsel for the plaintiff has also argued with much ingenuity, that the petition of the guardian for the sale of the property was insufficient to give the

including fully and particularly the age, circumstances, and condition of the parties under disability, what other property, if any, they own or are in any way entitled to, and the chancellor should see that all requirements are complied with.⁹⁴

The petition should set forth the condition of the estate,⁹⁵ show that the sale would be for the benefit of the minor,⁹⁶ and all the parties concerned,⁹⁷ and describe the property sought to be sold.⁹⁸ It has been

court jurisdiction to act in the particular case, for the reason that the petition is for the sale of the property to pay alleged debts. It is true, the petition mentions claims already accrued for the support of the children; but it then goes further, and alleges that they have no money or other estate whatever out of which to cancel such indebtedness for maintenance, or with which to provide for their future maintenance, etc.; and the future maintenance of said minors is elsewhere referred to in said petition as one of the reasons for making the sale. It is true, that payment of the alleged debt is also referred to as reason for making the sale; but in the present condition of this case before us, the only possible question that could arise on this part of the record is, Did the petition for the sale state *any cause* which, under the law, would have authorized the court to order a sale?—and we must say that it did. The petition showed there was no income from the estate, and that its sale was necessary to maintain said wards, . . . The case became coram iudice when a petition was presented containing facts which would authorize the court to act.”

[c] Where the application is by the father as natural guardian to sell the property for the support and education of the minor, the petition should clearly show that he is not able, for some good and sufficient reason, to support and educate the child. *Campbell v. Goodin's Guardian*, 32 Ky. L. Rep. 1137, 108 S. W. 248.

[d] Purpose of sale should be stated. *Ryder v. Flanders*, 30 Mich. 336.

[e] The infelicitous presentation of facts necessary to give court jurisdiction is a matter of little consequence, courts looking to the intent and not to the form. *Ryder v. Wood*, 55 Hun 607, 8 N. Y. Supp. 421.

94. *Greenlaw v. Greenlaw*, 16 Lea (Tenn.) 435, 442.

[a] In an application by a guardian

to the court for leave to sell his ward's real estate the rule is, “That enough must appear, either in the application or the order, or at least somewhere upon the face of the proceedings, to call upon the court to proceed to act, and when that does appear, then the court has properly acquired jurisdiction.” *Mulford v. Stalzenback*, 46 Ill. 303, 307.

[b] A description of all the real estate of the ward should be contained in the petition; and, where the contrary does not appear it will be presumed that the real estate described in the petition includes all that the ward owns. *Mauarr v. Parrish*, 26 Ohio St. 636.

[c] The petition should describe all the land that the ward owns, and especially that which is sought to be sold; but any description therein will be sufficient, when collaterally assailed, if it provides the means of identifying the property. *Hubermann v. Evans*, 46 Neb. 784, 65 N. W. 1045.

95. Cal.—*In re Hamilton's Estate*, 120 Cal. 421, 52 Pac. 708; *Fitch v. Miller*, 20 Cal. 352. Mich.—*Ryder v. Flanders*, 30 Mich. 336. Okla.—*Sockey v. Winstock*, 43 Okla. 758, 144 Pac. 372.

[a] Only necessary to state the condition of the estate in such manner as to enable the court to judge of the existence of circumstances rendering a sale necessary. *Fitch v. Miller*, 20 Cal. 352.

96. *Fitch v. Miller*, 20 Cal. 352; *Womble v. Trice's Guardian*, 112 Ky. 533, 66 S. W. 370; *Vowless' Heirs v. Buckman*, 6 Dana (Ky.) 466.

97. *Craig v. Wilcox's Exr.*, 94 Ky. 484, 489, 22 S. W. 76.

[a] The jurisdiction of the court cannot be sustained, unless the bill alleges that it will be for the interest and advantage of all parties interested that the land should be sold. *Watson v. Godwin*, 4 Md. Ch. 25, 26; *Tomlinson v. McKaig*, 5 Gill (Md.) 256, 274.

98. Ind.—*Weed v. Edmonds*, 4 Ind. 468. Me.—*Tracy v. Roberts*, 88 Me.

held unnecessary to state whether the minors have any near relations in the state.⁹⁹

Alleging Personalty Exhausted.—Usually, it seems, the petition should allege that the personal estate has been exhausted;¹ but this is not required where the proceeding is for the purpose of reinvesting the proceeds of unproductive property.²

The residence of the minor should be stated affirmatively in the petition.³

(D.) **VERIFICATION.**—The petition should be verified by the oath of the petitioner,⁴ though in the absence of a statutory requirement fail-

310, 31 Atl. 63, 51 Am. St. Rep. 394. Miss.—*Thompson v. Deslorde*, 93 Miss. 208, 46 So. 712. Neb.—*Hubermann v. Evans*, 46 Neb. 784, 65 N. W. 1045. Ohio.—*Maurer v. Parrish*, 7 Ohio Dec. 54. Wash.—*Brace v. Schofield*, 2 Wash. Ter. 209, 3 Pac. 235.

[a] **Property is sufficiently described** where the section and its proper subdivisions, and its situation in a certain named county, are stated, although the township or range is not given. *Doe v. Jackson*, 51 Ala. 514.

[b] The description of the land need not necessarily be more specific, definite, and certain than is required in a conveyance of real property. Hence, a general description of the premises in the petition, as all the real estate of the wards situate in this state, or in any particular county or city therein, is not void for indefiniteness and uncertainty. *Hubermann v. Evans*, 46 Neb. 784, 65 N. W. 1045.

[c] **Correction of Misdescription.** Where the petition contained a mistake in the description of the lands, which it is shown was corrected after the petition was drafted, it will not be presumed, in the absence of evidence, that such correction was not made until after the filing of the petition. *Deford v. Mercer*, 24 Iowa 118, 92 Am. Dec. 460.

[d] **An amended petition being filed, two years after the first petition**, reciting that the land had been incorrectly described in the petition and judgment, and setting out a correct description by metes and bounds, the variance between the two descriptions amounting to several acres, it was error to amend the judgment of sale rendered two years before and order a sale of the newly described lot of land, in accordance with the terms of the original judgment, where no summons was issued on the amended petition and no report

from the guardian or guardian ad litem was made until after the sale was confirmed. *Robinson v. Clark*, 17 Ky. L. Rep. 1401, 21 S. W. 1083.

[e] **Description of property held sufficient on collateral attack.** *Howbert v. Heyle*, 47 Kan. 58, 27 Pac. 116. See also *Hubermann v. Evans*, 46 Neb. 784, 65 N. W. 1045.

99. *Harrington v. Wofford*, 46 Miss. 31.

1. *Orman v. Bowles*, 18 Colo. 463, 33 Pac. 109; *Kindell v. Titus*, 9 Heisk. (Tenn.) 727.

2. *Orman v. Bowles*, 18 Colo. 463, 33 Pac. 109.

3. *Reid v. Morton*, 119 Ill. 118, 131, 6 N. E. 414; *Loyd v. Malone*, 23 Ill. 41, 47.

[a] "Applications for the sale of the real estate of a ward, shall be made in the county where the ward shall reside, although the estate may lie in a different county." Therefore the petition should state affirmatively where the minor wards reside. *Loyd v. Malone*, 23 Ill. 41, 47.

[b] Petition need not show that ward resides in county where it is filed. *Eaves v. Mullen*, 25 Okla. 679, 107 Pac. 433.

4. Cal.—*Fitch v. Miller*, 20 Cal. 352. Ind.—*Weed v. Edmonds*, 4 Ind. 468. Ky. Vowless' Heirs *v. Buckman*, 6 Dana 466, early Kentucky statute. Va.—*Lancaster v. Barton*, 92 Va. 615, 24 S. E. 251.

But see *Hanks v. Neal*, 44 Miss. 212.

[a] **Two guardians of infants uniting in a petition for the sale of infant's estate**, and one swearing to the petition, is a substantial compliance with the statute. *Owens v. Cowan's Heirs*, 7 B. Mon. (Ky.) 152.

[b] **Strict compliance with statute necessary.** *Vowless' Heirs v. Buckman*, 6 Dana (Ky.) 466, 468; *Liter v. Fish-*

ure to verify is not a fatal defect which invalidates the proceedings.⁵

(VI.) Notice of Petition or Application. — (A.) NOTICE TO MINOR. Whether notice of the filing of the petition or application must be given the infant depends largely upon statute.⁶ In some jurisdictions notice should be given to the ward, where the purpose of the sale is to pay debts,⁷ but it is held that where the proceeding is one by the

back, 25 Ky. L. Rep. 260, 75 S. W. 232, 233.

[c] **Necessity of Showing by Whom Verified.**—Where the statute requires that the bill shall be verified by the oath of the plaintiffs, it is not essential that the bill shall show that it was verified by the oath of the plaintiffs; it is sufficient if the affidavit to the bill simply recites: "Sworn to before me, at my county aforesaid, this 22nd day of October, 1886." The better practice, however, would be for the certificate to show on its face that the bill was sworn to by the plaintiffs, and not leave that fact to be supplied by evidence aliunde. *Lancaster v. Barton*, 92 Va. 615, 24 S. E. 251.

5. *Ellsworth v. Hall*, 48 Mich. 407, 12 N. W. 512.

[a] "That the petition was not sworn to by the proper party, will not make the judgment void. It may have been an error in the proceeding, but at best it would only be cause for reversal." *Castleman v. Relfe*, 50 Mo. 583.

[b] **When collaterally attacked**, failure to verify the petition is but an irregularity which will not defeat the jurisdiction of the court. *Hamiel v. Donnelly*, 75 Iowa 93, 39 N. W. 210; *Trumble v. Williams*, 18 Neb. 144, 24 N. W. 716.

6. See the statutes.

[a] **Notice necessary**, see the following cases: **Ill.**—*Musgrave v. Conover*, 85 Ill. 374. **Ia.**—*Rankin v. Miller*, 43 Iowa 11; *Lyon v. Vanatta*, 35 Iowa 521; *Washburn v. Carmichael*, 32 Iowa 475; *Good v. Norley*, 28 Iowa 188. **Ky.** *Isert v. Davis*, 17 Ky. L. Rep. 686, 32 S. W. 294. **Miss.**—*Rule v. Broach*, 58 Miss. 552; *Kennedy v. Gaines*, 51 Miss. 625. **N. C.**—*Gully v. Macy*, 81 N. C. 356.

[b] **Appearance of guardian in court** will not give the court jurisdiction if citation is not served on minor. *Kennedy v. Gaines*, 51 Miss. 625.

[c] **Service on father of an infant** under the age of fourteen years, held insufficient to bring infant before the

court. *Isert v. Davis*, 17 Ky. L. Rep. 686, 32 S. W. 294.

[d] A decree is not conclusive upon infant defendants who were not served with process, but who were represented by a guardian ad litem, appointed before the petition was filed on nomination of plaintiff, and who filed an answer prepared for him at plaintiff's instance and without inquiry as to the rights of the infant defendants. *Gully v. Macy*, 81 N. C. 356.

[e] **Advertisement.**—*Coy v. Downie*, 14 Fla. 544. See *Fry v. Bidwell*, 74 Ill. 381.

[f] **Notice unnecessary**, see the following: **Ala.**—*Daughtry v. Thweatt*, 105 Ala. 615, 16 So. 920, 53 Am. St. Rep. 146. **Ga.**—*Southern Marble Co. v. Stegall*, 90 Ga. 236, 15 So. 806. **Ind.** *Williams v. Williams*, 18 Ind. 345. **Mass.** *Rice v. Parkman*, 16 Mass. 326. **Mo.** *Ancell v. Southern Ill. & M. Bridge Co.*, 223 Mo. 209, 122 S. W. 709. **Neb.** *Hunter v. Buchanan*, 57 Neb. 277, 127 N. W. 166. **Okla.**—*Spade v. Morton*, 28 Okla. 384, 114 Pac. 724.

7. **Ill.**—*Mulford v. Beveridge*, 78 Ill. 455. **Ind.**—*Doe v. Anderson*, 5 Ind. 33; *Babbitt v. Doe*, 4 Ind. 355. **Ia.**—*Good v. Norley*, 28 Iowa 188. **N. Y.**—See *Stilwell v. Swarthout*, 81 N. Y. 109. **N. C.**—*Harrison v. Harrison*, 106 N. C. 282, 11 S. E. 356; *Stancil v. Gay*, 92 N. C. 455, 462; *Moore v. Gidney*, 75 N. C. 34. **S. C.**—*Morgan v. Morgan*, 45 S. C. 323, 23 S. E. 64. **Tenn.**—*Linnville v. Darby*, 21 Baxt. 306; *Frazier v. Pankey*, 1 Swain 75.

But see *Hunter v. Buchanan*, 57 Neb. 277, 127 N. W. 166, *disapproving* dictum in *Myers v. McGavock*, 39 Neb. 843, 58 N. W. 522, 42 Am. St. Rep. 627.

[a] **Waiver of personal service** on the infant cannot be made by the guardian. *Doe v. Anderson*, 5 Ind. 33. See *supra*, I. B. 2, et seq.

[b] **The rights of infant defendants cannot be waived** by failure to make objection to errors in a proceeding to sell real estate to pay debts. *Stilwell v. Swarthout*, 81 N. Y. 109.

[c] Where no service was made

guardian for the benefit of the infant and is not adverse to him such notice is not required.⁸

(B.) NOTICE TO RELATIVES.—The statutes of several states provide that notice shall be given to the near relatives of the minor, or the sale will be void.⁹

(VII.) Hearing.—The court should hear proof and be satisfied that the sale is necessary before the order of sale is made,¹⁰ and the sale should not be authorized until all liens against the same have been first ascertained and determined.¹¹

upon defendants except one, and the infant defendants were not represented by guardian ad litem or otherwise, and the land brought only one-third of its value, it was held that these proceedings were in such utter disregard of the rights of property and the fundamental principles of law, that they might be pronounced void on motion made many years after final judgment. *Harrison v. Harrison*, 106 N. C. 282, 11 S. E. 356.

[d] Acceptance of service by guardian does not bind the minor. *Morgan v. Morgan*, 45 S. C. 323, 23 S. E. 64.

[e] Description of land (1) in notice unnecessary. *Frazier v. Steenrod*, 7 Iowa 339, 71 Am. Dec. 447. (2) But if described the description must be accurate. *Deford v. Mercer*, 24 Iowa 118, 92 Am. Dec. 460.

[f] Mistake in the time of the application is fatal. *Knickerbocker v. Knickerbocker*, 58 Ill. 399.

8. U. S.—*Gager v. Henry*, 5 Sawy. 237, 9 Fed. Cas. No. 5,172. Ark.—*Beidler v. Friedell*, 44 Ark. 411. Cal.—*Scarff v. Aldrich*, 97 Cal. 360, 32 Pac. 324, 33 Am. St. Rep. 190. D. C.—*Marshall v. Wheeler*, 7 Mackey, 414 proceeding was to carry out the express provisions of a will. Ill.—*Spring v. Kane*, 86 Ill. 580, the court saying: "A proceeding by a guardian to sell real estate for the maintenance of his ward is a proceeding in rem, being made on behalf of the owner of the estate, and hence it is only necessary the court should have jurisdiction of the subject-matter." Neb.—*Myers v. McGavock*, 39 Neb. 843, 58 N. W. 522, 42 Am. St. Rep. 627. Ore.—*Trutch v. Bunnell*, 5 Ore. 504. Wis.—*Mohr v. Porter*, 51 Wis. 487, 8 N. W. 364.

[a] In *Myers v. McGavock*, 39 Neb. 843, 862, 58 N. W. 522, 42 Am. St. Rep. 627, the court said: "The authorities are as conflicting as they are numerous; but we think that the weight of authority is that such pro-

ceeding is one in rem,—a proceeding on behalf of the ward and not adverse to him,—and that notice to such ward of such proceeding is not essential to the jurisdiction of the court to grant the license for the sale. In support of this view, see *Gringnon's Lessee v. Astor*, 43 U. S. 318; *Mohr v. Manierre*, 101 U. S. 417; *Thaw v. Ritchie*, 136 U. S. 519; *Scarff v. Aldrich*, 32 Pac. Rep. (Cal.) 324; *Mohr v. Porter*, 51 Wis. 487, and authorities there collated." See also *Hunter v. Buchanan*, 87 Neb. 277, 127 N. W. 166.

9. *Temple v. Hammock*, 52 Miss. 360 (citation shall be served on three of the nearest relatives of the ward residing in the state); *Stamper v. King*, 51 Miss. 728; *Wells v. Steckleberg*, 50 Neb. 670, 70 N. W. 242, on next of kin.

10. Ala.—*Ex parte Jewett*, 16 Ala. 409. Ill.—*Lloyd v. Malone*, 23 Ill. 43. Ia.—*Dickenson v. Hughes*, 37 Iowa 160. Mich.—*Petition of Dorr*, Walk. Ch. 145. N. C.—*Marsh v. Dellinger*, 127 N. C. 360, 37 S. E. 494; *Coffield v. McLean*, 49 N. C. 15; *Leary v. Fletcher*, 23 N. C. 259. S. C.—*Bulow v. Buckner*, Rich Eq. Cas. 401.

See *Adkins v. Sidener*, 8 Ind. 228.

[a] Under a statute providing that the court may proceed in a summary manner to inquire into the merits of the application for sale, it is held that this permits the court to satisfy itself by means of affidavits, inspection or other methods of proof, without oral examination and cross-examination of witnesses. *Schafer v. Luke*, 51 Wis. 669, 8 N. W. 857.

[b] The discretion of the court is not absolute and irresponsible, uncontrolled by the necessities of the minors and their interests, but is a legal discretion to be guided by justice and the rules of law. *Dickinson v. Hughes*, 37 Iowa 160.

11. *White v. Straus*, 47 W. Va. 794, 35 S. E. 843.

Neither the infant's answer, nor the answer of adult defendants confessing that the sale would be for the benefit of the infant is sufficient to authorize such a finding by the court;¹² nor does the fact that the infants are complainants dispense with proof that the sale would be for their benefit.¹³ Where the question has been submitted to a commissioner the usual practice is for the court to base its decree on the evidence taken before such commissioner showing the propriety of the sale.¹⁴

The guardian of the infant has the right to be heard and represented in the naming of the commissioner, in their examination of the evidence adduced before them, and in the action of the court upon the return of the commissioner.¹⁵

Where the statute is silent as to the means to be resorted to, to satisfy the court and the record shows that the court has been satisfied, a presumption arises that the end was attained by proper and adequate means.¹⁶

c. Contents of Order or Decree Authorizing Sale.—(I.) Finding of Necessity for Sale.—The order or decree of sale should adjudge the facts upon which the sale is based.¹⁷

(II.) Directing Terms of Sale.—The order should state the terms on which the sale is to be made.¹⁸ It may be amended to permit the sale on different terms from those stated in the original order.¹⁹

(III.) Fixing Time and Place of Sale.—The order authorizing the sale should fix the time and place of sale.²⁰

12. *Harris v. Harris*, 6 Gill & J. (Md.) 72; *Watson v. Godwin*, 4 Md. Ch. 25.

[a] However, a decree of sale rendered by consent of the parties in interest, with the minors properly represented, is binding on the minors as to the necessity for the sale, in favor of a purchaser at a private sale made pursuant to the decree, if the decree is free from fraud. *Southern Marble Co. v. Stegall*, 90 Ga. 236, 15 S. E. 806.

13. *Watson v. Godwin*, 4 Md. Ch. 25.

14. *Lancaster v. Barton*, 92 Va. 615, 24 S. E. 251. See also *Bulow v. Buckner*, Rich. Eq. Cas. (S. C.) 401.

15. *Hunter v. Hatton*, 4 Gill (Md.) 115.

16. *Adkins v. Sidener*, 5 Ind. 228. See also *Schafer v. Luke*, 51 Wis. 669, 8 N. W. 857.

17. **Debts.**—The order of sale must find and adjudge that there are debts against the ward that render a sale necessary, and a failure to do so renders the sale void. *Pendleton v. Trueblood*, 48 N. C. 96; *Spruill v. Davenport*, 48 N. C. 42.

[a] The amount of the debts, to

whom due, or other particular description is not essential to the validity of the order. *Pendleton v. Trueblood*, 48 N. C. 96.

18. *In re Hamilton's Estate*, 120 Cal. 421, 52 Pac. 708; *Reid v. Morton*, 119 Ill. 118, 6 N. E. 414.

[a] **Public or Private Sale.**—Court may grant a license to the guardian to sell the land either by public auction or private sale, as he might find most for interest of his ward. *Ex parte Cousins*, 5 Me. 240. See, however, *infra*, III, A, 7, b, (IV).

19. *Reid v. Morton*, 119 Ill. 118, 6 N. E. 414. See *In re Stafford*, 3 Misc. 106, 22 N. Y. Supp. 706.

20. *Campbell v. Harmon*, 43 Ill. 18; *Palmer v. Husbands*, 134 Ky. 152, 119 S. W. 762.

[a] The court may set a sale of property in partition for the first day of the next regular term of court. *Palmer v. Husbands*, 134 Ky. 152, 119 S. W. 762.

[b] **But the failure to fix** absolutely the day of sale is an irregularity not jurisdictional. *Benefield v. Albert*, 132 Ill. 665, 24 N. E. 634; *Spring v. Kane*.

(IV.) **Description of Property To Be Sold.**—The land to be sold should be designated with certainty, in the order of sale.²¹

(V.) **Directing Investment of Proceeds.**—It is the duty of the court ordering the sale to direct the manner in which the funds arising therefrom, belonging to the minors, shall be appropriated.²²

4. **Appraisement.**—In some states the statutes require that there be made an appraisement of the minor's property before it is sold.²³ Under some statutes this appraisement is properly made after the filing of the petition and the order of sale has been made,²⁴ but it must be made before the sale.²⁵ Under other statutes the filing of the petition is a prerequisite to the appraisement,²⁶ and the appraisement is a

86 Ill. 580, 585; *Greer v. Ford*, 31 Tex. Civ. App. 389, 72 S. W. 73.

[e] It is sufficient if the court in its order fixes certain reasonable limits, both as to the day and the hour, within which the sale shall be held, requiring the guardian to give due notice. *Campbell v. Harmon*, 43 Ill. 18, 21.

21. Cal.—Hill v. Wall, 66 Cal. 130, 4 Pac. 1139. N. C.—*Brock v. King*, 48 N. C. 45. Tex.—*Graham v. Hawkins*, 38 Tex. 628.

[a] An order to sell "all the real estate" of a decedent, is a sufficient description, though the better practice would be to describe the lands more definitely. *Clements v. Henderson*, 4 Ga. 148, 48 Am. Dec. 216.

[b] A description of land as "being ninety-one acres of the southwest corner of lot number eleven," it being shown that party owning land had just that quantity of land and no more in the designated lot and his portion touched the southwest corner of the lot, held sufficient. *Bloom v. Burdick*, 1 Hill (N. Y.) 130, 37 Am. Dec. 299.

[c] An order "to sell the land of the ward named in the petition, adjoining the lands of John Bailey and others, containing about one hundred and ten acres" (it appearing that the ward had no other land), is a sufficient specification of the land sought to be sold." *Pendleton v. Trueblood*, 48 N. C. 96.

[d] An order authorizing the sale of one hundred acres more or less, without any definite boundaries, is void for failure to designate the land with sufficient certainty. *Brock v. King*, 48 N. C. 45.

[e] An order that the guardian "sell the land of the said deceased, T. H., or so much thereof as will be sufficient to discharge debts," is un-

authorized and void. *Ducket v. Skinner*, 33 N. C. 431; *Leary v. Fletcher*, 23 N. C. 259.

[f] **Where Sale Is Private.**—"While the description of the land in the order of sale is not as full as it should be it is sufficient to identify the property, and that is all that was required. The sale in this case as ordered by the court was a private sale, and the meagerness of the description could therefore have had no effect upon the price paid for the land by the appellees." *Jiron v. Jiron* (Tex. Civ. App.), 136 S. W. 493.

[g] **Statutory requirement as to description held directory.** *Robertson v. Johnson*, 57 Tex. 62.

[h] **The description cannot be helped out by reference to a document not found in the order itself.** *Hill v. Wall*, 66 Cal. 130, 4 Pac. 1139.

22. *Morris v. Richardson*, 11 Humph. (Tenn.) 389, 394; *The Case of G. C. Brown*, 8 Humph. (Tenn.) 200, 208; *Rogers v. Clark*, 5 Sneed (Tenn.) 665, 667.

23. Cal.—*Smith v. Biscailuz*, 83 Cal. 344, 21 Pac. 15, 23 Pac. 314. Ind.—*Corbaley v. State*, 81 Ind. 62; *Adkins v. Sidener*, 5 Ind. 228. Kan.—*Beachy v. Shomber*, 73 Kan. 62, 84 Pac. 547. Ky.—*Woodcock v. Bowman*, 4 Mete. 40; *Mattingly v. Read*, 3 Mete. 524. La.—*Fraser v. Zyliez*, 29 La. Ann. 534. Mo.—*Strouse v. Drennan*, 41 Mo. 289; *Exendine v. Morris*, 8 Mo. App. 383.

24. *Noland v. Barrett*, 122 Mo. 181, 26 S. W. 692, 43 Am. St. Rep. 572.

25. *Strouse v. Drennan*, 41 Mo. 289.

[a] No title passes to the purchaser where the statutory requirement, as to an appraisement being made before the sale, is not complied with. *Strouse v. Drennan*, 41 Mo. 289.

26. Until the statutory guardian's

jurisdictional prerequisite to the making of the order of sale.²⁷

5. Bond.—It is generally required that the guardian give a special bond to properly account for the proceeds of the sale,²⁸ which bond

petition for the sale of real estate of the ward is filed, the court has no right to appoint commissioners to value the ward's estate. *Woodcock v. Bowman*, 4 Mete. (Ky.) 40; *Watts v. Pond*, 4 Mete. (Ky.) 61, 62; *Mattingly's Heirs v. Read*, 3 Mete. (Ky.) 524, 79 Am. Dec. 565.

27. The report of the commissioners appointed to appraise the estate of the infants, must be full and explicit on all the matters which, by the statute, they are required to ascertain and report to the court. Without this the court has no jurisdiction to decree a sale. *Campbell v. Clay*, 6 Bush (Ky.) 498; *Woodcock v. Bowman*, 4 Mete. (Ky.) 40, 42; *Wells v. Cowherd's Heirs*, 2 Mete. (Ky.) 514; *Bell v. Clark*, 2 Mete. (Ky.) 573, 574; *Wyatt v. Mansfield's Heirs*, 18 B. Mon. (Ky.) 779, 781; *Carpenter v. Strother's Heirs*, 16 B. Mon. (Ky.) 289; *Bolgiano v. Cooke*, 19 Md. 375, 392; *Tomlinson v. McKaig*, 5 Gill (Md.) 256.

[a] The commissioner's report should show that the property therein valued is all of the real and personal estate belonging to the infants whose lands are sought to be sold, as well as that it is to the infant's interest. Without such a report the sale would be void. *Woodcock v. Bowman*, 4 Mete. (Ky.) 40, 42; *Mattingly's Heirs v. Read*, 3 Mete. (Ky.) 524, 525, 79 Am. Dec. 565.

28. U. S.—*Goldsmith v. Gilliland*, 23 Fed. 645. **Cal.**—*Smith v. Biscailuz*, 83 Cal. 344, 21 Pac. 15, 23 Pac. 314. **Ga.** *Cuyler v. Wayne*, 64 Ga. 78. **Ind.**—*Marquis v. Davis*, 113 Ind. 219, 15 N. E. 251. **Kan.**—*Watts v. Cook*, 24 Kan. 278. **Ky.**—*Caulder v. Chenault's Exr.*, 154 Ky. 777, 159 S. W. 578; *Baldrige v. Baldrige*, 117 S. W. 253; *Loeb v. Struck*, 19 Ky. L. Rep. 935, 42 S. W. 401; *Fritsch v. Klausung*, 11 Ky. L. Rep. 788, 13 S. W. 241. **Mich.**—*Persinger v. Jubb*, 52 Mich. 304, 17 N. W. 851; *Ryder v. Flanders*, 30 Mich. 336. **Mo.**—*Heady v. Crouse*, 203 Mo. 100, 100 S. W. 1052, 120 Am. St. Rep. 643; *Duncan v. Crook*, 49 Mo. 116. **Pa.** *Blauser v. Diehl*, 90 Pa. 350. **R. I.** *McGale v. McGale*, 18 R. I. 675, 29 Atl. 967. **Tenn.**—*In re Andrew's Heirs*, 3 Humph. 592. **W. Va.**—*Reed v. Hedges*,

16 W. Va. 167. **Wis.**—*McKinney v. Jones*, 55 Wis. 39, 11 N. W. 606, 12 N. W. 381.

[a] In *Cuyler v. Wayne*, 64 Ga. 78, the court said: "As the question was discussed on the argument as to whether a guardian was required to give bond and security, especially when the clerk of the superior court is appointed a guardian for minors by the ordinary, or whether it is discretionary with the ordinary to require bond and security, we will express our opinion upon that question. In our judgment the law requires that bond and security should be given in all cases on the appointment of a guardian by the ordinary. Code sec. 1812. But the grant of letters of guardianship by the ordinary without taking bond, though erroneous, would not make the grant of the letters void as against a bona fide purchaser who had no notice that a bond had not been given."

[b] In *Indiana*, no bond is required of the commissioner making the sale. *McKeever v. Ball*, 71 Ind. 398.

[c] In *Mississippi* (1) the law does not require a bond to be given by the guardian, and if the court does not require one, none is necessary (*Morton v. Carroll*, 68 Miss. 699, 9 So. 896), (2) but if the court require a bond, a failure to execute such bond renders the sale void. *Vanderburg v. Williamson*, 52 Miss. 233.

[d] The sale bonds should be made payable to the court's commissioner, and the control of the fund reserved by the court until it is paid out in the purchase of other property. *Crutcher v. Rodman*, 26 Ky. L. Rep. 294, 81 S. W. 252.

[e] The court cannot dispense with sureties, even though the petition for the sale sets forth the inability to procure security, and a master's certificate to the same effect. *Matter of Thorne*, 1 Edw. Ch. (N. Y.) 507.

[f] **Duty of Surety on Bond.**—A surety on a guardian's bond given on the sale of his ward's real estate is bound to see that his principal sells the land in the manner prescribed by law for the sale of real estate by executors and administrators, and this, by reference, adopts all the provisions

should be executed before the sale;²⁹ and where the statute or order of court requires such a bond to be executed, a sale made without it will be void,³⁰ though this is not the universal rule, some courts hold-

of the statute relating to such last named sales, and covers all the statute requires such officers to do in order to make a legal and valid sale, including the publishing and posting of notices, and making proper proofs thereof. If the license is properly granted, the bond covers all the acts of the guardian, as well as his neglects and omissions to make the sale in a legal manner, but not any illegalities or defects occurring prior to granting such license. *Schlee v. Darrow's Estate*, 65 Mich. 362, 32 N. W. 717.

[g] **Discharge of Bond.**—The additional bond given by a guardian, in an application to sell the real estate of his ward, is not discharged by the fact that, on reporting the sale of the real estate, he produced the proceeds of the sale in court and then withdrew them by order of the court. *State ex rel. Mount v. Steele*, 21 Ind. 207, 83 Am. Dec. 346.

[h] **Acts Amounting to Breach of Bond.**—A failure to account for the purchase money, and to invest it according to the terms of the sale and the order of the court confirming the same, is a clear breach of the condition of the bond. *Hunt v. Hunt*, 65 Barb. (N. Y.) 577.

29. *Wyatt v. Mansfield's Heirs*, 18 B. Mon. (Ky.) 779; *Weld v. Johnson Mfg. Co.*, 84 Wis. 537, 54 N. W. 335, 998.

[a] **The recital in the decree of sale** that the guardian had given the required bond, authorizes the inference that it was given before, or simultaneously with, the decree, although dated the day after. *Thornton v. McGrath*, 1 Duv. (Ky.) 349, 353.

30. See cases under two preceding notes and: Ky.—*Phillips v. Spalding's Guardian*, 31 Ky. L. Rep. 579, 102 S. W. 1193. Me.—*Tracy v. Roberts*, 88 Me. 310, 34 Atl. 68, 51 Am. St. Rep. 394; *Williams v. Morton*, 38 Me. 47, 61 Am. Dec. 229. Mich.—*Ryder v. Flanders*, 30 Mich. 336, 343. See *Fender v. Powers*, 67 Mich. 433, 35 N. W. 80. Miss.—*Vanderburg v. Williamson*, 52 Miss. 233. Nev.—*Henderson v. Coover*, 4 Nev. 429. Wis.—*Weld v. Johnson Mfg. Co.*, 84 Wis. 537, 54 N. W. 335,

998. See also *McKinney v. Jones*, 55 Wis. 39, 11 N. W. 606, 12 N. W. 381.

[a] **Kentucky.**—(1) In *Elliott v. Fowler*, 112 Ky. 376, 65 S. W. 849, it was held that where the bond required by §493 of the civil code of practice had not been executed to the infant, the judgment and sale were void; that the infant lost no rights under them, and the purchaser took none. See also *Caulder v. Chenault's Exr.*, 154 Ky. 777, 159 S. W. 578. (2) But in an action under civil code practice, §490, for a sale of property jointly owned, the fact that no bond was executed to an infant owner constitutes no ground for setting aside the sale. *Ellis v. Smith's Guardian*, 147 Ky. 99, 143 S. W. 776; *Dineen v. Hall*, 112 Ky. 273, 65 S. W. 445, 66 S. W. 392.

[b] **In Michigan**, the absence of a sale bond in the probate proceedings for a guardian's sale of lands, although no such bond appears to have been ordered by the probate court, is a fatal defect, and one which is open to the wards in their suit for the lands against even a bona fide purchaser; notwithstanding the peculiar wording of the statute (Comp. Laws, §4622, subd. 2), "in case any bond was required," etc. It is held, construing the whole chapter together, that a sale bond is in all cases essential, and that no discretion is lodged with the probate judge in this regard, nor is any express or formal order required. *Stewart v. Bailey*, 28 Mich. 251.

[c] The bond required of the special guardian is an absolute necessity; and therefore where the court orders that a bond, theretofore given by the special guardian as guardian of the property of the infant in the court of the surrogate, shall be deemed a sufficient bond in the proceeding for the sale of the real estate, the latter proceeding is void, and a purchaser of land affected by the sale need not carry out his purchase. *Blanchard v. Blanchard*, 33 Misc. 284, 67 N. Y. Supp. 478.

[d] A failure to file a bond theretofore executed and approved, prior to the entry of the order of reference, will not invalidate the proceedings where

ing that such failure renders the sale erroneous but not necessarily void.³¹ A bond and an order reciting its execution should be considered together.³²

6. Oath.—The guardian is sometimes required, before making the sale, to take an oath to the effect that he will faithfully conduct the sale to the best interest of his ward,³³ and a failure to comply with the statute in this respect renders the sale void.³⁴

7. The Sale.—a. *Notice of Sale.*—Notice of the sale is usually required to be given, either by publication or some other method; this matter, however, is largely dependent on statute.³⁵ Where the statute or order of court requires notice to be given, failure to give such notice usually renders the sale void for want of jurisdiction,³⁶ though

the rights of the infants are not jeopardized. *Kelly v. Pitcher*, 4 N. Y. Supp. 3.

31. U. S.—*Arrowsmith v. Gleason*, 129 U. S. 86, 9 Sup. Ct. 237, 32 L. ed. 630; *Arrowsmith v. Harmoning*, 118 U. S. 194, 6 Sup. Ct. 1023, 30 L. ed. 243. **Colo.**—*Orman v. Bowles*, 18 Colo. 463, 33 Pac. 109. **Kan.**—*Howbert v. Heyle*, 47 Kan. 58, 27 Pac. 116; *Watts v. Cook*, 24 Kan. 278. **Ohio.**—*Arrowsmith v. Harmoning*, 42 Ohio St. 254.

[a] In the case of *Watts v. Cook*, 24 Kan. 278, it was held that "the failure of a guardian to give security, as required by section 15, chapter 46, Compiled Laws of 1879, upon obtaining an order for the sale of real estate, will not render void a sale regularly made and approved."

[b] "In *McKee's Heirs v. Hann*, 9 Dana (Ky.) 526, no bond was executed before the sale, yet the sale was sustained. The court in effect, decided that the execution of the bond was not essential to give the court jurisdiction. That the sale would be valid provided a bond was subsequently executed." *Lampton v. Usher's Heirs*, 7 B. Mon. (Ky.) 57, citing *Gates v. Kennedy*, 3 B. Mon. (Ky.) 167.

[c] **Collateral Attack.**—A sale of minor's property will not be held void in a collateral proceeding because the bond filed by the guardian for the purpose of obtaining the license to sell the real estate was not formally approved. *Myers v. McGavock*, 39 Neb. 843, 845, 58 N. W. 522, 42 Am. St. Rep. 627.

32. Higdon v. Lancaster, 7 Ky. L. Rep. 296.

[a] In an action for the sale of the real estate of infants the guardian executed bond to all the infants, which

was approved by the court, but the order reciting the execution of the bond omitted the name of one of the infants. It was held that the bond and order of court, considered together, show that the bond was executed to all the infants, and that the purchaser cannot complain. *Higdon v. Lancaster*, 7 Ky. L. Rep. 296.

33. Ia.—*Cooper v. Sunderland*, 3 Iowa 114, 66 Am. Dec. 52. **Minn.** *Montour v. Purdy*, 11 Minn. 384, 83 Am. Dec. 88. **Neb.**—*Howe v. Blumenkamp*, 88 Neb. 389, 129 N. W. 539; *Bachelor v. Korb*, 58 Neb. 122, 78 N. W. 485, 76 Am. St. Rep. 70. **Wis.** *Blackman v. Blaumann*, 22 Wis. 611.

34. Mich.—*Ryder v. Flanders*, 30 Mich. 336. **Neb.**—*Howe v. Blumenkamp*, 88 Neb. 389, 129 N. W. 539; *Card v. Deans*, 84 Neb. 4, 120 N. W. 440; *Levara v. McNeny*, 73 Neb. 414, 102 N. W. 1042; *Bachelor v. Korb*, 58 Neb. 122, 78 N. W. 485. **Wis.**—*Blackman v. Baumann*, 22 Wis. 611.

35. Colo.—*Orman v. Bowles*, 18 Colo. 463, 33 Pac. 109. **Ill.**—*Fry v. Bidwell*, 74 Ill. 381. **Ia.**—*Lyon v. Vanatta*, 35 Iowa 521; *Frazier v. Steenrod*, 7 Iowa 339, 71 Am. Dec. 447. **Me.**—*Tracy v. Roberts*, 88 Me. 310, 34 Atl. 68, 51 Am. St. Rep. 394. **Mich.**—*Schlee v. Darrow's Estate*, 65 Mich. 362, 32 N. W. 717; *Dexter v. Cranston*, 41 Mich. 448, 2 N. W. 674. **Miss.**—See *Morton v. Carroll*, 68 Miss. 699, 9 So. 896. **Ore.** *Walker v. Goldsmith*, 14 Ore. 125, 12 Pac. 537.

As to what notice should contain, see the statutes of the particular states.

36. Ia.—*Lyon v. Manatta*, 35 Iowa 521. **Me.**—*Tracy v. Roberts*, 88 Me. 310, 34 Atl. 68, 51 Am. St. Rep. 394. **Md.**—*Bolgiano v. Cooke*, 19 Md. 375,

mere irregularities in the notice do not necessarily render the sale void.³⁷

b. *Conduct of Sale.*—(I.) *In General.*—The conduct of the sale must conform to the decree of the court ordering the same,³⁸ and to all statutory provisions relating to such matter.³⁹

(II.) *Sale in Conjunction With Other Property.*—In a proceeding to sell the land of an infant, it is improper to order the sale of the infant's land in conjunction with another tract in which the infant has no interest, the two tracts to be sold as a whole.⁴⁰ But it has been held that the special guardian may enter into a contract of sale conjointly with the adult owners.⁴¹

(III.) *Sale in Parcels.*—Persons making public sale of lands, may be given discretion to divide the tract, and sell in parcels, being responsible for the abuse of that discretion.⁴² The failure to sell all

397. *Miss.*—*Burrus v. Burrus*, 56 *Miss.* 92, 100.

37. *Richardson v. Farwell*, 49 *Minn.* 210, 51 *N. W.* 915.

38. *In re Axtell*, 95 *Mich.* 244, 54 *N. W.* 889; *Tennent's Heirs v. Pattons*, 6 *Leigh (Va.)* 196. See also *Mason v. Wait*, 5 *Ill.* 127, 134.

[a] *Construction of Order of Sale.* The construction of an order of sale, made by the orphan's court, is a question for the court and not for the jury; and must be determined from an inspection of the record alone. *Wyatt's Admr. v. Steele*, 26 *Ala.* 659.

39. *Caulder v. Chenault's Exr.*, 154 *Ky.* 777, 159 *S. W.* 578; *Elliott v. Fowler*, 112 *Ky.* 376, 65 *S. W.* 849; *Walker v. Smoyer's Exrs.*, 80 *Ky.* 620; *Thornton v. McGrath*, 1 *Duv. (Ky.)* 339; *Todd v. Dowd's Heirs*, 1 *Metc. (Ky.)* 281; *Liter v. Fishback*, 25 *Ky. L. Rep.* 260, 75 *S. W.* 232; *Meddis v. Bull's Admr.*, 13 *Ky. L. Rep.* 767, 18 *S. W.* 6. See *Warren v. Union Bank*, 28 *App. Div.* 7, 61 *N. Y. Supp.* 27; *Blanchard v. Blanchard*, 33 *Misc.* 284, 67 *N. Y. Supp.* 478.

[a] No interest in lands to which infants are entitled, can be sold until the conditions required by statute are complied with. *Barrett v. Churchill*, 18 *B. Mon. (Ky.)* 287; *Carpenter v. Strother's Heirs*, 16 *B. Mon. (Ky.)* 289, 290.

[b] In *Lucas v. Davis*, 17 *Ky. L. Rep.* 486, 21 *S. W.* 304, the court said: "The statutes regulating proceedings of this kind are clear and explicit. They are designed for the protection of a class of persons who are unable to protect themselves and unless rigidly adhered to by the courts these

persons who are the peculiar objects of the chancellor's care, will constantly be made the victims of injustice and wrong."

[c] Powers conferred by legislative act upon persons to sell and convey the interests of minors in lands must be strictly exercised. *Garth v. Arnold*, 115 *Fed.* 468, 53 *C. C. A.* 200.

40. *Conrad v. Conrad*, 152 *Ky.* 422, 153 *S. W.* 740; *Bennett v. Bennett*, 143 *Ky.* 380, 136 *S. W.* 878; *Kelley v. Muir*, 17 *Ky. L. Rep.* 167, 30 *S. W.* 653.

41. *O'Reilly v. King*, 28 *How. Pr. (N. Y.)* 408.

42. *Lessee of Stall v. Macalester*, 9 *Ohio* 19; *Talley v. Starke's Admx.*, 6 *Gratt. (Va.)* 339.

[a] "The commissioner, moreover, acted indiscreetly, though not fraudulently, in his manner of conducting the sale. The decree having authorized him to sell the land in one entire tract, or to divide the same and sell it in parcels, with authority to engage the services of a surveyor to enable him to make such division, and having determined to sell in parcels, he ought to have caused them to be laid off, by survey, prior to the sale; instead of attempting to describe them orally and by reference to a general plat, at the time of the sale; in which description he fell into errors, the consequence of which was, . . . the appellants (purchasers) were misled to their prejudice . . . The appellants, . . . ought, therefore, to be relieved from their said purchases." *Talley v. Starke's Admx.*, 6 *Gratt. (Va.)* 339.

[b] If it is made to appear to the court that it will be more for the interest of the ward to sell the real

the land described in the order of sale will not vitiate the sale of a portion.⁴³

(IV.) Public or Private Sale.—In some states the property of an infant must be sold at a public sale to the highest bidder,⁴⁴ though in many jurisdictions the court has power to order the property to be sold at a private sale,⁴⁵ in which case the matter lies in the discretion

estate at private sale, it may authorize the guardian to sell in parcels. *Arrowsmith v. Gleason*, 129 U. S. 80, 2 Sup. Ct. 237, 32 L. ed. 639, quoting laws of Ohio.

[c] A decree or order for the sale of "the real estate described in the petition" justifies the sale of all the estate so described. Under such an order or decree, if but part be sold and report made and confirmed, no further proceedings being had, it is competent under the same order to proceed subsequently and sell the residue. *Stow v. Kimball*, 28 Ill. 93.

[d] Confirmation cures error in not selling lands in the order named in the license. *Emery v. Vroman*, 19 Wis. 689, 88 Am. Dec. 726.

43. *Osgood v. Bowles*, 18 Colo. 433, 33 Pac. 169.

44. *Hobart v. Upton*, 2 Sawy. 302, 12 Fed. Cas. No. 6548; *Dineen v. Hall*, 112 Ky. 272, 65 S. W. 445, 60 S. W. 799; *Clark v. Stanhope*, 129 Ky. 521, 59 S. W. 859.

[a] Sale is void unless made at public auction, after proper notice of time and place thereof. *Hobart v. Upton*, 2 Sawy. 302, 12 Fed. Cas. No. 6548, Laws of Oregon.

[b] In Alabama, the court of probate can only authorize a public sale by a guardian in the manner prescribed by the statute; a private sale under an order of the court, though sanctioned by the court, passes no title as against the ward. *Hudson v. Helmes*, 23 Ala. 745.

[c] In Florida, by the statutes, county judges were empowered to authorize a guardian to sell the estate of his ward "under such conditions as the interests of said infant may, in the opinion of said judge, seem to require." The judge made a general unconditional order permitting the guardian to sell, and the guardian sold the property at private sale. It was held that a private sale was not authorized by the order, and was wholly illegal. In the absence of a special order to sell at private sale, if the property

could be sold at all under the order, the sale should have been public. *Lenders v. Thomas*, 25 Fla. 318, 17 So. 633, 18 Am. St. Rep. 266.

[d] Georgia.—A guardian has no authority, even under the decree or order of the court, to sell his infant ward's property at private sale. *Home Land Co. v. Eastman*, 80 Ga. 883, 600, 6 S. E. 586; *Dawning v. Penbody*, 56 Ga. 49, 42.

[e] A private contract with a guardian for the purchase of the ward's land at a stipulated price is contrary to public policy. Although, according to the evidence, the price agreed upon was not only fair, but in excess of the value of the property, still, the rule of law is violated. *Dawning v. Penbody*, 56 Ga. 49, 42.

[f] In Kentucky as every sale made under an order of court must be public and open reasonable credits, to be fixed by the court, the court has no power to authorize its commissioners to make a private sale or to sell for cash. *Lathell v. Wells*, 97 Ky. 84, 50 S. W. 10.

[g] Louisiana.—The property of a minor cannot be sold at a private sale to pay debts, although it may be sold at private sale to effect a partition. *Orsillion v. Roy*, 125 La. 514, 41 So. 576.

[h] A private sale of minor's property to pay debts is void, and it is none the less so because a family meeting advised it and the judge homologated the proceedings of the meeting. *Blair v. Dwyer*, 110 La. 322, 34 So. 464.

[i] Court may adopt and confirm private sale. "With the assent of the purchasers, if found beneficial to the infants, open full and scrupulous investigation." *Ex parte Kirkman*, 2 Head (Tenn.) 127.

45. U. S.—*Arrowsmith v. Gleason*, 129 U. S. 80, 2 Sup. Ct. 237, 32 L. ed. 639 (quoting laws of Ohio); *Boyd v. Willard*, 80 Fed. 659, Ark.—*Ellinger v. Johnson*, 28 Ark. 471; Ind.—*Blair v. Dwyer*, 110 La. 322, 34 So. 464.

of the court.⁴⁶ But an order for a private sale does not authorize a public sale of the property.⁴⁷

Where the statute conferring the power to sell, and the order of the court carrying it out, are silent as to the manner of making the sale it is left to the discretion of the person authorized to make the sale.⁴⁸

(V.) **Sale by Whom Made.**—The sale, in the eye of the law, is regarded as being made by the court.⁴⁹ The court may direct that the sale be made by the guardian or guardians,⁵⁰ or commissioner appointed by the court,⁵¹ or other suitable person,⁵² but a father cannot be authorized to sell the lands of his minor child until he has been appointed guardian;⁵³ and one who is a part owner with the infant in the property ought not to be appointed,⁵⁴ though it has been held that the power to sell may be granted to anyone, even to the infants themselves.⁵⁵

ington *v.* Dunkin, 41 Ind. 515; Thompson *v.* Doe, 8 Blackf. 336. **La.**—Blandin *v.* Blandin, 126 La. 819, 53 So. 15; Durand *v.* Dubuclet, 24 La. Ann. 155. **Me.**—*Ex parte* Cousins, 5 Me. 240. **Mo.**—Pattee *v.* Thomas, 58 Mo. 163; McVey *v.* McVey, 51 Mo. 406; Robert *v.* Casey, 25 Mo. 584. **N. C.**—Barcello *v.* Haggood, 118 N. C. 712, 24 S. E. 124; Rowland *v.* Thompson, 73 N. C. 504. **Pa.**—Gilmore *v.* Rodgers, 41 Pa. 120. See Morrison *v.* Nellis, 115 Pa. 41, 7 Atl. 768. **Va.**—See Cooper *v.* Hepburn, 15 Gratt. 551.

[a] Where the court directed the sale to be made, and that it should be "first advertised at the court-house and three other public places," and no bid be received less than \$125, and that the guardian should make the conveyance, it was held that the terms of the decree required a public sale. *In re* Dickerson, 111 N. C. 108, 15 S. E. 1025.

[b] Where the guardian sells at a private sale, he sells at his peril, if he sells for less than a fair price. Holbrook *v.* Brooks, 33 Conn. 347.

[c] A license to sell the land of a minor may be granted in the alternative for public or private sale. *Ex parte* Cousins, 5 Me. 240.

[d] A decree directing a private sale, cannot be impeached collaterally, if the court has jurisdiction. Gilmore *v.* Rodgers, 41 Pa. 120. See Spotswood *v.* Pendleton, 4 Call (Va.) 514.

16. Fleming *v.* Johnson, 26 Ark. 421; Barcello *v.* Haggood, 118 N. C. 712, 24 S. E. 124.

17. Mallard *v.* Dejan, 45 La. Ann. 1270, 14 So. 238.

48. McComb *v.* Gilkey, 29 Miss. 146.

49. Titman *v.* Riker, 43 N. J. Eq. 122, 10 Atl. 397.

[a] The sale is really made by the court—it is a part of the judicial proceedings in the case. Blossom *v.* Milwaukee & C. R. Co., 3 Wall. (U. S.) 196, 18 L. ed. 43; Williamson *v.* Berry, 8 How. (U. S.) 495, 546, 12 L. ed. 492; Gager *v.* Henry, 5 Sawy. 237, 9 Fed. Cas. No. 5,172, laws of Oregon.

50. Titman *v.* Riker, 43 N. J. Eq. 122, 10 Atl. 397.

[a] The guardian is clearly the most proper person to exercise the power. McComb *v.* Gilkey, 29 Miss. 146.

[b] **General Guardian.**—If the infant have a general guardian, such general guardian will be appointed special guardian to make the sale, unless special reasons for not doing so be shown to the court. Matter of Wilson, 2 Paige Ch. (N. Y.) 412. See Matter of Lansing, 3 Paige Ch. (N. Y.) 265.

51. Ind.—McKeever *v.* Ball, 71 Ind. 393. Mass.—Pope *v.* Jackson, 11 Pick. 113. Va.—Talley *v.* Starke's Admx., 6 Gratt. 339.

See Bulow *v.* Witte, 3 S. C. 308.

52. Pope *v.* Jackson, 11 Pick. (Mass.) 113.

[a] A husband cannot be appointed guardian to sell the property of his infant wife. Matter of Lansing, 3 Paige Ch. (N. Y.) 265; Matter of Whittaker, 4 Johns. Ch. (N. Y.) 378.

53. Guynn *v.* McCauley, 32 Ark. 97, 104.

54. Matter of Tillotsons, 2 Edw. Ch. (N. Y.) 113.

55. McComb *v.* Gilkey, 29 Miss. 146.

Delegation of Power.—While the guardian need not act as auctioneer and may authorize someone to act for him in that capacity,⁵⁶ yet the law charges him with the general supervision and conduct of the sale, and his authority in that regard cannot be delegated.⁵⁷

(VI.) Time and Place of Sale.—(A.) **TIME OF SALE.**—The sale if not made at the time required by law, is illegal, and should be set aside by the court,⁵⁸ but confirmation will cure slight errors as to the date of the sale to protect a bona fide purchaser.⁵⁹

Adjourning Sale.—The sale may be adjourned for good cause by the guardian,⁶⁰ trustee making the sale,⁶¹ or on order of court.⁶²

(B.) **PLACE OF SALE.**—The sale must be made at the place specified in the decree ordering the sale.⁶³ In some jurisdictions the sale should

56. **Ill.**—*Kellogg v. Wilson*, 89 Ill. 357; *Sebastian v. Johnson*, 72 Ill. 282, 22 Am. Rep. 144. **Neb.**—*Levara v. McNeny*, 5 Neb. (Unof.) 318, 98 N. W. 679. **Pa.**—*Schwartz's Estate*, 14 Pa. 42; *Vandever v. Baker*, 13 Pa. 121.

[a] **Employment of Real Estate Agent.**—The court may with the consent of the guardian of infants, if satisfied that it is for their interest, order the employment of real estate agents to assist in the sale. *Goodlett v. Campbell*, 1 Tenn. Ch. 200.

[b] **Guardian Need Not Make Sale Personally.**—In *Myers v. McGavock*, 39 Neb. 843, 866, 58 N. W. 522, 42 Am. St. Rep. 627, it was argued that the guardian should make the sale personally. The court said: "We have not been cited to any authority or statute showing that a sale of real estate made by a guardian is void because the guardian did not personally attend or cry the sale. It certainly cannot be said that because the statute says that a guardian may file his petition and procure the order of a court under certain circumstances for the sale of his ward's real estate, that therefore the guardian must draw the petition and the other papers in such proceeding and attend to it personally and cannot do the same by an attorney; and we see no good reason why a guardian may not entrust the conduct of the sale of the real estate which he is making to his attorney or an auctioneer; and we are quite clear that this sale is not void because the attorney of the guardian actually made or cried the sale of the property."

57. *Levara v. McNeny*, 5 Neb. (Unof.) 318, 98 N. W. 679.

58. *Butler v. Stephens*, 77 Tex. 599,

14 S. W. 202; *Brown v. Christie*, 27 Tex. 73, 84 Am. Dec. 607. See also *Robert v. Casey*, 25 Mo. 584.

59. *Conover v. Musgrave*, 68 Ill. 58.

60. *Gager v. Henry*, 5 Sawy. 237, 9 Fed. Cas. No. 5,172. In this case the guardian adjourned the sale for four weeks, at which time it was made and it was duly confirmed by the court. The sale was held valid despite the fact that the statute provided for postponements of not more than one week at a time, and not more than four weeks in all.

61. In *Richards v. Holmes*, 18 How. (U. S.) 143, 147, 15 L. ed. 304, a trustee was authorized to sell real property on thirty days' notice. At the time and place designated, the sale was adjourned for want of bidders. The court held the subsequent sale valid, because there was an implied power in the trustee to adjourn the sale.

62. "The court possessed full power to extend the time for the sale. There is nothing in the statute prohibiting this, and cases might arise in which it would be the duty of the court to do so." *Butler v. Stephens*, 77 Tex. 599, 14 S. W. 202.

63. *Brown v. Christie*, 27 Tex. 73, 84 Am. Dec. 607.

[a] The decree directing the sale to be made upon the premises, the commissioner acts irregularly in making it at a different place, especially after advertising that it would be made on the premises. He should report to the court that it could not be made there for want of bidders, and obtain instructions for his future action. *Talbot v. Starke's Admx.*, 6 Gratt. (Va.) 539.

take place at the court house door;⁶⁴ and a sale under an order granting to a guardian leave to sell "on the premises" is invalid;⁶⁵ but in others there is no such requirement.⁶⁶

(VII.) Reception of Bids. — Much liberality should be indulged in the manner of receiving bids, to the end that the estate of the minor be made to bring the best possible price.⁶⁷

(VIII.) Who May Purchase. — Purchase by Guardian. — The authorities are in conflict as to whether a guardian may become the purchaser, some jurisdictions permitting him to purchase.⁶⁸ In such case the guardian must act fairly, with the utmost good faith.⁶⁹ In other

64. *Casper v. Henry*, 5 Sawy. 237, 9 Fed. Cas. No. 5,172 (Craws of Oregon); *Horne v. Rodgers*, 113 Ga. 224, 38 S. E. 768.

65. *Horne v. Rodgers*, 113 Ga. 224, 38 S. E. 768.

66. *Williamson v. Warren*, 55 Miss. 199.

[a] In Louisiana the sale must be made at the place where the family meeting has decided it must advance. *Case of Florio*, 9 Mart. (La.) 461.

67. *Le re Bokanau*, 37 Okla. 560, 123 Pac. 44.

68. Cal. — *San Braly v. Reese*, 51 Cal. 447. Ky. — *Clements v. Hauser*, 9 Ky. 12. Rev. 173. 4 S. W. 313. N. C. — *Lee v. Howell*, 60 N. C. 200; *Lee v. Hassell*, 68 N. C. 212. S. C. — *See McDonald v. McGowan*, 4 Deason. Eq. 386. Tenn. — *Elrod v. Lancaster*, 2 Head 571; *Blackmore v. Shelby*, 8 Humph. 436.

[a.] The guardian having executed the premises does not affect the proceedings nor can they on that account be deemed fraudulent. It was a public sale to the highest bidder, authorized by statute and under the sanction and inspection of a court. Without circumstances of abuse fraud, therefore to support such an allegation the deed is valid to him. *Jackson v. Wooley*, 11 Johns. (N. Y.) 446. But see *Dugan v. Sawyer*, 12 App. Div. 244, 43 N. Y. Supp. 303.

[b.] Good faith and an adequate consideration under the eye of the court makes a valid sale. *March v. March*, 5 Okla. Dec. (Ogden) 280.

[c.] In *Lee v. Howell*, 60 N. C. 200, the court said: "Why may not the guardian purchase at such a sale? Must he stand by and see the property sold at an undue value, or throw it into the lot of any ready buyer? It has been reported to court, and thus until the court is satisfied that the land brought

a fair price. Why then may not the guardian become a purchaser? What reason is there to deny him the right to purchase? Is it possible that after a sale as in this case, and after by proceeding in court the owners have received the proceeds of the sale and appropriated the same to their own use, that they can turn round and claim title to the land? Surely there is no principle of law, justice or common sense that would authorize such a proceeding."

69. *Elrod v. Lancaster*, 2 Head (Tenn.) 571; *Blackmore v. Shelby*, 8 Humph. (Tenn.) 436.

[a] "One standing in the relation of guardian will not be permitted to place himself in an attitude of hostility to the interests of his wards; nor to derive any benefit to himself at their loss; and if a purchase, by him, of the property of the wards, during the continuance of such relation, can be permitted to stand, under any circumstances, it will only be upon his showing, clearly, that he acted in the utmost good faith, that the price given was the full value, and that the transaction was for the benefit of the wards." *Mann v. McDonald*, 10 Humph. (Tenn.) 275.

[b] A guardian sold his ward's land by auction, being himself the auctioneer, and employed an agent to bid on his account, and there being a question whether the bidding of his agent or a higher bidding by another person was the last before the hammer was down, the guardian declared it in favor of his agent. The court in declining against the guardian said: "The conduct of the guardian was sinister, not honest and disadvantageous to his ward. He was bound by his duty and oath to obtain the best price; and at the time of the sale a better price was offered. The guardian, acting fairly,

states the guardian cannot either directly or indirectly become the purchaser,⁷⁰ and it is immaterial whether he act in good or bad faith.⁷¹

Purchase by Guardian Ad Litem.—The general rule seems to be that a guardian ad litem or a next friend of an infant cannot become the purchaser of his ward's property at a sale decreed by the court,⁷² although some courts hold that he may provided he acts in good faith.⁷³

Sale Void or Voidable.—At common law the effect of a purchase by a guardian is to render the sale voidable only,⁷⁴ and it cannot be

should have waived his right to his bidding, in favor of the party claiming to offer more, so long as any question could be made about it." *Hayward v. Ellis*, 13 Pick. (Mass.) 272.

70. Ala.—*Callaway v. Gilmer*, 36 Ala. 354. Cal.—*Cadley v. Greenfield*, 62 Cal. 602. Del.—*Willey v. Tisdal*, 5 Del. Ch. 194; *Downs v. Richards*, 4 Del. Ch. 416. Ind.—*Gwin v. Williams*, 30 Ind. 374. Kan.—*Fraser v. Jenkins*, 10 Kan. App. 558, 63 Pac. 459, *affirmed* in 64 Kan. 615, 68 Pac. 24. La.—*Aronstein v. Irvine*, 48 La. Ann. 304, 19 So. 131. Mass.—*Walker v. Waller*, 101 Mass. 169. Minn.—*Brown v. Fischer*, 77 Minn. 1, 79 N. W. 494. Miss.—*Brockett v. Richardson*, 61 Miss. 766; *Scott v. Freedland*, 7 Smed. & M. 499. Mo.—*Reel v. Hampton*, 38 Mo. 435. Tex.—*Hampton v. Hampton*, 9 Tex. Civ. App. 497, 29 S. W. 423.

[a] A private contract made with a guardian for the purchase of the ward's land for a stipulated price, at a future public sale, is contrary to public policy. *Rame Land Co. v. Eastman*, 50 Ga. 683, 6 S. E. 584; *Downing v. Penabody*, 56 Ga. 40. Compare *Hunt v. Anderson*, 69 Neb. 702, 96 N. W. 629.

[b] The husband of the guardian cannot become a purchaser. *Fraser v. Jenkins*, 10 Kan. App. 558, 63 Pac. 459; *Sturkey v. Hammer*, 1 Bast. (Tenn.) 438, holds that a sale is void, if the purchaser be a guardian or next friend.

[c] The guardian takes the property subject to a constructive trust for the ward. *Downs v. Richards*, 4 Del. Ch. 416. See also *Reel v. Coursey*, 26 Miss. 511.

[d] A tax deed made upon the sale of a minor's land to his guardian for delinquent taxes conveys no title adverse to his ward. *Inhaus v. Mann*, 76 Iowa 713, 30 N. W. 823.

71. *Fraser v. Jenkins*, 10 Kan. App. 558, 63 Pac. 457; *Brockett v. Richardson*, 61 Miss. 766.

72. *Gallatin v. Cunningham*, 9 Cow. (N. Y.) 361; *Dugan v. Shackey*, 89 App. Div. 161, 85 N. Y. Supp. 778; *Masie v. Matthews*, 12 Ohio 351.

[a] Where the guardian ad litem acted as purchasing agent for others and not for himself, the sale was held void. *Lefevre v. Laraway*, 22 Barb. (N. Y.) 167.

[b] The burden of proof is upon the guardian ad litem to show that he purchased the land for the infant and not for himself in a partition sale. *O'Donoghue v. Boies*, 92 Hun 3, 37 N. Y. Supp. 961.

73. *Mitchell v. Berry*, 1 Mete. (Ky.) 602; *Blackmore v. Shelby*, 8 Hensph. (Tenn.) 439. *Contra*, *Collins v. Smith*, 1 Head (Tenn.) 251.

[a] A sale is not void because the purchaser is guardian ad litem and clerk of the court, the infant having been represented by a trustee, who made defense for him. *Spencer v. Milliken*, 4 Ky. L. Rep. 856.

74. Cal.—*Boyd v. Blackman*, 29 Cal. 19. Ga.—*Wallace v. Jones*, 23 Ga. 419, 21 S. E. 89. Minn.—*White v. Iselin*, 26 Minn. 487, 5 N. W. 359. N. Y.—*Dugan v. Denyse*, 13 App. Div. 214, 43 N. Y. Supp. 308.

[a] If the guardian purchases either directly or indirectly, the sale is voidable. *Wyman v. Hooper*, 2 Gray (Mass.) 141.

[b] Ratification Implied.—Where property of a ward has been purchased by his guardian, and the ward on arriving at age, receives the value of the property sold, with a full knowledge of what had been done by his guardian, it is an affirmation of the purchase by the guardian and vests property in him. *Scott v. Freedland*, 7 Smed. & M. (Miss.) 409.

[c] Purchase On Behalf of Guardian.—(1) A guardian who petitions for the sale of his ward's estate, gets an order of sale, acts as the agent of the clerk and master in making it, cries

avoided as against a bona fide purchaser.⁷⁵ But in some jurisdictions such a purchase renders the sale void.⁷⁶

Purchase by Other Persons.—The judge making the decree for the sale of the infant's lands cannot become, directly or indirectly, a purchaser of the property.⁷⁷

The spouse of the guardian is not ipso facto debarred from purchasing the property,⁷⁸ and it has been held that an administrator of the estate of the infant's ancestor, may be the purchaser.⁷⁹ The court has the power, with the consent of the reported purchaser, to substitute another person in his place.⁸⁰

(IX.) Terms of Sale.—The sale must be made upon such terms as

the sale, takes the bonds, and gives information to the clerk and master, on which the report is made and sale confirmed will not be allowed to hold the land of his ward, purchased by another for him at such sale. *Patton v. Thompson*, 55 N. C. 285. (2) But in *Hoskins v. Wilson*, 20 N. C. 243, it was held that if another purchases at the guardian's sale for the guardian's benefit, but takes a conveyance to himself and afterwards conveys to the guardian, the purchase will not be void at law. And even in equity such sales are not ipsa jure, void; but the trustee purchases subject to the equity of having the sale set aside, if the cestui que trust in a reasonable time, chooses to say he is not satisfied with it.

75. *Ind.*—*Gwinn v. Williams*, 30 Ind. 374. *Ky.*—*Clements v. Ramsey*, 9 Ky. L. Rep. 172, 4 S. W. 311. *Mass.*—*Wyman v. Hooper*, 2 Gray 141. *Minn.*—*White v. Iselin*, 26 Minn. 487, 5 N. W. 359. *Tex.*—*Hampton v. Hampton*, 9 Tex. Civ. App. 497, 29 S. W. 423.

[a] If a guardian, who has obtained license to sell the real estate of his wards, purchases the same himself, either directly or indirectly, the sale is voidable only by the wards, and as against the guardian, or a purchaser claiming under him with knowledge of the circumstances of the sale; but not as against one to whom before it is so avoided, he conveys or mortgages the estate, for a valuable consideration, and without notice that it had been bought at the guardian's sale for the guardian's benefit. *Wyman v. Hooper*, 2 Gray (Mass.) 141.

76. *Forbes v. Halsey*, 26 N. Y. 53; *Dugan v. Denyse*, 13 App. Div. 214, 43 N. Y. Supp. 308. See *Collins v. Smith*, 1 Head (Tenn.) 251; *Blackmore v. Shelby*, 8 Humph. (Tenn.) 439.

[a] Where purchase is absolutely void, guardian can convey no title to a bona fide purchaser. *O'Donoghue v. Boies*, 92 Hun 3, 37 N. Y. Supp. 961.

[b] **Reconveyance to Guardian.**—No title passes by the sale and conveyance by a guardian at guardian's sale of the land of his ward, and its immediate reconveyance to him individually by the purchaser for the same consideration. *Winter v. Truax*, 87 Mich. 324, 49 N. W. 604; *McKay v. Williams*, 67 Mich. 547, 35 N. W. 159. But see *Sumner v. Sessoms*, 94 N. C. 371, holding that where the person making a sale of land purchases himself directly, the sale is void, but that if he purchases through an agent, who afterwards conveys to him, the legal title passes, subject to the right of the parties interested, to divest it by a proper proceeding.

77. *Hoskinson v. Jaquess*, 54 Ill. App. 59.

78. *Strauss v. Bendheim*, 162 N. Y. 469, 56 N. E. 1007 (*reversing* 44 App. Div. 82, 60 N. Y. Supp. 398), holding that the conduct of a special guardian of infants in selling their real estate to his wife is not to be commended; but where it appeared that the sale was confirmed by the court in which the proceedings were instituted, with full knowledge of all the facts, the title cannot after the lapse of twenty-six years and long after all of the infants have become of age, be questioned.

[a] **Purchase by Husband of Guardian.**—In *Gregory v. Lenning*, 54 Md. 51, the court held that in the absence of fraud or collusion, there was no disability in the husband of the guardian of the infants to become the purchaser.

79. *Hurt v. Long*, 90 Tenn. 445, 16 S. W. 968.

80. *Williams v. Harrington*, 33 N. C. 616.

are authorized by law and the court may direct,⁸¹ and purchasers are presumed to have knowledge of the limitations.⁸²

In Louisiana a family meeting is required to be held to fix the terms and conditions of the sale,⁸³ but in a suit for partition if the representative of the infant fails to have the terms fixed by a family meeting, the court may order the sale of the property, so far as the interest of the minors is concerned, to be made for cash.⁸⁴

Consideration.—The sale can be made at not less than the price fixed by the order of sale.⁸⁵

c. *Report and Confirmation.*—(1.) **In General.**—The person making the sale should file a report thereof with the court and after inquiry as to the manner and conduct of the sale, the court, if satisfied, should enter a decree confirming the same.⁸⁶ Confirmation of a guardian's

81. *Clark v. Stanhope*, 109 Ky. 521, 59 S. W. 856; *In re Axtell*, 95 Mich. 244, 54 N. W. 889. See *Lattrell v. Wells*, 97 Ky. 84, 30 S. W. 10, holding that although the court by its judgment authorized the sale to be made either for cash or on certain specified credits, which were within those prescribed by law, and the sale was in fact made on credit, yet as the commissioner sold upon longer credits than was authorized by the judgment, this might have been a valid ground of exception for the purchaser if he had chosen to avail himself of it.

82. *In re Axtell*, 95 Mich. 244, 54 N. W. 889.

83. *Blandin v. Blandin*, 126 La. 819, 53 So. 15; *Tobin v. United States Safe Dep. & Sav. Bank*, 115 La. 366, 370, 39 So. 33; *Mayronne v. Waggaman*, 30 La. Ann. 974; *Richard v. Deuel*, 11 Rob. (La.) 508, 509.

A family meeting is the tribunal to pass primarily upon the necessity for the sale of the minor's property. *Succession of Hawkins*, 35 La. Ann. 591, 593. See *Lemoine v. Ducote*, 45 La. Ann. 857, 12 So. 939.

84. *Beenel v. Stewart*, 117 La. 744, 42 So. 256.

[a] The parish court under the constitution of 1868, was competent to grant orders for family meetings and homologate their proceedings in such cases, and a sale made in accordance with the judgment of homologation passed the title to the minor's property. *Dauterive v. Shaw*, 47 La. Ann. 882, 889, 17 So. 345.

85. *In re Axtell*, 95 Mich. 244, 54 N. W. 889.

[a] **Less Than Appraisement.** When the sale is made to pay debts,

the property may be sold for less than the appraisement. *Valderes v. Bird*, 10 Rob. (La.) 396, 398.

[b] **Discretion of court to order sale on credit** or for cash, subject to review in appellate court. *Tennent's Heirs v. Pattons*, 6 Leigh (Va.) 196.

[c] **Confirmation in Confederate Money.**—*Chappell v. Doe*, 49 Ala. 153. See also *Latta v. Vickers*, 82 N. C. 501; *Dixon v. McCue's Admx.*, 21 Gratt. (Va.) 373.

86. **Ark.**—*Greer v. Anderson*, 62 Ark. 213, 35 S. W. 215. **Cal.**—*In re Jack's Estate*, 115 Cal. 203, 46 Pac. 1057. **Tex.**—*Carroll v. Booth*, 2 Tex. Unrep. 326.

See *Mich.*—*Persinger v. Jubb*, 52 Mich. 304, 17 N. W. 851. **Miss.**—*Hanks v. Neal*, 44 Miss. 212. **Tenn.**—*Crawford v. Woodward*, 1 Tenn. Ch. App. 274, 311.

[a] **Mistake in Report.**—Where there is a probable, if not an evident, mistake in the report it should not be held conclusive upon the guardian. Upon principles of equity, he should be permitted to correct it by satisfactory proof. *In re Steele*, 65 Ill. 322.

[b] **The statute of limitations** does not begin to run until after confirmation. *Morrow v. James*, 69 Ark. 539, 64 S. W. 269.

[c] **Signing of Report by Guardian.** A guardian's sale is not invalidated by the fact that the guardian has not signed the report of sale; the defect may be supplied by seasonable amendment under the order of the probate court. *Ellsworth v. Hall*, 48 Mich. 407, 12 N. W. 512.

[d] **Receipt of Purchase Price Before Confirmation.**—Until confirmation of the sale by the court, the guardian has no legal authority to receive the

sale rests in the sound discretion of the court,⁸⁷ this discretion, however, must be exercised according to established principles.⁸⁸

(II.) **Necessity for Report and Confirmation.**—A report and confirmation of the sale are necessary to complete the sale and pass the title, and cannot be dispensed with,⁸⁹ and equity will not interfere with

purchase money, and if the guardian should receive the purchase money he holds it as the mere depository of the payer of the money. *State v. Cox*, 62 Miss. 786. But see *Mason v. Tinsley*, 1 Tenn. Ch. 154, 156.

87. *In re Jack's Estate*, 115 Cal. 203, 46 Pac. 1057; *Ayers v. Baumgarten*, 15 Ill. 444.

88. *Ayers v. Baumgarten*, 15 Ill. 444.

89. **U. S.**—*Bank of United States v. Ritchie*, 8 Pet. 128, 8 L. ed. 890. **Ark.**—*Alexander v. Hardin*, 54 Ark. 480, 16 S. W. 264; *Ambleton v. Dyer*, 53 Ark. 224, 13 S. W. 926; *Reid v. Hart*, 45 Ark. 41; *Guynn v. McCauley*, 32 Ark. 97. **Cal.**—*In re Jack's Estate*, 115 Cal. 203, 46 Pac. 1057. **Ill.**—*Miller v. McMannis*, 104 Ill. 421; *Musgrave v. Conover*, 85 Ill. 374; *Young v. Dowling*, 15 Ill. 482; *Rawlings v. Bailey*, 15 Ill. 178; *Young v. Keogh*, 11 Ill. 642. **Ind.**—*Hammann v. Mink*, 99 Ind. 279; *Maxwell v. Campbell*, 45 Ind. 360. **Ia.**—*Wade v. Carpenter*, 4 Iowa 361. **Mich.**—*Hunt v. Stevens*, 174 Mich. 501, 140 N. W. 992; *People v. Judge of Wayne County Circ. Ct.*, 19 Mich. 296. **Minn.**—*Myrick v. Coursalle*, 32 Minn. 153, 19 N. W. 736. **Miss.**—*Learned v. Matthews*, 40 Miss. 210. **Mo.**—*Bone v. Tyrrell*, 113 Mo. 175, 20 S. W. 796; *Valle v. Fleming*, 19 Mo. 454, 61 Am. Dec. 566. **N. J.**—*Titman v. Riker*, 43 N. J. Eq. 122, 10 Atl. 397. **N. Y.**—*Ellwood v. Northrup*, 106 N. Y. 172, 12 N. E. 590; *Stilwell v. Swarthout*, 81 N. Y. 109; *Battell v. Torrey*, 65 N. Y. 294; *Aldrich v. Funk*, 48 Hun 367, 1 N. Y. Supp. 541; *In re Whitaker*, 4 Johns. Ch. 378. **N. C.**—*In re Dickerson*, 111 N. C. 108, 15 S. E. 1025, citing *England v. Garner*, 90 N. C. 197; *Latta v. Vickers*, 82 N. C. 501; *Mebane v. Mebane*, 80 N. C. 34; *Brown v. Coble*, 76 N. C. 391. **Tex.**—*Harrison v. Ilgner*, 74 Tex. 86, 11 S. W. 1054; *Swenson v. Seale* (Tex. Civ. App.), 28 S. W. 143. **Va.**—*Daniel v. Leitch*, 13 Gratt. 195.

But see *Stall v. Macalester*, 9 Ohio 19.

[a] *In Bank of United States v. Ritchie*, 8 Pet. (U. S.) 128, 129, 8 L. ed. 890, Chief Justice Marshall deliv-

ering the opinion of the court said: "The eighth section of the law which authorizes the sale of real estate descending to minors, enacts, 'that all sales made by the authority of the chancellor under this act, shall be notified to, and confirmed by the chancellor, before any conveyance of the property shall be made.' This provision is totally disregarded. The sale was never confirmed by the court; yet the conveyance has been made. It is a fatal error in the decree, that it directs the conveyance to be made on the payment of the purchase money, without directing that the sale shall first 'be notified to, and approved by' the court."

[b] *In Stilwell v. Swarthout*, 81 N. Y. 109, it was held that an omission on the part of the administrators to report a sale to the surrogate, and to obtain an order confirming the report prior to a conveyance to the purchaser at the sale, is a fatal defect, and this defect is not cured by the provisions of the act "for the protection of purchasers of real estate upon sale made by order of surrogate." (§3, ch. 82, Laws of 1857, as amended by ch. 260, Laws of 1869).

[c] A sale under a surrogate's order for the sale of real estate, whose jurisdiction was special and limited, held void for want of confirmation. *Rea v. McEachron*, 13 Wend. (N. Y.) 465, 28 Am. Dec. 471. Same as to a mortgage. *Battell v. Torrey*, 65 N. Y. 294.

[d] **Approval of sale and deed by clerk**, see *Bunce v. Bunce*, 59 Iowa 533, 13 N. W. 705.

[e] **In Michigan under Comp. Laws**, 1857, §3116, confirmation of the sale is not necessary to make it valid. *Blanchard v. De Graff*, 60 Mich. 107, 26 N. W. 849. See, however, *Hunt v. Stevens*, 174 Mich. 501, 140 N. W. 992; *Winslow v. Jenness*, 64 Mich. 84, 30 N. W. 905; *Jenness v. Smith*, 58 Mich. 280, 25 N. W. 191.

[f] **The purchaser at an unapproved guardian's sale** is liable for rents and profits, where he takes possession of

the statutory requirement that a sale be reported and confirmed.⁹⁰

(III.) **Time for Confirmation.** — (A.) **PREMATURE CONFIRMATION.** — The fact that a sale is prematurely confirmed in the probate court does not make it invalid;⁹¹ though a judgment confirming a sale rendered on the same day the petition was filed and before the parties were brought before the court is premature and without jurisdiction.⁹²

(B.) **DELAY IN CONFIRMATION.** — Long delay in the confirmation of the sale will not render it void where such delay was not owing to any defect or bad faith in the action of the guardian;⁹³ delay has, however, been held to render confirmation a nullity.⁹⁴

(IV.) **Objections to Confirmation.** — Before confirmation is made all the objections within the limits of error, mistake, misunderstanding and misrepresentation as to the terms and manner of the sale are open for consideration.⁹⁵

(V.) **When Sale Subject to Confirmation.** — Unless void, the sale is subject to confirmation or disaffirmance by the court,⁹⁶ a sale which is

the property. *Ambleton v. Dyer*, 53 Ark. 224, 13 S. W. 926.

[g] **The recital of confirmation** in the purchaser's deed is prima facie evidence of the fact, if the deed be properly acknowledged and recorded. *Reid v. Hart*, 45 Ark. 41. Compare *Robertson v. Johnson*, 57 Tex. 62.

90. *Young v. Dowling*, 15 Ill. 482.

[a] Sale will not pass even an equitable title in the absence of confirmation. *Bone v. Tyrrell*, 113 Mo. 175, 20 S. W. 796.

91. *Henry v. McKerlie*, 78 Mo. 416, disapproving earlier decisions.

[a] **As a matter of regularity**, the confirmation of a guardian's sale should precede the execution of the guardian's deed; but if it succeeds it, the confirmation relates to the deed and sanctions it. *Dawson v. Helmes*, 30 Minn. 107, 14 N. W. 462.

[b] "The fact that the order of confirmation was entered before the expiration of the time after the report was filed which the statute requires to elapse between the report and action on it, was merely an error which did not render the order void." *Taffinder v. Merrell*, 95 Tex. 95, 65 S. W. 177, 93 Am. St. Rep. 814; *Greer v. Ford*, 31 Tex. Civ. App. 389, 72 S. W. 73.

[c] **In Mississippi**, the sale should be reported for confirmation at the first term after it is made. *Hoel v. Coursey*, 26 Miss. 511.

92. *Baldrige v. Baldrige* (Ky.), 117 S. W. 253.

93. *In re Harvey*, 16 Ill. 127, in this case the report was made soon after the sale but it was not confirmed

until seventeen years after the sale. But see *Spellman v. Dowse*, 79 Ill. 66.

94. *Hoel v. Coursey*, 26 Miss. 511, in this case it was held that the fact of the sale not being confirmed until more than six years after the sale had been made, and nearly a year after the death of the guardian, was fatal to the sale.

[a] **Where a guardian never reported** a sale of his ward's land to the probate court, but four years after the sale the purchaser presented his deed to the court, by which it was approved, neither the guardian nor the ward being present, there was no valid confirmation of the sale. *Morrow v. James*, 69 Ark. 539, 64 S. W. 269.

95. *Bolgiano v. Cooke*, 19 Md. 375, 391.

[a] The motion for confirmation and order form a part of the original proceedings under which the sale was ordered to be made, and on the hearing of the motion any objection may be urged that might have been made at the next term after the sale. *Spellman v. Dowse*, 79 Ill. 66.

[b] It is no objection to the ratification of a sale made under a decree, that a bill was pending at the time of the sale to vacate the decree, where the grounds for impeaching it are not stated, and it does not appear that any order was passed to restrain the proceedings of the trustee. *Bolgiano v. Cooke*, 19 Md. 375, 396.

96. *Nelson's Heirs v. Lee*, 10 B. Mon. (Ky.) 495.

[a] **The court upon its own motion** has the right to refuse to approve the

voidable being susceptible to confirmation.⁹⁷ The sale must appear in all respects fair and proper, or it cannot receive the sanction of the court.⁹⁸ The court may refuse to confirm the sale where at a re-sale the property will bring a larger price,⁹⁹ where the guardian has

sale if the sale was improperly made, and order a resale. *McCallum v. Chicago Title & Tr. Co.*, 203 Ill. 142, 67 N. E. 823.

[b] **The courts have the power to confirm and make valid a conveyance by an infant feme covert, which may be shown, during her infancy, to be equitable, expedient, or proper, looking to her benefit, but has no such power after such infant feme covert has attained full age.** *Glenn v. Clark*, 53 Md. 580, 601.

[c] **A void sale cannot be confirmed.** *Carnes v. Polk*, 4 Coldw. (Tenn.) 87.

97. *Lampton v. Usher's Heirs*, 7 B. Mon. (Ky.) 57; *Carnes v. Polk*, 4 Coldw. (Tenn.) 87.

98. *Bolgiano v. Cooke*, 19 Md. 375; *Tomlinson v. McKaig*, 5 Gill (Md.) 256, 276.

[a] If a guardian disposes of his ward's property in violation of the direction of the court, the mere fact that the court subsequently allowed the account of the guardian, in which he charged himself with the proceeds of the sale, it not appearing that the court knew that the guardian had disobeyed its orders or the source from which the money charged in the account was derived, cannot be construed as amounting to a confirmation of the unauthorized act of the guardian. *Cox v. Manvel*, 56 Minn. 358, 57 N. W. 1062.

[b] **Sale by Unauthorized Person.** A court of equity has no power to confirm a private sale of an infant's real estate made by an unauthorized person, or to order a commissioner to convey to such person in order that he may convey to his vendee. *Kinslow v. Grove*, 98 Ky. 266, 32 S. W. 933.

[c] **When a court can see injustice will be inflicted by the ratification of a sale upon a party not in default, the sale should not be ratified.** *Bolgiano v. Cooke*, 19 Md. 375; *Penn v. Brewer*, 12 Gill & J. (Md.) 113.

99. **Cal.**—*In re Jack's Estate*, 115 Cal. 203, 46 Pac. 1057. **Ill.**—*McCollum v. Chicago Title & Tr. Co.*, 203 Ill. 142, 67 N. E. 823. **N. C.**—*Sumner v. Sessoms*, 94 N. C. 371. **Pa.**—*Delp's Estate*, 2 Woodw. 241.

[a] **Confirmation will not be refused (1) on the ground alone, that the price was inadequate unless it is clearly made to appear that a resale will realize for the minor a sum substantially larger than that resulting from the sale attacked.** *Stivers v. Stivers*, 236 Ill. 160, 86 N. E. 209. (2) **A resale will not be ordered on an offer of an increased price alone.** *Lefevre v. Laraway*, 22 Barb. (N. Y.) 167.

[b] "The fact that its (the court's) attention was challenged to the fact that the property had been sold for an inadequate sum, by a person who stood ready to pay more upon a re-sale than the property had been sold for, did not divest the probate court of power to decline to approve the sale and order a re-sale in case the sale had been improperly made. We do not hold that an intermeddler may appear in the probate court at any time and object to the confirmation of a guardian's sale solely because he may think the property was sold for too small an amount, but do hold that when a prospective bidder at a re-sale appears in court and offers to make a bid in excess of the amount for which the property was sold, and as evidence that his proposed bid is made in good faith deposits in court, in cash, an amount in excess of the amount of his proposed bid, upon the objection of such proposed bidder the court may properly investigate the question of the propriety of approving the sale, and if it appears that there is legal objection to the approval of the sale, may disapprove the same and order a resale of the property." *McCallum v. Chicago Title & Tr. Co.*, 203 Ill. 142, 67 N. E. 823.

[c] **Opening the Biddings.**—(1) The English practice of opening the biddings before the confirmation of the report of the sale, on the offer of a reasonable advance upon the sum bid at the sale and the payment of the expenses of the purchaser (*Ayers v. Baumgarten*, 15 Ill. 444, *citing*, *Lefevre v. Laraway*, 22 Barb. (N. Y.) 167; *Upton v. Feners*, 4 Ves. Jr. 700, 31 Eng. Reprint 362; *Anonymous*, 6 Ves. Jr. 513, 31 Eng. Reprint 1171; *Macclesfield v.*

neglected his trust,¹ or if the necessity which seemed to exist when the sale was ordered shall have ceased to exist.²

(VI.) **Effect of Confirmation**—In the absence of jurisdictional irregularity, when the sale is made in good faith and confirmed, it is valid and effectual,³ and the title of the purchaser becomes perfected.⁴ Non-jurisdictional irregularities in the sale are cured by its confirmation,⁵ but confirmation of a void sale will not render it valid.⁶

Blake, 8 Ves. Jr. 214, 32 Eng. Reprint 336), (2) is held not to have been adopted in this country. *Ayers v. Baumgarten*, 15 Ill. 444; *Williamson v. Dale*, 3 Johns. Ch. (N. Y.) 290; *Leffevre v. Laraway*, 22 Barb. (N. Y.) 167. (3) But in *Daniel v. Leitch*, 13 Gratt. (Va.) 195, the court said: "As the chief aim of the court is to obtain as great a price for the estate as possible, it is in the habit, under certain regulations, of opening the biddings." And see the statutes, and the title "**Judicial Sales**."

1. *Ex parte Guernsey*, 21 Ill. 442, 443.

2. *Harkrader v. Bonham*, 88 Va. 247, 16 S. E. 159.

3. *Titman v. Riker*, 43 N. J. Eq. 122, 10 Atl. 397.

[a] The report of a guardian, when approved by the court, must be regarded as at least prima facie correct, casting on him who assails it the burden of proof to show error. *Warfield v. Warfield*, 74 Iowa 184, 37 N. W. 144.

[b] The confirmation of a sale is conclusive where the record does not show affirmatively that jurisdiction did not attach. *Butler v. Stephens*, 77 Tex. 599, 14 S. W. 202; *Edwards v. Halbert*, 64 Tex. 667; *Robertson v. Johnson*, 57 Tex. 62; *Stroud v. Hawkins*, 28 Tex. Civ. App. 321, 67 S. W. 534.

[c] **In New York**, the burden is upon one claiming under a title, acquired at the sale of an infant's real estate, to establish by affirmative evidence that every requirement necessary to give jurisdiction has been complied with; there is no presumption of compliance in the absence of proof. *Ellwood v. Northrup*, 106 N. Y. 172, 12 N. E. 590.

4. *Cromwell's Heirs v. Mason's Heirs*, 2 Bush (Ky.) 439; *Thornton v. McGrath*, 1 Duv. (Ky.) 349. See also *Blake v. Willard*, 56 Fed. 699.

[a] Unless confirmation precedes the execution of the conveyance, in which case title does not pass until the

deed is executed and delivered. *Searf v. Aldrich*, 97 Cal. 360, 32 Pac. 324, 33 Am. St. Rep. 190. See also *Doe v. Jackson*, 51 Ala. 514.

[b] **Interest Acquired by Purchaser**. If the report be confirmed the purchaser takes all of the interest of the ward in the estate sold. *Conover v. Musgrave*, 68 Ill. 58.

[c] After confirmation without any objection on the part of the purchaser, the court has the right to compel him to complete his purchase. *Daniel v. Leitch*, 13 Gratt. (Va.) 195.

5. **Ala.**—*Doe v. Jackson*, 51 Ala. 514. **Ark.**—*Alexander v. Hardin*, 54 Ark. 480, 16 S. W. 264; *Fleming v. Johnson*, 26 Ark. 421. See *Guynn v. McCauley*, 32 Ark. 97. **Ind.**—*Hammann v. Mink*, 99 Ind. 279. **Kan.**—*Frazier v. Jenkins*, 64 Kan. 615, 68 Pac. 24. **Tex.** *Brown v. Christie*, 27 Tex. 73, 84 Am. Dec. 607; *Stroud v. Hawkins*, 28 Tex. Civ. App. 321, 67 S. W. 534. **Va.**—*Daniel v. Leitch*, 13 Gratt. 195. **Wis.**—*Emery v. Vroman*, 19 Wis. 689, 88 Am. Dec. 726.

[a] In *Gates v. Kennedy*, 3 B. Mon. (Ky.) 167, the court said: "If the court had jurisdiction of the case in the first instance, it had authority to act for the infant, and however irregular and unobligatory its subsequent action might have been, and although the sale might even have been void if he had not become a party and sanctioned it while the proceeding was in progress, it was, in our opinion, capable of confirmation by his act, and by the act of the court, against the will of the purchaser while the sale was yet incomplete."

6. **Kan.**—*Frazier v. Jenkins*, 64 Kan. 615, 68 Pac. 24. **N. Y.**—*O'Donoghue v. Boies*, 159 N. Y. 87, 53 N. E. 537. **Tenn.** *Carnes v. Polk*, 4 Coldw. 87. **Wis.** *Blackman v. Baumann*, 22 Wis. 611.

[a] In *Burrell v. Chicago, M. & St. P. Ry. Co.*, 43 Minn. 363, 45 N. W. 849, the court said: "The order of confirmation is merely an adjudication that the 'sale proceedings' are regular, and

(VII.) **Record.**—The approval of the sale by the court need not necessarily appear by formal entry of an order, it being sufficient if the approval can be gathered from the whole record;⁷ and though the better practice would be to require an order of court entered upon its records approving the report of the sale, yet the want of this will not render the sale invalid.⁸

Entry Nunc Pro Tunc.—The order of the court approving the sale may be ordered entered on the records after the death of the guardian and years after the sale took place, on motion of the purchasers.⁹

(VIII.) **Appeal and Review.**—The action of the court in confirming or refusing to confirm a sale is subject to review on appeal,¹⁰ or by

in accordance with the execution, process, or decree under which the sale was assumed to be made, and that the sale was fairly conducted, and the price obtained an adequate one. If the sale was void because there was no judgment authorizing a sale to be made, or because, for any reason, the person making it had no authority to make one, no number of confirmations could make it valid. This was held in *Dawson v. Helmes*, 30 Minn. 107, (14 N. W. Rep. 462),—a case which fully covers and controls the present one.”

[b] The confirmation of a sale of the lands of wards does not validate it if any of the proceedings specified in § 3919, Rev. St. were omitted. *Weld v. Johnson Mfg. Co.*, 84 Wis. 537, 54 N. W. 335, 998.

7. *Henry v. McKerlie*, 78 Mo. 416, and cases there cited.

[a] The approval by the court of the report of the sale ought perhaps to be entered of record. But it does not necessarily follow, that if no formal entry is found reciting this, that therefore the sale is void and liable to overthrow in a collateral proceeding. *Jones v. Manly*, 58 Mo. 559.

[b] In *Pattee v. Thomas*, 58 Mo. 163, it was contended that the sale was not approved, the court in answering this objection said: “It is true there is no formal entry of approval in this case, but the orders of the court cannot be understood in any reasonable way except as a virtual approval of the report and sales. The court receives the report and orders the money to be charged to the guardian, for the benefit of the minor children. It was impossible for the court to distribute the proceeds of the sale and make the orders which were made without a previous approval of the sale.”

[c] “Sometimes a confirmation will

be presumed when there is some action of the court shown which shows that the sale was recognized and acted upon by the court.” *Swenson v. Seale* (Tex. Civ. App.), 28 S. W. 143.

[d] A formal order of court expressly confirming a guardian’s sale of land is not indispensable to the validity of the sale; the same may be shown by acts done by the court showing that it recognized and acquiesced in it as a completed sale. *Robertson v. Johnson*, 57 Tex. 62.

[e] “Where there is no evidence to show a report of sale, or confirmation thereof by the court, or any action by the court recognizing the same, the fact that the sale was ordered by the court and made by the guardian is not sufficient to establish a valid sale, and the same will not be presumed simply upon proof that the probate records have been loosely kept.” *Swenson v. Seale* (Tex. Civ. App.), 28 S. W. 143.

8. *Field v. Peebles*, 180 Ill. 376, 54 N. E. 304.

9. *Reid v. Morton*, 119 Ill. 118, 6 N. E. 414.

10. **U. S.**—*Hine v. Morse*, 218 U. S. 493, 31 Sup. Ct. 37, 54 L. ed. 1123, reversing 31 App. Cas. (D. C.) 433. **Ill.** *Ex parte Guernsey*, 21 Ill. 442, 443; *Ayers v. Baumgarten*, 15 Ill. 444. **Mo.** *McVey v. McVey*, 51 Mo. 406.

See *Pursley v. Hayes*, 22 Iowa 11, 92 Am. Dec. 350; *Clopper v. Hutcheson*, 16 Tex. Civ. App. 157, 40 S. W. 604.

[a] In *Missouri* “an appeal from a final order of the circuit court disapproving a sale which has been approved by the probate court before appeal to the circuit court, may be taken to the supreme court. *McVey v. McVey*, 51 Mo. 406.” *Henry v. McKerlie*, 78 Mo. 416.

[b] The purchaser may prosecute an appeal from the order confirming the

other appropriate proceedings.¹¹ The purchaser may except to the confirmation of the report of the sale, and may prosecute an appeal from such confirmation.¹²

Where an appeal is taken from the order overruling the exceptions to the sale, and ratifying the sale as reported, the original decree authorizing the sale of the property is not open for review.¹³

d. *The Deed*.—The sale is not complete until the execution of the guardian's deed,¹⁴ which should follow in substance the order of the court.¹⁵ It is held that the deed should refer to such order and give its date,¹⁶ and must show that the notice of sale required by the order has been given.¹⁷ However, other courts hold that statutes so requiring are merely directory and such facts may be shown aliunde,¹⁸ and that though the deed does not refer to the proceedings in the court, if it appears by the record of the court and the deed that the

report, in order to secure his title. *Allen v. Graves*, 3 Bush (Ky.) 491.

[c] **A sale will not be set aside** simply because the appellate court does not concur with the lower court as to the expediency of the sale. *Power v. Barbee*, 8 Dana (Ky.) 154.

[d] **A statute which provides that no person can question the validity of a guardian's sale of real estate after the lapse of five years from the time it was made**, has no application to cases of appeal, writs of error, or other process bringing up the matter for review before an appellate court. *Pursley v. Hayes*, 22 Iowa 11, 92 Am. Dec. 350.

11. **An infant may file a bill of review** by next friend, to reverse the decree of the court relating to the sale. *Bank of United States v. Ritchie*, 8 Pet. (U. S.) 128, 129, 8 L. ed. 890.

[a] **Certiorari**.—The proceedings affecting the sale may be reviewed through certiorari by any person interested. *Carroll v. Booth*, 2 Tex. Unrep. 326.

[b] **After the sale has been confirmed, and after the term has passed** and the proceedings are considered as enrolled, the court possesses no power over its decree to annul the same, except by bill of review for error apparent on the face of the decree or for some new matter discovered since the decree, or by an original bill to annul the same for fraud. *Tomlinson v. McKaig*, 5 Gill (Md.) 256, 277.

[c] **Setting sale aside**, see following section.

12. *Allen v. Graves*, 3 Bush (Ky.) 491.

13. *Newbold v. Schlens*, 66 Md. 585, 9 Atl. 849, citing *Vickers v. Tracey*, 22

Md. 196, 199; *Porter v. Askew*, 11 Gill & J. (Md.) 346.

[a] The court has not the power to go behind the judgment confirming the sale, for the purpose of revising the proceedings or of determining the validity of the sale. *Todd v. Dowd's Heirs*, 1 Metc. (Ky.) 281.

14. *Myrick v. Coursalle*, 32 Minn. 153, 19 N. W. 736.

[a] **The infant's title is divested** (1) by the deed and not by the confirmation of the sale (*Scarf v. Aldrich*, 97 Cal. 360, 32 Pac. 324, 33 Am. St. Rep. 190), (2) but not until a conveyance has been ordered by the court to be made to the purchaser and has actually been executed and delivered to him. *Doe v. Jackson*, 51 Ala. 514. See *Mulford v. Beveridge*, 78 Ill. 455. (3) Until this is done the infant may recover in ejectment, notwithstanding the confirmation of the sale and the payment of the purchase money. *Doe v. Jackson*, 51 Ala. 514. See also *Henry v. McKerlie*, 78 Mo. 416.

15. *Hvatt v. Seeley*, 11 N. Y. 52. See also *Worthington v. Dunkin*, 41 Ind. 515.

[a] **A deed of the curator which fails to recite the order of the court, appraisements, time, place and terms of sale, is defective, but not void**. *Bobb v. Barnum*, 59 Mo. 394. See *Jones v. Manly*, 58 Mo. 559.

16. *Segee v. Thomas*, 3 Blatchf. 11, 21 Fed. Cas. No. 12,633.

[a] **Failure to recite the order renders deed defective but not void**. *Bobb v. Barnum*, 59 Mo. 394.

17. *Segee v. Thomas*, 3 Blatchf. 11, 21 Fed. Cas. No. 12,633.

18. *Henry v. McKerlie*, 78 Mo. 416.

sale and deed were made pursuant to the license it is sufficient.¹⁹

So the omission of the date of the decree authorizing the sale,²⁰ the omission of the name of one of several minors,²¹ or the insertion of irrelevant matter will not vitiate the deed.²² The reason for the sale need not be stated.²³

The deed may be by the guardian in his own name,²⁴ unless otherwise ordered by the court.²⁵ It should appear from the deed that the guardian was duly appointed.²⁶

In some jurisdictions the deed must be returned to the court for approval before it is valid.²⁷ A deed made prior to confirmation of the sale by the court is inoperative,²⁸ but where such a deed is afterwards reported and confirmed it becomes effective to pass title.²⁹ All necessary conditions precedent must be complied with or the deed will not pass title,³⁰ and a deed which shows that the property was not sold for the amount required by statute is void on its face.³¹ By statute in some states the deed must be executed within a certain period.³²

A reference in a deed to a survey of the premises conveyed will authorize the court to examine such survey in aid of the description.³³

19. *Howard v. Lee*, 25 Conn. 1, 65 Am. Dec. 550; *Menage v. Jones*, 40 Minn. 254, 41 N. W. 972.

20. *Howard v. Lee*, 25 Conn. 1, 65 Am. Dec. 550.

[a] Mistakes in date will not vitiate. *Williamson v. Woodman*, 73 Me. 163.

21. *Bradford v. Larkin*, 57 Kan. 90, 45 Pac. 69.

22. *Williamson v. Woodman*, 73 Me. 163.

23. *Sowle v. Sowle*, 10 Pick. (Mass.) 276.

24. **Ia.**—*Wade v. Carpenter*, 4 Iowa 361. **Minn.**—*Menage v. Jones*, 40 Minn. 254, 41 N. W. 972. **N. Y.**—*Cole v. Gourlay*, 79 N. Y. 527.

[a] **Death of Guardian.**—Where the guardian making the sale dies before execution of the deed, his successor may complete the transaction by deeding the property, as the act of conveyance is rather official than personal and more a function of the place than a matter appropriated to any individual. *Lynch v. Kirby*, 36 Mich. 238.

25. Where the court orders the conveyance to be executed in the name of the infants by the guardian ad litem in their behalf, a deed purporting to be by the infants alone, signed by them and by such guardian without the addition of any words indicating his agency in the matter is insufficient. *Hyatt v. Seely*, 11 N. Y. 52. See Mat-

ter of *Windle*, 2 Edw. Ch. (N. Y.) 585.

26. *House v. Brent*, 69 Tex. 27, 7 S. W. 65.

27. *Wade v. Carpenter*, 4 Iowa 361.

[a] A deed made by a special guardian without the assent and approval of the court, as required by the statute, will not be good as against a subsequent purchaser. *Titman v. Riker*, 43 N. J. Eq. 122, 10 Atl. 397.

28. *Hammann v. Mink*, 99 Ind. 279. See also *Bone v. Tyrrell*, 113 Mo. 175, 20 S. W. 796.

29. *Hammann v. Mink*, 99 Ind. 279.

30. Where a special legislative act authorized a conveyance after the execution by the guardian of a bond in twice the value of the property, and such bond is not so executed, a deed given by such guardian passes no title. *Bone v. Tyrrell*, 113 Mo. 175, 20 S. W. 796.

31. *Carder v. Culbertson*, 100 Mo. 269, 13 S. W. 88, 18 Am. St. Rep. 548.

32. A sale of a minor's real estate by a guardian is void, if no deed thereof is delivered or executed until after the expiration of a year from the date of the license and no money therefor has been paid to the guardian or accounted for by him in the probate court. *Richmond v. Gray*, 3 Allen (Mass.) 25.

33. *Pursley v. Hayes*, 22 Iowa 11, 92 Am. Dec. 350.

[a] A misdescription can only be

Covenants of the deed bind the guardian personally, but not the ward.³⁴

e. *Action for Purchase Money*.—A guardian may maintain an action to compel payment of the unpaid purchase money.³⁵ If the general guardian refuse to collect the purchase price, an action for its recovery may be prosecuted by the minor through a guardian ad litem.³⁶

f. *Disposition of Proceeds*.—(I.) **Generally**.—The proceeds of the sale should be paid into court to be held subject to its order,³⁷ though it is held that the guardian and not the judge or clerk of the court is the proper custodian of the proceeds.³⁸

(II.) **Under Order of Court**.—The court should direct the disposition of the proceeds,³⁹ so that they will be secured for the benefit⁴⁰ of the

taken advantage of by one whose interests are prejudiced. *Kenniston v. Leighton*, 43 N. H. 309.

34. *Young v. Lorain*, 11 Ill. 624, 52 Am. Dec. 463; *Holyoke v. Clark*, 54 N. H. 578. See also *Donahoe v. Emery*, 9 Mete. (Mass.) 63.

35. *Downing v. Peabody*, 56 Ga. 40, 43.

[a] The ward having died, his administrator may maintain a bill in equity against the second guardian and the purchasers to compel actual payment of the purchase money thus left unpaid, the purchasers retain the land without having legally paid for it in full and they make no claim to rescind the contract of purchase for fraud or any other reason. *Downing v. Peabody*, 56 Ga. 40, 43.

[b] The purchaser of the property cannot after its confirmation by the chancellor, and the expiration of the term at which such confirmation was made, resist the payment of the purchase money, upon the ground that the sale, or the proceeding under which it was had was irregular. *Todd v. Dowd's Heirs*, 1 Mete. (Ky.) 281.

36. *Peterson v. Baillif*, 52 Minn. 386, 54 N. W. 185.

[a] The land of minors under guardianship having been sold and conveyed, an action to recover the purchase price is within the jurisdiction of the district court, but not of the probate court. *Peterson v. Baillif*, 52 Minn. 386, 54 N. W. 185.

37. *Bullock's Trustee v. Gudge*, 25 Ky. L. Rep. 1413, 77 S. W. 1126; *Mason v. Tinsley*, 1 Tenn. Ch. 154, holding that the provision of the statute making it the duty of the court to see that the proceeds are reinvested for the benefit

of the infants is in its very nature imperative, and this duty cannot be complied with unless the proceeds of the sale are paid into court and held subject to its orders.

[a] **Partition Sale**.—The shares of infant defendants, in the proceeds of a sale of property in a partition suit, ought not to be paid to their guardians ad litem; but should be brought into court, and invested, for the benefit of such infants. *Carpenter v. Schermerhorn*, 2 Barb. Ch. (N. Y.) 314.

38. *State ex rel. Mount v. Steele*, 21 Ind. 207, 83 Am. Dec. 346.

[a] **The guardian ad litem** rather than the general guardian held the proper person to receive and invest the proceeds under the statute. *Cook v. Lee*, 6 Paige Ch. (N. Y.) 158.

39. *Ky.*—*McKee's Heirs v. Hann*, 9 Dana 526. *Tenn.*—*Rogers v. Clark*, 5 Sneed 665. *Va.*—*Garland v. Loving*, 1 Rand. 396.

[a] **Where the father had a life estate** in the land sold, it was not improper to appropriate part of the proceeds to pay the debts of the father, not exceeding the value of such life estate. *Cochran v. Van Surley*, 20 Wend. (N. Y.) 365, 32 Am. Dec. 570.

[b] **Not in Lands Outside the County**.—*Stiles v. Beeman*, 1 Lans. (N. Y.) 90.

[c] **Attorney's Fee**.—The solicitor who conducted the proceedings instituted for a sale of the land is entitled to a fee out of such proceeds. *Senseney v. Repp*, 94 Md. 77, 50 Atl. 416.

40. *Ky.*—*McKee's Heirs v. Hann*, 9 Dana 526. *Mass.*—*Petition of Daggett*, 3 Pick 280. *N. Y.*—*In re Whitaker*, 4 Johns. Ch. 378. *Va.*—*Garland v. Loving*, 1 Rand. 396.

infant, and the proceeds must be invested as directed by the court.⁴¹ Under some circumstances the amount of certain incumbrances will be allowed out of the sale,⁴² though generally this cannot be done.⁴³

(III.) **Duty of Purchaser.** — The purchaser at a guardian's sale is not responsible for the order of the court in appropriating the proceeds of the sale,⁴⁴ and he is not required to see that the guardian invests or accounts for the proceeds.⁴⁵

8. **The Record.** — In order to divest the minor of his title it is necessary that the record show affirmatively that the requirements of the statute have been complied with,⁴⁶ and where the parties to be affected reside out of the jurisdiction of the court, the record must affirmatively show that every step necessary to give jurisdiction has been regularly taken, otherwise the proceedings are utterly void.⁴⁷

[a] It is the duty of the court to direct and secure the investment of the proceeds, for the benefit of the infants, in such manner as to the court may seem best. *Garland v. Loving*, 1 Rand. (Va.) 396.

41. *Swartwout v. Oaks*, 52 Barb. (N. Y.) 622; *Matter of Lampman*, 22 Hun (N. Y.) 239.

[a] **Conclusiveness of Order of Court.** — The orders for the application and division of the proceeds as between the infants and the purchasers, may be so far conclusive as to protect the latter, but they do not finally settle any questions between the infants themselves. *Davison v. De Freest*, 3 Sandf. Ch. (N. Y.) 456.

[b] **A failure to invest the proceeds** will not defeat a sale properly made. *Orman v. Bowles*, 18 Colo. 463, 33 Pac. 109. See *Mulford v. Beveridge*, 78 Ill. 455.

42. Where the purchaser was assured before the sale that he purchased free of all encumbrances, and because of such assurances he paid the purchase money, and it was not sought to recover the amount of certain encumbrances from him until over four years after he received his deed, it was held that as between the purchaser and the fund derived from the sale, the equities were all in favor of the former, and under the circumstances of the case, the amount of the encumbrances would be paid out of the fund. *Cool's Exrs. v. Higgins*, 25 N. J. Eq. 117.

43. *Cool's Exrs. v. Higgins*, 25 N. J. Eq. 117.

[a] In *Hunt v. Hunt*, 65 Barb. (N. Y.) 577, it was held that a purchaser took the property subject to the equitable encumbrance of a mortgage, and

the special guardian had no right to pay any portion of the proceeds of the sale upon such mortgage.

44. *Allman v. Taylor*, 101 Ill. 185; *Mulford v. Stalzenback*, 46 Ill. 303; *Fitzgibbon v. Lake*, 29 Ill. 165, 81 Am. Dec. 302.

[a] A failure to make any disposition of the proceeds could not affect a sale of the estate. *McKee's Heirs v. Hann*, 9 Dana (Ky.) 526.

45. *Orman v. Bowles*, 18 Colo. 463, 33 Pac. 109; *Allman v. Taylor*, 101 Ill. 185; *Mulford v. Beveridge*, 78 Ill. 455; *Mulford v. Stalzenback*, 46 Ill. 303.

46. *Orman v. Bowles*, 18 Colo. 463, 33 Pac. 109; *Singleton v. Cogar*, 7 Dana (Ky.) 479.

[a] It was not necessary, under an Indiana statute, that the record in the case of a guardian's application to sell real estate, should show that any evidence was offered to sustain the matters set out in the petition. *Adkins v. Sidener*, 5 Ind. 228.

[b] The circuit courts are authorized, by statute, to order a sale of real estate descended to infants for their benefit; the jurisdiction being special and limited, the statute must be strictly complied with; and unless every fact prescribed by it appears in the record, a decree for a sale under it will be *prima facie* erroneous. *Singleton v. Cogar*, 7 Dana (Ky.) 479.

[c] In *Wilkinson v. Filby*, 24 Wis. 441, a guardian's sale of land was held invalid because the record did not show that he took the oath required by the statute.

Record of confirmation see *supra*, III, A, 7, c, (VII).

47. *Seaverns v. Gerke*, 3 Sawy. 353, 21 Fed. Cas. No. 12,595. See also *Gal-*

Entry Nunc Pro Tunc.—The court may order an entry to be made nunc pro tunc, on motion of a guardian, to make the record of the sale of certain real estate of the ward complete,⁴⁸ or may deny the motion for such entry.⁴⁹

9. Setting Sale Aside.⁵⁰ — a. *Generally.*—The infant has a right to have a sale of his property set aside upon a proper showing.⁵¹ This right is not affected by the fact that he may have recourse against the guardian and his sureties,⁵² or that the proceeds of the sale have been applied to his benefit.⁵³

A judicial sale of an infant's property will only be set aside for substantial errors;⁵⁴ mere irregularities are not sufficient,⁵⁵ particularly if

pin v. Page, 18 Wall. (U. S.) 350, 21 L. ed. 959.

48. Uland v. Carter, 34 Ind. 344, after five years.

[a] **On Motion of Purchaser at the Sale.**—If a report of a sale has been made to the court and approved, but such report and approval was not entered of record at the time it was made, the court may place the report and approval properly in the record by an order nunc pro tunc, directing the clerk to enter it of record as of the time it was actually made, upon motion made by the purchaser at the sale, since purchasers under decrees in chancery are regarded, to a certain extent, as parties to the suit, so as to be under the control of the court on the one hand and its protection on the other. Reid v. Morton, 119 Ill. 118, 6 N. E. 414.

49. Calloway v. Nichols, 47 Tex. 327.

[a] Where the record fails to show that the additional bond, which the statute requires before a sale is ordered, was filed, an order of sale would have been irregular, and so a motion for an entry, nunc pro tunc, of a formal order directing the sale of the land will be denied. Makepeace v. Lukens, 27 Ind. 435, 92 Am. Dec. 263.

50. Vacating judgment or decree, see *supra* I, G, 9.

51. See *infra* this section.

[a] **Power of Federal Courts To Set Sale Aside.**—The circuit court of the United States has the power to make a decree setting aside and vacating the orders of a probate court, relating to the sale of infant's property. Arrowsmith v. Gleason, 129 U. S. 86, 9 Sup. Ct. 237, 32 L. ed. 630. See the title "United States Courts."

52. Hampton v. Hampton, 9 Tex. Civ. App. 497, 29 S. W. 423.

[a] **The bringing of an action against the guardian for a settlement**

does not estop the ward from suing to recover the land. Massie v. Hiatt's Admr., 82 Ky. 314.

53. Cooper v. Burns, 133 Fed. 398.

54. Md.—Gregory v. Lenning, 54 Md.

57. Pa.—In re Chew, 21 Pa. Dist. 28.

Va.—Zirkle v. McCue, 26 Gratt. 517.

[a] "In this state, special circumstances must in all cases exist, where the sale is not void, to justify an order for a resale." Lefevre v. Laraway, 22 Barb. (N. Y.) 167.

[b] Where the decree ordering the sale is void such sale will be set aside. Reynolds v. McCurry, 100 Ill. 356.

[c] **An exchange of the ward's property for other property is not authorized by statute, consequently the court's approval of the exchange is void and the judgment will be set aside.** Ford v. May, 157 Ky. 830, 164 S. W. 88. Compare Decker v. Fessler, 146 Ind. 16, 44 N. E. 657.

55. Gregory v. Lenning, 54 Md. 51. See also Montour v. Purdy, 11 Minn. 384, 88 Am. Dec. 88; Hurt v. Long, 90 Tenn. 445, 16 S. W. 968.

[a] "It is not however, any mere irregularity that can be made available as ground of impeachment by such bill; nor is it matter of complaint against the decree of sale that no day was given the infant defendants, after coming of age, to show cause against the decree. No purchaser under the decree could be expected to incur such hazard to his estate. Booth v. Rich, 1 Vern. 295; Bennett v. Namill, 2 Sch. & Lefr. 566; Mills v. Dennis, 3 John. Ch. 367." Gregory v. Lenning, 54 Md. 51.

[b] "Slight irregularities . . . are not to overturn the title of purchasers at a judicial sale, which the court had power to order, and in which there is no pretense of fraud, either on the part of the purchaser or guardian especially after the lapse of eighteen

the sale was advantageous to the infant,⁵⁶ or where such action would

years." *Pattee v. Thomas*, 58 Mo. 163.

[c] The statutes providing that guardian's sales shall not be set aside for mere irregularities should be construed as applying to mere "irregularities" in the proceedings where the good faith of the probate proceedings is not impeached, but it cannot be held to apply where those proceedings are assailed on the ground of fraud from their very inception. *Dormitzer v. German Sav. & Loan Soc.*, 23 Wash. 132, 193, 62 Pac. 862.

[d] Mere technical errors are not sufficient. *Tomblin v. Peck*, 73 W. Va. 336, 80 S. E. 450.

[e] The issue of corporate capacity of the purchaser to purchase and hold land cannot be set up by an infant seeking to set aside the sale. *Ansell v. Southern Ill. & M. Bridge Co.*, 223 Mo. 209, 122 S. W. 709.

[f] The omission to verify the guardian's petition is insufficient to set aside a sale of the infant's lands. *Ansell v. Southern Ill. & M. Bridge Co.*, 223 Mo. 209, 122 S. W. 709.

[g] The omission of the names of some of the infants from the guardian's report through mistake is an immaterial error insufficient as a ground to set aside the sale. *Thomson's Guardian v. Thomson*, 151 Ky. 296, 151 S. W. 658.

[h] A misnomer of one of the infants in the bill is a mere technical error. *Tomblin v. Peck*, 73 W. Va. 336, 80 S. E. 450.

56. *Andrews v. Andrews*, 7 Heisk. (Tenn.) 234; *Elliott v. Blair*, 5 Coldw. (Tenn.) 185; *Ex parte Kirkman*, 3 Head (Tenn.) 517; *Rankin v. Black*, 1 Head (Tenn.) 650; *Cralle v. Meem*, 8 Gratt. (Va.) 496.

[a] A sale contracted by a testamentary guardian without authority, and afterwards confirmed as an advantageous one, will not be set aside where such sale was manifestly to the benefit of the infant. *Hurt v. Long*, 90 Tenn. 445, 16 S. W. 968.

[b] In *Swan v. Newman*, 3 Head (Tenn.) 288, the court said: "This being so, it might be unnecessary to consider the objections taken to the regularity of the proceedings under which the sale was made, because, as between the purchaser and the infants, where we can see that the sale was

advantageous to the latter, and that a loss would result from setting it aside, we would not do so, for irregularities or defects which can be cured by decreeing the title to the purchaser, as we have all the parties before us. The purchaser can only claim the title, and that can be given to him notwithstanding there may be defects in the proceedings of such a character as that the infants would not be bound by them. But if it is clear to the Court, as it is in this case, where the property has since the sale depreciated in value, or on any other account, that it is to the interest of the infants that the sale should be maintained, that will be done by a divestiture of their title in favor of the purchaser, and holding him to his contract. All he can demand is a good title, and if the Court is able to give him that, he has no reason to complain that the proceedings were irregular; that is nothing to him. This, of course, can only be done where the parties interested are all before the Court, and a case is made out to give the Court jurisdiction. Otherwise the court could not decree him a good title, and for that reason would not compel him to pay his money. The case of *Rowan v. Pope*, decided at the last term at Nashville, and to be reported in the next volume of reports, was very similar to this in its principle."

[c] In the case of *Durrett v. Davis*, 24 Gratt. (Va.) 302, 316, 317, Judge Staples, in delivering the opinion of the court, after holding that mere formal defects would not affect the validity of the sale, said: "In considering them (the formal defects) this court has not been unmindful of the importance of a faithful observance of the various statutes enacted for the benefit of the infant, and for the protection of his inheritance. The power to sell the estate of those who have no capacity to be heard is a very grave one, and only to be exercised with great caution. Still it is an indispensable power, and is well-regulated in some tribunal in every well-regulated State. Sound policy requires that judicial sales shall not be brought into disrepute by the practice of vacating decrees for slight and minute defects in the preparation of causes, when the

prejudice bona fide purchasers.⁵⁷ It is the policy of the law to uphold and maintain judicial sales, wherever it can be done without violating principle or doing injustice.⁵⁸ There are, however, two matters as to which purchasers are required at their peril to make inquiry, viz., that the court ordering the sale had jurisdiction of the subject matter, and that all proper parties were before the court when the order was made.⁵⁹ It has been held, however, that an irregular sale which is prejudicial to the interests of the infants will be set aside,⁶⁰ as relief is accorded to

true meaning and spirit of the law has been observed. If the court clearly perceives that the sale when made was an advantageous one, it ought not to regard mere technical informalities which do not substantially affect the validity of the proceedings, or the rights and interests of the infant." Quoted with approval in *Coleman v. Virginia Stave, etc. Co.*, 112 Va. 61, 70 S. E. 545.

[d] In determining whether the sale was a beneficial one for the infant, we must look to the circumstances as they existed at the time it was made, and not to subsequent events. *Durrett v. Davis*, 24 Gratt. (Va.) 302.

57. See *supra*, I, G, 9, a, and the following: N. C.—*Hare v. Hollomon*, 94 N. C. 14; *England v. Garner*, 90 N. C. 197, 201. Tenn.—*Ridgely v. Bennett*, 13 Lea 210, 220. Va.—*Parker v. McCoy*, 10 Gratt. 594. Eng.—*Bennett v. Hamill*, 2 Sch. & Lef. 566; 575.

[a] A decree for the sale of an infant's land, in a case in which he is a party, and over which the court has jurisdiction, is so far binding on the infant that he cannot, either by bill of review, or by an original bill, impeach it to the prejudice of a bona fide purchaser. *Anderson v. Ammonett*, 9 Lea (Tenn.) 1; *Winchester v. Winchester*, 1 Head (Tenn.) 461, 500. See also *Wright v. Miller*, 1 Sandf. Ch. (N. Y.) 103.

[b] The purchaser at the sale is presumed to have notice of any irregularity in conducting it, but bona fide purchasers after confirmation of the sale are not presumed to have such notice. *Conover v. Musgrave*, 68 Ill. 58; *Mulford v. Stalzenbach*, 46 Ill. 303.

58. *Conover v. Musgrave*, 68 Ill. 58; *Tederall v. Bouknight*, 25 S. C. 275.

[a] "If these sales cannot be upheld, or if set aside for trifling causes, the property of minors can only be sold at great loss to them." *Conover v. Musgrave*, 68 Ill. 58.

[b] "We are not insensible of the importance, as a matter of public policy, of upholding sales made by guardians and personal representatives whenever it can be done under the law. If such sales are generally held good, that fact increases the competition at the sales by enlarging the circle of bidders, by inviting the attention of a class who buy for use and are generally willing to pay a fair price; while if such sales are of doubtful validity, only speculative and chancing men are ready to invest at prices that justify the risk. Therefore it is for the interest of those whose estates have to be disposed of in this manner that the public generally should have confidence in the validity of the titles acquired." *Higinbotham v. Thomas*, 9 Kan. 328.

59. *Blake v. Blake*, 260 Ill. 70, 102 N. E. 1007; *Tederall v. Bouknight*, 25 S. C. 275; *Trapier v. Waldo*, 16 S. C. 276, 282.

[a] That the guardian's bond was forged is not ground for setting aside a sale, as the purchaser is not required to look beyond the question of jurisdiction. If the jurisdictional facts appear of record the purchaser will be protected. *Blake v. Blake*, 260 Ill. 70, 102 N. E. 1007.

60. *Swan v. Newman*, 3 Head (Tenn.) 288; *Cralle v. Meem*, 8 Gratt. (Va.) 496.

[a] Mere technicalities will not warrant the court in upholding a sale of the ward's property which results in wrong and injustice to that ward. *Gillespie v. Darroch* (Ind. App.), 107 N. E. 475.

[b] After a sale of infants' land has been confirmed by the court, although the proceeding has been irregular, yet if the title of the purchaser can be made good, and it is for the interest of the infants to confirm the sale, the purchaser will not be released from his purchase; but if the interest of the infants is injured by the sale

infants, on account of their infancy, where it would be denied to adults.⁶¹

Sufficient Grounds.—Among matters which have been held sufficient ground for setting aside a sale, are the following: error apparent in the face of the decree;⁶² mistake;⁶³ misunderstanding or misrepresentation as to the terms or manner of sale;⁶⁴ fraud;⁶⁵ collusion between the pur-

it will be set aside. *Daniel v. Leitch*, 13 Gratt. (Va.) 195.

61. *Lefevre v. Laraway*, 22 Barb. (N. Y.) 167.

62. *Bolgiano v. Cooke*, 19 Md. 375; *Tomlinson v. McKaig*, 5 Gill (Md.) 276; *Rogers v. Clark*, 5 Sneed (Tenn.) 665.

[a] **Errors which are jurisdictional** will justify setting aside a sale of the infant's realty. *Gregory v. Lenning*, 54 Md. 51; *Wells v. Steckleberg*, 50 Neb. 670, 70 N. W. 242.

63. *Bolgiano v. Cooke*, 19 Md. 375; *Tomlinson v. McKaig*, 5 Gill (Md.) 276; *McComb v. Gilkeson*, 110 Va. 406, 66 S. E. 77, 135 Am. St. Rep. 944.

[a] The orphans' court has jurisdiction to enter a decree vacating a private sale made by a guardian under an order of court, ordering a reconveyance of the same and directing a restitution of the purchase money for gross mistake (in this case the sale of fifty-two acres for two hundred acres, upon the petition of the purchaser), even after the sale is confirmed, the purchase money paid, and the deed executed and delivered, where the rights of third parties have not intervened. *Johnson's Appeal*, 114 Pa. 132, 6 Atl. 556.

[b] **The principle upon which courts of equity grant relief** in cases of deficiency in the estimated quantity upon the sale of lands is that of mistake, and is as applicable where the rights of infants are involved as in other cases. *McComb v. Gilkeson*, 110 Va. 406, 66 S. E. 77, 135 Am. St. Rep. 944.

[c] **Misapprehension**, created by the conduct of the purchaser, or of some person interested in the sale, or of the officer who conducts the sale. *Lefevre v. Laraway*, 22 Barb. (N. Y.) 167.

64. *Bolgiano v. Cooke*, 19 Md. 375; *Tomlinson v. McKaig*, 5 Gill (Md.) 276.

65. **U. S.**—*Arrowsmith v. Gleason*, 129 U. S. 86, 9 Sup. Ct. 237, 32 L. ed. 630. **Ga.**—*Southern Marble Co. v. Stegall*, 90 Ga. 236, 15 S. E. 806. **Ill.** *Devine v. Harkness*, 117 Ill. 145, 7 N. E. 52; *Ex parte Guernsey*, 21 Ill. 443;

Coffey v. Coffey, 16 Ill. 141. **Md.**—*Gregory v. Lenning*, 54 Md. 51. **Mich.**—*Tong v. Marvin*, 26 Mich. 35. See *Morford v. Dieffenbacher*, 54 Mich. 593, 20 N. W. 600. **N. Y.**—*Le Fevre v. Laraway*, 22 Barb. 167; *Clark v. Underwood*, 17 Barb. 202. **Tenn.**—*Rogers v. Clark*, 5 Sneed 665.

[a] In *Walker v. Goldsmith*, 14 Ore. 125, 12 Pac. 537, the court said: "We cannot try the question of fraud in this case, for the reason there are no pleadings and no issues on that subject. If fraud entered into the original proceedings of the guardian in procuring or conducting the sale, it might be a reason for setting aside his proceedings in equity, on the application of anyone injured by such fraud. In such case his proceedings were not absolutely void—but voidable at the election of the party injured—and such party ought to make his election by bringing a suit to avoid the sale within a reasonable time after obtaining majority—or after knowledge of the fraud. Acquiescence for an unreasonable time after notice of the fraud, and after such minor had reached his majority, would be a waiver of the right to complain of it."

[b] **The fact that the lands sold for their full value** does not affect the minor's equities; the doctrine, that fraud and damage must concur, does not apply to such a case. No one can be forced to submit to a sale at other people's estimate of value. *Tong v. Marvin*, 26 Mich. 35.

[c] **An order giving a party authority to sell and convey, fraudulently obtained from a court**, is no better than a power fraudulently derived from the party whose rights are injuriously affected by it. It may always be annulled at his instance, upon establishing the fraud, at least as to all persons who were parties or privies to such fraud. *Clark v. Underwood*, 17 Barb. (N. Y.) 202.

[d] **Agreement Restricting Bidding.** Where the purchaser made an agreement with another prospective bidder

chaser and the guardian;⁶⁶ of false statements made in the report,⁶⁷ and misconduct in the purchaser.⁶⁸

If the guardian has, either directly or indirectly become the purchaser at the sale, in those jurisdictions where he is not permitted to purchase,⁶⁹ or if he has made a profit therefrom,⁷⁰ the sale will be set aside. And where the guardian accepts, as part of the purchase price, the promissory note of the purchaser, and fails to pay such amount in money to the ward the sale will be set aside.⁷¹

If the date of the sale is erroneously advertised it will be set aside and a resale ordered, unless the land has passed to a bona fide purchaser.⁷²

Insufficient Grounds.—The following have been held insufficient grounds for setting aside a sale: the fact that the sale subsequently proved injudicious and unfortunate for the infant;⁷³ irregularity on

whereby the latter did not bid at the sale, such agreement was sufficient ground for setting aside the sale. *Devine v. Harkness*, 117 Ill. 145, 7 N. E. 52; *Loyd v. Malone*, 23 Ill. 41, 43, 74 Am. Dec. 179.

[e] **Petitioning in the ward's name without his sanction** for leave to sell the ward's lands for the payment of claims against the estate of the ward's ancestor constitutes fraud on the part of the guardian. *Wohlscheid v. Bergrath*, 46 Mich. 46, 8 N. W. 548.

[f] **Proof of fraudulent negligence or misconduct** in any person connected with the sale will warrant setting aside the sale. *Lefevre v. Laraway*, 22 Barb. (N. Y.) 167.

66. **Ga.**—*Southern Marble Co. v. Stegall*, 90 Ga. 236, 15 S. E. 806. **Tex.** *Parker v. Bowers*, 37 Tex. Civ. App. 252, 84 S. W. 380. **Wash.**—*Dormitzer v. German Sav., etc. Soc.*, 23 Wash. 132, 62 Pac. 862.

67. *Parker v. Bowers*, 37 Tex. Civ. App. 252, 84 S. W. 380.

68. *Lefevre v. Laraway*, 22 Barb. (N. Y.) 167.

[a] **Failure of the purchaser to pay the price** is a ground for dissolution of the sale. *Jones v. Crocker*, 1 La. Ann. 440.

[b] **On refusal or neglect of the purchaser to comply with the terms of the sale** a re-sale may be ordered. *State ex rel. Donovan v. First Judicial Dist. Ct.*, 27 Mont. 415, 71 Pac. 401.

69. **Ala.**—*Bank of Wetumpka v. Walkley*, 169 Ala. 648, 53 So. 830. **Ill.** *Blake v. Blake*, 260 Ill. 70, 102 N. E.

1007. **Ky.**—See *Morehead v. Hobbs*, 7 Ky. L. Rep. 748. **Mass.**—*Goodell v. Goodell*, 173 Mass. 140, 53 N. E. 275. **Minn.**—*White v. Iselin*, 26 Minn. 487, 5 N. W. 359. **Pa.**—*In re Tanner's Estate*, 218 Pa. 361, 67 Atl. 646. **Tex.** *Parker v. Bowles*, 37 Tex. Civ. App. 252, 84 S. W. 380.

See *supra*, III, A, 7, b, (VIII).

[a] **Regardless of the fairness of the sale or the adequacy of the price**, a sale at which the guardian was the purchaser will be set aside at the election of the infant. *Blake v. Blake*, 260 Ill. 70, 102 N. E. 1007; *In re Tanner's Estate*, 218 Pa. 361, 67 Atl. 646.

70. *Hampton v. Hampton*, 9 Tex. Civ. App. 500, 29 S. W. 423.

71. *Bevis v. Heflin*, 63 Ind. 129.

72. *Conover v. Musgrave*, 68 Ill. 58, in this case the court ordered the sale to be made on June 19, and it was advertised to take place on June 18, the court held that after land had passed to one not chargeable with notice of the irregularity the sale would not be set aside.

73. *Zirkle v. McCue*, 26 Gratt. (Va.) 517.

[a] **The propriety of the sale must be tested**, and its validity determined by the circumstances then existing, and the surrounding circumstances. *Zirkle v. McCue*, 26 Gratt. (Va.) 517.

[b] **The subsequent increase in the value of the property sold** will not authorize setting aside the sale where the sale was regular and there is no charge of fraud. *Latta v. Vickers*, 82 N. C. 501.

the part of the guardian in executing the order of sale;⁷⁴ or that credit was extended to the purchaser, and no interest provided for.⁷⁵

The failure of the guardian to apply the proceeds of the sale to the benefit of the ward cannot be held to vitiate a sale as to the purchasers.⁷⁶ Nor will mere suspicion of fraud be sufficient ground for setting aside the sale.⁷⁷

Where Guardian Is Without Authority.—Where it does not appear the guardian was licensed by a court of competent jurisdiction,⁷⁸ or where the guardian failed to qualify,⁷⁹ or where his appointment is void,⁸⁰ a sale will be set aside. But where a court of general jurisdiction having authority to appoint guardians generally is without jurisdiction to make the particular appointment, the sale will not be set aside.⁸¹

Inadequacy of Consideration.—Mere inadequacy of price is not a sufficient cause for setting aside a sale,⁸² but where the price is grossly inadequate the sale will be set aside.⁸³

74. *Mulford v. Beveridge*, 78 Ill. 455.

75. *Powers v. Barbee*, 8 Dana (Ky.) 154.

76. *Knotts v. Stearns*, 91 U. S. 638, 23 L. ed. 252; *Allman v. Taylor*, 101 Ill. 185; *Mulford v. Beveridge*, 78 Ill. 455.

77. In *Adkins v. Sidener*, 5 Ind. 228, the petition of a guardian to sell real estate of his ward, was filed, the appraisers appointed and sworn, the appraisement made and returned, and the order of sale made, on the same day. The court held that this was not sufficient to set aside the order of sale.

78. *Montour v. Purdy*, 11 Minn. 384, 88 Am. Dec. 88.

[a] The infant cannot "go behind the granting of the license any further or for any other purpose than to inquire whether it was granted by the probate court of the county in which the guardian received his appointment." *Montour v. Purdy*, 11 Minn. 384, 88 Am. Dec. 88.

79. *Wells v. Steckleberg*, 50 Neb. 670, 70 N. W. 242.

80. *Nettleton v. Mosier*, 3 Fed. 387; *St. Paul Sanitarium v. Crim*, 38 Tex. Civ. App. 1, 84 S. W. 1114.

[a] Where the court disregards a former order discharging the guardian, and orders a sale to be made by him, the former order cannot be invoked to annul the sale. *Gillean v. Witherspoon* (Tex. Civ. App.), 121 S. W. 909.

81. *Decker v. Fessler*, 146 Ind. 16, 44 N. E. 657; *Dequindre v. Williams*, 31 Ind. 444.

82. *Ill.*—*Ayers v. Baumgarten*, 15 Ill. 444. *Ky.*—*Egard v. Chearnly*, 1

Bush 12. *Tex.*—*Carroll v. Booth*, 2 Tex. Unrep. 326.

[a] Where the land was alleged to have been worth \$2,500, and was sold for \$1,089, the court would not disturb the sale. *Carroll v. Booth*, 2 Tex. Unrep. 326.

[b] It would be hazardous to impeach confirmed judicial sales, upon the ground of inadequacy of price; and if it can be done in any case, it must be a very strong one of deceitful practice on the court. *Harrison v. Bradley*, 40 N. C. 136.

[c] The insufficiency in price would be cause for refusing to confirm the sale, but it is no ground for annulling the deed in an action brought to try the legal title. *Sumner v. Sessoms*, 94 N. C. 371.

83. *Johnson v. Buck*, 220 Ill. 226, 77 N. E. 163; *Steele v. Wood's Admr.*, 144 Ky. 254, 137 S. W. 1061. See *Ancell v. Southern Ill. & M. Bridge Co.*, 223 Mo. 209, 122 S. W. 709; *Carder v. Culbertson*, 100 Mo. 269, 13 S. W. 88, 18 Am. St. Rep. 548; *Wichita Land & C. Co. v. Ward*, 1 Tex. Civ. App. 307, 21 S. W. 128.

[a] In the case of *Egard v. Chearnly*, 1 *Bush* (Ky.) 12, the land of infants, estimated to be worth \$3,000, was sold for \$1,000. The court, while recognizing the rule that judicial sales should not be set aside for mere inadequacy of price, set aside the sale because the purchase price was flagrantly inadequate.

[b] In *Fowler v. Poor*, 93 N. C. 466, it was held that the purchase of land worth \$250, by one who acted as coun-

b. *At Whose Instigation Set Aside.*—On proper and sufficient grounds the sale may be set aside upon the petition of the purchaser,⁷⁴ or of the infant, if alive, or the heirs of a deceased infant,⁷⁵ or of any one claiming under the infant,⁷⁶ or the court on its own motion may set aside the sale, though no application be made by the minor.⁷⁷ And, it has been held, it may be set aside on motion of a stranger where the sale was in fraud of the minor,⁷⁸ But a third person will not be per-

sel for the infants, for the grossly inadequate price of \$11.00, was, in a professional point of view, wholly indefensible, but such purchase was not necessarily fraudulent, although it might be evidence of fraud, or of a fraudulent intent.

[c] Where the guardian failed to take advantage of a bona fide offer of \$3400 and subsequently sold the property for \$2994, the first offer being kept open, the court set the sale aside. *Delp's Estate*, 2 Woodw. (Pa.) 241.

84. *Johnson's Appeal*, 114 Pa. 132, 6 Atl. 556, even after confirmation of the sale and delivery of the deed.

85. *Gregory v. Lenning*, 54 Md. 51; *Marvin v. Schilling*, 12 Mich. 356.

[a] "It is clear that the infant defendants, after arriving at the age of twenty-one, may, by proper proceedings, have the sale set aside." *Meddis v. Fenley*, 98 Ky. 432, 33 S. W. 197.

[b] In Louisiana, it is held that the formalities accompanying the sale of property belonging to minors, being exclusively ordained for their benefit, the minors alone, when they become of age, can take advantage of errors in the proceedings. *Foutelet v. Murrell*, 9 La. 299; *Rousseau v. Tete*, 6 Rob. 471; *Melancon's Heirs v. Duhamel*, 10 Mart. (O. S.) 225.

[c] "There could be no doubt of the right of the infant defendants, if they were living, to impeach the decree, if proper grounds were alleged and shown for such impeachment. And any substantial cause, such as fraud in obtaining the decree, or the non-observance of those requirements prescribed by the statute to confer jurisdiction to pass the decree; or, indeed, as it has been said, any matter that clearly shows that an improper decree has been made against an infant, though not obtained by fraud, collusion, or surprise, may be made the ground for impeaching the decree by original bill in the nature of a bill of review. . . . *Bank of United States v. Ritchie*, 8 Pet. 128." *Gregory v. Lenning*, 54 Md. 51.

[d] The right of an infant to show causes against a decree which affect his interests, after he arrives at age, is limited to causes existing at the time of the rendition of the decree. *Lancaster v. Barton*, 92 Va. 615, 24 S. E. 251; *Zirkle v. McCue*, 26 Gratt. (Va.) 517; *Durrett v. Davis*, 24 Gratt. (Va.) 302; *Walker v. Page*, 21 Gratt. (Va.) 636.

[e] The fact that the proceeds of the sale were applied to the benefit of the wards, does not estop them from denying its validity after becoming of age. *Wilkinson v. Filby*, 24 Wis. 441. Chief Justice Dixon in a note to the case says: "I have met with the following decisions, in which it was held that minor heirs may, under some circumstances, be estopped from questioning the regularity or validity of sales made or assented to by their guardians, where the proceeds thereof have been applied to the use or benefit of such heirs. They are interesting cases upon the subject; and I deem it important that the attention of the profession should be called to them: *Wilson v. Bigger*, 7 W. & S. 111; *McPherson v. Cunliffe*, 11 S. & R. 426; *Stroble v. Smith*, 8 W. 280; *Benedict v. Montgomery*, 7 W. & S. 238; *Lessee of Merritt v. Horne*, 5 Ohio St. 307."

[f] It was the settled doctrine of the chancery courts of England that if the infant sought to impeach a decree on the ground of fraud, collusion, or error, he was not required to wait until he attained his majority, and might proceed by original bill, in which it will be enough for him to say the decree was obtained by fraud and collusion, or that no day was given him to show cause against it." *Richmond v. Tayleur*, 1 P. Wms. 734, 737, 24 Eng. Reprint 591.

86. *Marvin v. Schilling*, 12 Mich. 356.

87. *Lefevre v. Laraway*, 22 Barb. (N. Y.) 167.

88. *Ex parte Guernsey*, 21 Ill. 443.

mitted, in an action between himself and the purchaser, to question the sale on the ground that it was in fraud of the infant's rights.⁸⁹

c. *Proceedings To Set Aside Sale.* — (I.) **Generally.** — An action may be brought for the purpose of setting aside the sale,⁹⁰ or a bill in equity may be filed,⁹¹ or relief may be sought by a petition in the sale proceedings.⁹²

(II.) **Pleadings.** — The pleadings should conform to the general principles and rules of pleading, and the petition set forth the facts showing the right to relief.⁹³

(III.) **Parties.**⁹⁴ — Where the infant proceeds to impeach the sale, on arriving at majority, the one who holds the real estate under the decree must be made a party,⁹⁵ and all other parties to the decree should be given notice.⁹⁶

89. *Pfirman v. Wattles*, 86 Mich. 254, 49 N. W. 40; *Marvin v. Schilling*, 12 Mich. 356.

[a] **One not injured by the irregularities** in the proceedings for the sale by the guardian, cannot become the beneficiary of such irregularity. *Meikei v. Borders*, 129 Ind. 529, 29 N. E. 29.

[b] No one can take advantage of defective proceedings in the court of probate in relation to the sale, but those whose interests are affected injuriously by the proceedings. *Kenniston v. Leighton*, 43 N. H. 309.

90. *McKeever v. Ball*, 71 Ind. 398; *Gillespie v. Darroch* (Ind. App.), 107 N. E. 475; *Weems v. Masterson*, 80 Tex. 45, 15 S. W. 590; *Williams v. Pollard* (Tex. Civ. App.), 28 S. W. 1020; *Wichita Land & C. Co. v. Ward*, 1 Tex. Civ. App. 307, 21 S. W. 128.

Actions to set aside a judgment or decree, see *supra*, I, G, 9, et seq.

[a] A proceeding in the county court to vacate the sale does not open the door for an inquiry there into the merits of the minor's title. *Hampton v. Hampton*, 9 Tex. Civ. App. 497, 29 S. W. 423.

[b] If a sale be improperly confirmed the judgment of the court may be corrected by a direct proceeding for that purpose by anyone having an interest in the matter. *Butler v. Stephens*, 77 Tex. 599, 14 S. W. 202; *Brown v. Christie*, 27 Tex. 73, 77.

91. *Arrowsmith v. Gleason*, 46 Fed. 256. See *supra*, I, G, 9, c.

[a] The chancery practice was that the infant, desiring to impeach the decree for fraud, collusion, or error, might proceed by bill of review, or supplemental bill in the nature of a bill

of review, or by original bill; and in case of a decree nisi causa against an infant, on his coming of age and applying to the court for leave to put in a new answer, it was granted on his ex parte application, in the case of *Fountain v. Caine*, 1 P. Wms. 504, 24 Eng. Reprint 491. See *McLemore v. Chicago, etc. R. Co.*, 58 Miss. 514.

92. *Bryant v. McCollum*, 4 Heisk. (Tenn.) 511, for matter in the record and which could not have been taken advantage of by exceptions.

93. See *supra*, I, G, 9, i; and such titles as "Bills and Answers;" "Declaration and Complaint;" "Motions;" and other titles dealing with specific principles and rules of pleading.

[a] **Showing Tender or Return of Consideration.** — The petition to set aside the sale is not demurrable because it does not appear therefrom that the purchaser has been tendered the amount paid by him for the property unless it shows that the purchaser did not take possession of the premises, since otherwise the rents and profits would be of fact against the consideration. *Washburn v. Carmichael*, 32 Iowa 475.

[b] **An allegation that no purchase money was paid**, negatively states that the minors received no benefit therefrom. *Hampton v. Hampton*, 9 Tex. Civ. App. 497, 29 S. W. 423.

[c] **Petition May Be Amended.** *Southern Marble Co. v. Stegall*, 90 Ga. 236, 15 S. E. 806.

94. See *supra*, I, G, 9, g.

95. *McLemore v. Chicago, etc. R. Co.*, 58 Miss. 514.

96. *Ruby v. Strother*, 11 Mo. 417.

(IV.) **Limitation of Actions.**—Actions to set aside guardians' sales must be commenced within the time limit prescribed by the statute,⁹⁷ or permitted under the equitable doctrine of laches.⁹⁸ Sometimes the action must be brought within a specified time, after the confirmation of the sale,⁹⁹ or after the sale was made.¹

The infant may be given a reasonable length of time after arriving at majority,² or a specified number of years next after he becomes of age,³ or after the termination of his guardianship.⁴

The statute may except from its operation persons who are out of the state,⁵ but the grantee or heir of a ward is not within this exception, and the time limited commences to run, as to him, immediately on the transfer of the estate.⁶

There is a conflict of opinion as to what sales the statutes apply. some courts hold that they apply to all sales made by a guardian, whether

97. *Fraser v. Zylicz*, 29 La. Ann. 534, 536. See the statutes, and *supra*, I, G, 9, f.

98. See the title "Laches," and *Hawkins v. Simmons*, 41 N. C. 16.

[a] **Laches Excused.**—A guardian, without authority, sold and conveyed his ward's real estate in September, 1863, and the ward married before attaining her majority, in view of her infancy and coverture, she was not guilty of laches in failing to file a bill until 1875, to set aside such deed as a cloud upon her title. *Cooter v. Dearborn*, 115 Ill. 509, 515, 4 N. E. 388.

99. *Balliet's Appeal*, 2 Walk. (Pa.) 268.

1. *Hall v. Wells*, 54 Miss. 289.

2. See *supra*, I, G, 9, f, and *Wichita Land & C. Co. v. Ward*, 1 Tex. Civ. App. 307, 21 S. W. 128.

[a] **Estoppel.**—Where heirs after arriving of age, with full knowledge of all the facts, and in the absence of fraud or mistake of fact, receive and retain the purchase money arising from the sale by their guardian of their interest in certain lands, they are thereby estopped from questioning the validity of such sale on the ground of a defect in the proceedings. This principle is not limited to cases of voidable sales, but extends to those where the sale is void. *Deford v. Mercer*, 24 Iowa 118, 92 Am. Dec. 460, following *Pursley v. Hayes*, 17 Iowa 310.

[b] **The right of rescission is not an absolute right**, and one who desires to enforce such right should act with reasonable promptitude. *Weems v. Masterson*, 80 Tex. 45, 15 S. W. 590, in this case the sale was not attacked

until thirty-three years after it took place, and it was held that the lapse of time barred the right to rescind.

3. See *supra*, I, G, 9, f, and *Seward v. Didier*, 16 Neb. 58, 20 N. W. 12.

4. **Cal.**—Code Civ. Proc., §1806; *McNeil v. First Cong. Soc.*, 66 Cal. 103, 4 Pac. 1096. **Ia.**—*Cooper v. Sunderland*, 3 Iowa 114, 66 Am. Dec. 52. **Minn.** *Smith v. Swenson*, 37 Minn. 1, 22 N. W. 784.

[a] Where the statute provides "that no action for the recovery of any estate sold by a guardian, . . . shall be maintained by the ward, or by any person claiming under him, unless it be commenced within five years next after the termination of the guardianship," it is not a valid objection that the suit was not commenced within five years after the sale. *Cooper v. Sunderland*, 3 Iowa 114, 66 Am. Dec. 52.

5. See the statutes, and *Hobart v. Upton*, 2 Sawy. 302, 12 Fed. Cas. No. 6,548; *Jordan v. Secombe*, 33 Minn. 220, 22 N. W. 383.

[a] Where the statute excludes from its operation persons "out of the territory" when the cause of action shall accrue, and gives such persons a number of years "after their return to the territory" in which to bring their action, it is held that such a provision includes persons who never were residents of the territory, as well as those who were temporarily absent. *Hobart v. Upton*, 2 Sawy. 302, 12 Fed. Cas. No. 6,548; *Jordan v. Secombe*, 33 Minn. 220, 22 N. W. 383.

6. *Jordan v. Secombe*, 33 Minn. 220, 22 N. W. 383.

valid or void,⁷ while in other jurisdictions it is held that the statute does not afford protection to one claiming under a void guardian's sale, and cannot be pleaded to defeat an action to quiet the title in the ward.⁸ A statute providing that no person can question the validity of such sale, after the lapse of five years from the time it was made, is held not to apply to sales which took place prior to its passage,⁹ or as extending

7. *Reed v. Ring*, 93 Cal. 96, 28 Pac. 851 (compare *McNeil v. San Francisco First Cong. Soc.*, 66 Cal. 105, 4 Pac. 1096); *Hall v. Wells*, 54 Miss. 289, "every sale which is included in the evil intended to be remedied is embraced."

[a] In *Seward v. Didier*, 16 Neb. 58, 20 N. W. 12, the court says: "It is claimed on his behalf that the five years' limitation of the decedent's act only applies in case the sale was valid. There would seem to be no necessity for a statute of limitations to protect a title valid in itself. The statute, without doubt, was intended to apply to all sales made by a guardian, executor, or administrator. *Spencer v. Sheehan*, 19 Minn. 338; *Miller v. Sullivan*, 4 Dill. 340; *Good v. Norley*, 28 Iowa 188. The last case was overruled in *Boyles v. Boyles*, 37 Iowa 592; but in our view the opinion in 28 Iowa is the better law."

[b] In *Miller v. Sullivan*, 4 Dill. 340, 17 Fed. Cas. No. 9,592, Judge Dillon says: "This is a wise statute, doubly wise in a new country, for reasons which fully appear in this case. It would be robbed of its virtue if it was confined to cases where the sale was valid, for such sales do not need the protection of such a statute. 'They that are whole need no physician.'"

8. *Rankin v. Miller*, 43 Iowa 11, citing *Boyles v. Boyles*, 37 Iowa 592; *Washburn v. Carmichael*, 32 Iowa 475; *Good v. Norley*, 28 Iowa 188; *Tracy v. Roberts*, 88 Me. 310, 34 Atl. 68, 51 Am. St. Rep. 394.

[a] The limitation of five years within which an action is to be brought applies to defective sales under licenses from a court of competent jurisdiction, but not to sales where no petition or license ever existed. *Tracy v. Roberts*, 88 Me. 310, 34 Atl. 68, 51 Am. St. Rep. 394.

[b] "Inasmuch as the guardian ad litem's purchase was made void by statute, delay on the part of these plaintiffs in bringing proceedings to recover possession of the premises does

not affect their rights." *O'Donoghue v. Boies*, 92 Hun 3, 37 N. Y. Supp. 961.

[c] In *Minnesota*, Laws 1864, ch. 45, §2, which provides that where an order of confirmation has been made prior to the passage of that act, no proceedings shall be had to set aside and vacate the sale after the expiration of two years from such passage, and that the conveyances of the guardian made in pursuance of any such sale shall not, after the expiration of said two years, be voided by any court, etc., does not apply to a sale made by a guardian without any license, or by one not a guardian. *Dawson v. Helmes*, 30 Minn. 107, 14 N. W. 462. Compare *Smith v. Swenson*, 37 Minn. 1, 32 N. W. 784.

9. *Cooper v. Sunderland*, 3 Iowa 114, 66 Am. Dec. 52.

[a] In *Hall v. Wells*, 54 Miss. 289, the court after citing Code, 1871, ch. 45, §2173, which provides that "no action shall be brought to recover any property heretofore sold by any administrator, executor or guardian, by virtue of the order of any Probate Court in this state, on the ground of the invalidity of such sale, unless such action be commenced within one year after this chapter shall take effect, if such sale shall have been made in good faith and the purchase money paid," said: "We adhere to the views expressed in *Morgan v. Hazlehurst Lodge*, 53 Miss. 665. The section of the code cited was not intended, and does not have the effect, to cure by express enactment illegal or defective proceedings in the Probate Court for the sale of property by administrators, executors or guardians. It has no retrospective operation, but is wholly prospective. It is founded on a view of the past, but looks to the future. It originated in the known fact that a very large proportion of the sales of property by virtue of the orders of Probate Courts was void, from various causes; and, as insecurity of titles to property is a great public evil, it was determined to provide a short statute of limitations applicable to all

the time within which an appeal may be taken, referring rather to a proceeding other than an appeal.¹⁰

(V.) **Question of Law and Fact.**—The question as to whether the probate proceedings were "regular," in other words, in accordance with the laws regulating the sale of a minor's property, is not a question of fact for the jury, but a question of law to be determined by the court, and the same is true as to the effect of the order of the probate court relating to the sale, and the deed executed by the guardian.¹¹

(VI.) **Judgment.**—Upon a consolidation of an action to set aside and an action to confirm a sale, if the court determines the sale should stand, the judgment should confirm the original judgment or decree and sale.¹²

g. Indemnification of Purchaser.—Where the sale is set aside, a purchaser in good faith must be indemnified for all damages, costs and expenses to which he has been subjected.¹³

10. Collateral Attack.—If the court have jurisdiction, its decree or the proceedings affecting the sale of an infant's property are not subject to collateral attack, even though erroneous;¹⁴ the remedy, if

cases falling within the existing evil; and the section under review contains the provisions to remedy it."

10. *Pursley v. Hayes*, 22 Iowa 11, 92 Am. Dec. 350.

11. *Weems v. Masterson*, 80 Tex. 45, 15 S. W. 590.

12. *Boyce v. Sinclair*, 3 Bush (Ky.) 261, and not merely dismiss the petition to set aside.

13. *Duncan v. Dodd*, 2 Paige Ch. (N. Y.) 99, 102. See *Wichita Land & C. Co. v. Ward*, 1 Tex. Civ. App. 307, 313, 21 S. W. 128.

[a] **The court of equity will compel the minors to refund the purchase money in their possession upon setting aside a decree and sale and also all taxes paid by the adverse party under the mistaken idea that he was a bona fide purchaser, and improvements may be removed if it can be done without permanent injury to the realty.** *Chambers v. Jones*, 72 Ill. 276, 280.

[b] Where the decree is void (1) and the guardian fraudulently appropriates the proceeds of the sale the ward need not return the purchase price to the purchaser before having the sale set aside. *Reynolds v. McCurry*, 100 Ill. 356. (2) If infant has the purchase price, however, he will be compelled to return it. *Reynolds v. McCurry*, 100 Ill. 356.

[c] **Allowance made for improvements when sale to bona fide purchaser set aside.** See *Ark.*—*Summers v. Howard*, 33 Ark. 490. *La.*—*Lemoine v.*

Ducote, 45 La. Ann. 857, 12 So. 939. *Miss.*—*Cole v. Johnson*, 53 Miss. 94.

[d] **Refund of taxes paid.** *Summers v. Howard*, 33 Ark. 490.

[e] **Ward may recover rents and profits from the purchaser accruing during his occupation.** *Ambleton v. Dyer*, 53 Ark. 224, 13 S. W. 926; *Anderson v. Layton*, 3 Bush (Ky.) 87.

[f] **Who Are Bona Fide Purchasers.** See the following: *Ark.*—*Blanton v. Rose*, 70 Ark. 415, 68 S. W. 674. *Ind.* *Young v. Wiley* (Ind. App.), 102 N. E. 54. *Neb.*—*Kazebeer v. Nunemaker*, 82 Neb. 732, 739, 118 N. W. 646.

14. U. S.—*Hine v. Morse*, 218 U. S. 493, 31 Sup. Ct. 37, 54 L. ed. 1123, reversing 31 App. Cas. (D. C.) 433; *Thaw v. Falls*, 136 U. S. 519, 10 Sup. Ct. 1037, 34 L. ed. 531; *Gager v. Henry*, 5 Sawy. 237, 9 Fed. Cas. No. 5,172. *Ala.*—*Birmingham Coal & Iron Co. v. Doe*, 181 Ala. 621, 62 So. 26; *Daughtry v. Thweatt*, 105 Ala. 615, 16 So. 920, 53 Am. St. Rep. 146. *Ark.*—*Alexander v. Hardin*, 54 Ark. 480, 16 S. W. 264; *Fleming v. Johnson*, 26 Ark. 421. *Cal.* *Searf v. Aldrich*, 97 Cal. 360, 32 Pac. 324, 33 Am. St. Rep. 190; *Smith v. Biscailuz*, 83 Cal. 344, 21 Pac. 15, 23 Pac. 314; *Fitch v. Miller*, 20 Cal. 352. *Ill.*—*Field v. Peeples*, 180 Ill. 376, 54 N. E. 304; *Allman v. Taylor*, 101 Ill. 185; *Conover v. Musgrave*, 68 Ill. 58; *Fitzgibbon v. Lake*, 29 Ill. 165, 81 Am. Dec. 302; *Young v. Lorain*, 11 Ill. 625. *Ind.*—*Meikel v. Borders*, 129 Ind. 529, 29 N. E. 29; *Davidson v. Hutchins*, 112

any, by the minor is an application for its modification or vacation within the proper time after obtaining majority.¹⁵ But if the sale is void

Ind. 322, 13 N. E. 106; *Davidson v. Bates*, 111 Ind. 391, 12 N. E. 687; *Davidson v. Koehler*, 76 Ind. 398. **Ia.** *Ringstad v. Hanson*, 150 Iowa 324, 130 N. W. 145; *Hamiel v. Donnelly*, 75 Iowa 93, 39 N. W. 210; *Bunce v. Bunce*, 59 Iowa 533, 13 N. W. 705; *Lyon v. Vanatta*, 35 Iowa 521; *Cooper v. Sunderland*, 3 Iowa 114, 66 Am. Dec. 52. **La.** *Boullemet's Succession*, 39 La. Ann. 1046, 3 So. 401. **Md.**—*Newbold v. Schlens*, 66 Md. 585, 9 Atl. 849; *Gregory v. Lenning*, 54 Md. 51. **Mich.** *Schaale v. Wasey*, 70 Mich. 414, 38 N. W. 317; *Pfirman v. Wattles*, 86 Mich. 254, 49 N. W. 40; *Morford v. Dieffenbacker*, 54 Mich. 593, 20 N. W. 600; *Dexter v. Cranston*, 41 Mich. 448, 2 N. W. 674. **Miss.**—*Morton v. Carroll*, 68 Miss. 699, 9 So. 896; *Stampley v. King*, 51 Miss. 728. **Mo.**—*Cox v. Boyce*, 152 Mo. 576, 54 S. W. 467, 75 Am. St. Rep. 483; *Exendine v. Morris*, 76 Mo. 416; *Castleman v. Relfe*, 50 Mo. 583; *Carr v. Spannagel*, 4 Mo. App. 284. **Neb.** *Hubermann v. Evans*, 46 Neb. 784, 65 N. W. 1045; *Myers v. McGavock*, 39 Neb. 843, 58 N. W. 522, 42 Am. St. Rep. 627; *Larimer v. Wallace*, 36 Neb. 444, 54 N. W. 835. **N. Y.**—*Warren v. Union Bank*, 28 App. Div. 7, 51 N. Y. Supp. 27. **Ore.**—*McCulloch v. Estes*, 20 Ore. 349, 25 Pac. 724; *Walker v. Goldsmith*, 14 Ore. 125, 12 Pac. 537. **Pa.** *Kramer v. Mugele*, 153 Pa. 493, 25 Atl. 788; *Gilmore v. Rodgers*, 41 Pa. 120. **S. C.**—*Tederall v. Bouknight*, 25 S. C. 275. **Tenn.**—*Greenlaw v. Greenlaw*, 16 Lea 435. **Tex.**—*Weems v. Masterson*, 80 Tex. 45, 15 S. W. 590; *Butler v. Stephens*, 77 Tex. 599, 14 S. W. 202; *Brown v. Christie*, 27 Tex. 73, 84 Am. Dec. 607. **Wis.**—*Emery v. Vroman*, 19 Wis. 689, 88 Am. Dec. 726.

See *supra*, I, G, 6 and 7, and the titles "Judgments;" "Res Judicata."

[a] "The decree of sale being valid, and the sale having been confirmed, no question of mere error or not can now be litigated collaterally." *Morton v. Carroll*, 68 Miss. 699, 9 So. 896.

[b] In *Gager v. Henry*, 5 Sawy. 237, 9 Fed. Cas. No. 5,172, the court held that a sale by a guardian, when authorized by a court of competent jurisdiction, could not be questioned collateral-

ly, except as provided in §20 of Act of December 16, 1853 (Ore. Laws 739) which provides, that when the ward or any person claiming under him shall contest the validity of a guardian's sale "the same shall not be avoided on account of any irregularity in the proceedings; provided it shall appear: 1. That the guardian was licensed to make the sale by a county court of competent jurisdiction; 2. That he gave a bond that was approved by the county judge; 3. That he took the oath prescribed by statute; 4. That he gave notice of the time and place of sale as prescribed by law; and, 5. That the premises were sold accordingly at public auction, and are held by one who purchased them in good faith." See also *Goldsmith v. Gilliland*, 10 Sawy. 606, 613; *Hobart v. Upton*, 2 Sawy. 302, 12 Fed. Cas. No. 6,548.

[c] The order of the court for the sale of real estate of infants cannot be collaterally impeached for want of notice to the infants, or of a record of the evidence on which the court proceeded, or of an accounting by the guardian for the proceeds of the sale. *Thaw v. Falls*, 136 U. S. 519, 10 Sup. Ct. 1037, 34 L. ed. 531.

[d] The question as to whether a sale was necessary cannot be called into question collaterally. *Wyatt v. Steele*, 26 Ala. 639.

[e] Failure to sell the land for its full value, or for the amount of its appraisement is not ground for collateral attack. *Meikel v. Borders*, 129 Ind. 529, 29 N. E. 29.

[f] Want of a sale bond is not ground for collateral attack. *Bunce v. Bunce*, 59 Iowa 533, 13 N. W. 705.

[g] The rule as to the conclusiveness, in a collateral proceeding, of the judgment of a court of competent jurisdiction, cannot be invoked in aid of a decree of sale made by the orphans' court subject to conditions where neither compliance with the conditions nor confirmation of the sale has been had. *Kreimendahl v. Neuhauser*, 13 Pa. Super. 606.

15. *Ringstad v. Hanson*, 150 Iowa 324, 130 N. W. 145. See *supra*, III, A, 9.

for want of jurisdiction,¹⁶ or the error is one affecting the jurisdiction, the sale may be collaterally attacked.¹⁷

B. MORTGAGE OF INFANT'S REAL PROPERTY. — 1. Jurisdiction. — The jurisdiction of proceedings to mortgage an infant's real property is substantially the same as in the case of sales of such property.¹⁸

2. Necessity for Order of Court. — To mortgage the real property of an infant the guardian must first obtain an order of court,¹⁹ and

16. *Musgrave v. Conover*, 85 Ill. 374.

[a] **What Necessary To Give Jurisdiction.**—In *Young v. Lorain*, 11 Ill. 625, the court in commenting upon the authorities said: "They all agree that enough must appear, either in the application or the order, or, at least, somewhere upon the face of the proceeding, to call upon the court to proceed to act; and all agree, that when that does appear, then the court has properly acquired jurisdiction, or, in other words, is properly set to work. When the jurisdiction is thus established, and the court is authorized to hear, it follows, as a necessary consequence, that it is authorized to adjudge, and that judgment being thus entered by authority of law, no matter how erroneous it may be, or even absurd—though it be made in palpable violation of the law itself, and manifestly against the evidence—is, nevertheless, binding upon all whom the law says shall be bound by it, that is, upon all parties and privies to it, until it is reversed in a regular proceeding for that purpose. While it remains a judgment, it can not be inquired into, nor its regularity questioned, in any collateral proceeding. . . . The inquiry is not whether the proof was sufficient, but was such a case presented to the court as called upon it, under the statute, to act, to deliberate, and to decide? Was its aid properly invoked? If so, then the court acted within its jurisdiction, and every presumption is in favor of its judgment."

[b] **In Minnesota**, "By Gen. St. (1866), c. 57, sec. 47 (being the same as Gen. St. 1878, c. 57, sec. 51), it is enacted that 'in case of an action relating to any real estate sold by . . . guardian, . . . in which the ward . . . shall contest the validity of the sale, it shall not be avoided on account of any irregularity in the proceedings, provided it appears . . . that the . . . guardian was licensed to make the sale by the probate court having jurisdic-

tion,' etc. As held in *Montour v. Purdy*, 11 Minn. 278 (384), and *Babcock v. Cobb*, Id. 247 (347), the effect of this section is to authorize the proceedings of a probate court in reference to a guardian's sale to be drawn in question by a ward (including, of course, an ex-ward) in an action collateral to such proceedings and upon the grounds which the section specifies." *Davis v. Hudson*, 29 Minn. 27, 11 N. W. 136. To same effect under the Nebraska statute. *Hubermann v. Evans*, 46 Neb. 784, 65 N. W. 1045.

[c] **On collateral attack the appellate court** "can only look to see if the probate court had jurisdiction of the subject-matter of the order, etc., and will not inquire into errors or irregularities unless patent on its face." *Fleming v. Johnson*, 26 Ark. 421.

17. *Mich.*—*Stewart v. Bailey*, 28 Mich. 251. *Miss.*—*Stampley v. King*, 51 Miss. 728. *Neb.*—*Wells v. Steckleberg*, 50 Neb. 670, 70 N. W. 242.

18. See *supra*, III, A, 1.

[a] **Equity has no inherent jurisdiction** to mortgage. *Warren v. Union Bank*, 157 N. Y. 259, 51 N. E. 1036, 68 Am. St. Rep. 777, 43 L. R. A. 256; *Losey v. Stanley*, 147 N. Y. 560, 42 N. E. 8. *Contra*, see *Northwestern G. L. Co. v. Smith*, 15 Mont. 101, 38 Pac. 224, 48 Am. St. Rep. 662.

19. **U. S.**—*United States Mtg. Co. v. Sperry*, 138 U. S. 313, 11 Sup. Ct. 321, 34 L. ed. 969. **Ill.**—*Kingsbury v. Powers*, 131 Ill. 182, 22 N. E. 479. **Ia.** *Foster v. Young*, 35 Iowa 27, probate court. **R. I.**—*Barry v. Clarke*, 13 R. I. 65, probate court.

See *supra*, III, A, 3, a.

[a] **In Illinois**, the county court is the one to order the mortgage. *United States Mtg. Co. v. Sperry*, 138 U. S. 313, 11 Sup. Ct. 321, 34 L. ed. 969.

[b] **In Louisiana** the sanction of a family meeting is required. *Heirs of McCormick*, 32 La. Ann. 956; *Williams v. Chotard*, 11 La. Ann. 247.

[c] **In Pennsylvania**, the orphans'

while the guardian may execute a deed of trust thereon it must be under the direction of the court.²⁰

3. Proceedings To Obtain Order of Court. — a. *Generally.* — Proceedings for the mortgage of infant's property are in general the same as proceedings to obtain license to sell such real estate.²¹

b. *Petition.* — To give the court jurisdiction to authorize the mortgage a petition in substantial conformity to the statute must be filed,²² which petition should be in writing,²³ and be verified,²⁴ in some jurisdictions.

The petition may be by the general guardian,²⁵ or the guardian of the property of the infant,²⁶ and in some jurisdictions, if the infant be of the age of fourteen years, he must join in the petition.²⁷ The petition should set out the condition of the estate,²⁸ a description of the premises sought to be mortgaged,²⁹ the facts and circumstances on which the petition is founded,³⁰ and the purpose for which it is sought to mortgage the premises.³¹

court may authorize mortgage. *Chase v. Brown*, 22 Pa. Co. Ct. 598.

[d] **Change of Guardians After Order Made.**—Where an order of the probate court has been made authorizing a guardian to execute a mortgage on his ward's real property, and a change of guardians is effected before such order is carried out, the new guardian may act upon the authority given his predecessor. *First Nat. Bank v. Bangs*, 91 Kan. 54, 136 Pac. 915.

20. *Foster v. Young*, 35 Iowa 27.

21. *Trutch v. Bunnell*, 5 Ore. 504. See *supra*, III, A, 3, b.

22. **U. S.**—*United States Mtg. Co. v. Sperry*, 138 U. S. 313, 11 Sup. Ct. 321, 34 L. ed. 969. **Cal.**—*Howard v. Bryan*, 133 Cal. 257, 65 Pac. 462. **Ill.**—*Kingsbury v. Powers*, 131 Ill. 182, 22 N. E. 479. **N. Y.**—*Warren v. Union Bank of Rochester*, 157 N. Y. 259, 51 N. E. 1036, 68 Am. St. Rep. 777, 43 L. R. A. 256; *Warren v. Union Bank*, 28 App. Div. 7, 51 N. Y. Supp. 27. **Pa.**—*West v. Cochran*, 104 Pa. 482; *Chase v. Brown*, 22 Pa. Co. Ct. 598. **R. I.**—*Barry v. Clarke*, 13 R. I. 65.

See *supra*, III, A, 3, b, (V).

[a] **The foundation of jurisdiction** in cases of this sort is the petition filed by the guardian for leave to mortgage. *Howard v. Bryan*, 133 Cal. 257, 65 Pac. 462.

23. *Barry v. Clarke*, 13 R. I. 65.

24. *Howard v. Bryan*, 133 Cal. 257, 65 Pac. 462. See *supra*, III, A, 3, b, (V), (D).

25. *Warren v. Union Bank*, 28 App.

Div. 7, 51 N. Y. Supp. 27. See *supra*, III, A, 3, b, (II).

26. *Warren v. Union Bank*, 28 App. Div. 7, 51 N. Y. Supp. 27.

27. *Warren v. Union Bank*, 28 App. Div. 7, 51 N. Y. Supp. 27. See *supra*, III, A, 3, b, (II) and (III).

28. *United States Mtg. Co. v. Sperry*, 138 U. S. 313, 11 Sup. Ct. 321, 34 L. ed. 969; *Kingsbury v. Powers*, 131 Ill. 182, 22 N. E. 479. See *supra*, III, A, 3, b, (V), (C).

29. **U. S.**—*United States Mtg. Co. v. Sperry*, 138 U. S. 313, 11 Sup. Ct. 321, 34 L. ed. 969. **Cal.**—*Code Civ. Proc.*, §1578; *Howard v. Bryan*, 133 Cal. 257, 65 Pac. 462. **Ill.**—*Kingsbury v. Powers*, 131 Ill. 182, 22 N. E. 479.

See *supra*, III, A, 3, b, (V), (C).

[a] Though the petition itself does not set out clearly the property involved, it will be held sufficient where from the various papers on file in the proceeding there is no difficulty in understanding just what real estate is sought to be mortgaged. *West v. Cochran*, 104 Pa. 482.

30. **U. S.**—*United States Mtg. Co. v. Sperry*, 138 U. S. 313, 11 Sup. Ct. 321, 34 L. ed. 969. **Cal.**—*Code Civ. Proc.*, §1578; *Howard v. Bryan*, 133 Cal. 257, 65 Pac. 462. **Ill.**—*Kingsbury v. Powers*, 131 Ill. 182, 22 N. E. 479.

31. *Cal. Code Civ. Proc.*, §1578; *Howard v. Bryan*, 133 Cal. 257, 65 Pac. 462; *Chase v. Brown*, 22 Pa. Co. Ct. 598.

[a] The first requisite of the petition is, that it must disclose the particular purpose for which the money derived from the mortgage is to be

c. *Notice*.—In some jurisdictions the wards are not regarded as adversary parties to their guardian but they appear by him and notice of the application for leave to mortgage need not be given them.³²

d. *Hearing and Determination*.—If, upon a full hearing,³³ the court is satisfied that it will be for the advantage of the estate, an order empowering and directing the guardian to execute the mortgage is made.³⁴

e. *Bond*.—A bond should be given by the guardian in such penalty and with such sureties and in such form as the court may direct, conditioned on the faithful performance of the trust imposed.³⁵

4. **What Property May Be Mortgaged**.—Property belonging to the minor at the time of application may be mortgaged, but a prospective mortgage of property which it is proposed to acquire is not authorized.³⁶

5. **Report and Confirmation of Mortgage**.—An agreement to mortgage as well as an absolute sale must be reported to the court and confirmed.³⁷

6. **Collateral Attack**.—If the court had no jurisdiction of the proceedings to mortgage, then the proceedings and mortgage are open to collateral attack for that reason and should be set aside.³⁸

C. **LEASE OF REALTY**.—While, as has been seen, the guardian has no power to sell realty without judicial sanction, yet in the absence of statute to the contrary he may lease it without order of court,³⁹ for a reasonable time in view of all the circumstances,⁴⁰ but not for a longer period than during the probable continuance of the guardianship,⁴¹

used. *Howard v. Bryan*, 133 Cal. 257, 65 Pac. 462.

32. *Trutch v. Bunnell*, 5 Ore. 504. But see *supra*, III, A, 3, b, (VI), (A).

[a] No notice is required before granting a petition for leave to mortgage. *Barry v. Clarke*, 13 R. I. 65.

[b] In Louisiana an undertutor is appointed to protect the interests of the minors against any improper action of their tutor. *Heirs of McCormick*, 32 La. Ann. 956.

33. See *supra*, III, A, 3, b, (VII).

[a] The filing of the petition is followed by an order of court directing all persons interested to appear and show cause why authority to mortgage should not be granted, and by a hearing at the time designated. *Howard v. Bryan*, 133 Cal. 257, 65 Pac. 462.

[b] **Reference to a family meeting** is had in Louisiana. *Heirs of McCormick*, 32 La. Ann. 956.

34. *Howard v. Bryan*, 133 Cal. 257, 65 Pac. 462. See *supra*, III, A, 3, c.

35. *Higgins v. Reed*, 48 Kan. 272, 29 Pac. 389; *Battell v. Torrey*, 65 N. Y. 294. See *supra*, III, A, 5.

36. *Williams v. Chotard*, 11 La. Ann. 247.

37. *Dohms v. Mann*, 76 Iowa 723, 39 N. W. 823; *Wade v. Carpenter*, 4 Iowa 361, 365; *Battell v. Torrey*, 65 N. Y. 294. See *supra*, III, A, 7, c.

38. *Warren v. Union Bank*, 157 N. Y. 259, 51 N. E. 1036, 68 Am. St. Rep. 777, 43 L. R. A. 256. See *supra*, I, G, 6 and 7; III, A, 10.

39. Conn.—*Palmer v. Cheseboro*, 55 Conn. 114, 10 Atl. 508. See *Welles v. Cowles*, 4 Conn. 189. Mo.—*Richardson v. Richardson*, 49 Mo. 29. N. Y.—*Field v. Schieffelin*, 7 Johns. Ch. 150, 11 Am. Dec. 441.

See also: Ill.—*Clark v. Burnside*, 15 Ill. 62. N. J.—*Snook v. Sutton*, 10 N. J. L. 133. Eng.—*Rex v. Oakley*, 10 East 491, 103 Eng. Reprint 862.

Contra, see Appeal of Stoughton, 88 Pa. 198.

Sale or Mortgage.—Necessity for order, see *supra*, I, A, 3, a; I, B, 2.

40. *Palmer v. Cheseboro*, 55 Conn. 114, 10 Atl. 508.

41. *Snook v. Sutton*, 10 N. J. L. 133; *Emerson v. Spicer*, 46 N. Y. 594;

and subject to be defeated by the appointment of another guardian and his election to avoid it.⁴² A guardian who has not control of the estate, but only of the custody of the minor, cannot make a lease of such estate.⁴³

A chancery court may authorize the lease of infant's property for such time as it shall deem beneficial to the infant.⁴⁴

Under the statutes of some states the lease should be approved by the court,⁴⁵ though failure to secure such approval merely renders the lease voidable and subject to be set aside by the proper court.⁴⁶ Where the statute requires the lease to be in writing this requirement must be complied with or the lease will be a nullity.⁴⁷

Direct and collateral attack upon the proceedings leasing an infant's property are governed by the same principles which apply to sales.⁴⁸

Appeal is governed by principles elsewhere discussed.⁴⁹

D. SALE, MORTGAGE, ETC., OF PERSONALTY. — A guardian has power, if not restrained by statute, to sell his ward's personal estate without an order of court,⁵⁰ and it seems the guardian may lease the personalty

People v. Ingersoll, 20 Hun (N. Y.) 316.

[a] "By the common law neither the guardian in socage or any other guardian had any power or authority to surrender a lease in fee, or to lease the freehold estate of the ward for any longer time than during the probable continuance of the trust that is, in the case of guardianship by will until the age of twenty-one, and of guardianship by socage until the age of fourteen. (Roe v. Hodgson, 2 Wilson 129; Doe v. Bell, 5 Durn. & East 471; Litt. §123; Cary's Comm. on Litt. 240)." Putnam v. Ritchie, 6 Paige Ch. (N. Y.) 390.

42. Emerson v. Spicer, 46 N. Y. 594; In re Stafford, 3 Misc. 106, 22 N. Y. Supp. 706.

43. Magruder v. Peter, 4 Gill & J. (Md.) 323.

44. By Statute.—Gomez v. Gomez, 147 N. Y. 195, 41 N. E. 420; Hedges v. Riker, 5 Johns. Ch. (N. Y.) 163, 167; Ricardi v. Gaboury, 115 Tenn. 484, 491, 89 S. W. 98; Talbot v. Provine, 7 Baxt. (Tenn.) 502.

[a] Without the support of authority, it would seem that, granting the jurisdiction of an equity court to dispose of the fee in a minor's real estate when it clearly appeared this was manifestly in his interest, the disposition of a lesser estate upon the same ground might equally be sanctioned by the court. Ricardi v. Gaboury, 115 Tenn. 484, 493, 89 S. W. 98.

45. Muller v. Benner, 69 Ill. 108.

46. Under a statute providing that

guardian may lease upon such terms and for such length of time "as the court shall approve," a failure to have the court approve the lease does not render it void, but voidable only. Field v. Herrick, 101 Ill. 110. See Alexander v. Battington, 66 Iowa 360, 23 N. W. 754.

47. Sawyers v. Zackery, 1 Head (Tenn.) 21.

48. See Anderson v. Ammonett, 9 Lea (Tenn.) 1, 11; and *supra*, III, A, 9 and 10.

[a] A bona fide purchaser for value of the leasehold interest will be protected, though the proceedings were not regular, where the court sanctioning the lease had jurisdiction and the infant was a party to the proceeding. Anderson v. Ammonett, 9 Lea (Tenn.) 1, 11.

49. See *supra*, III, A, 3, c, (VIII).

[a] Where a statute provides that any person aggrieved by any order of a judge of probate may appeal therefrom, this does not authorize the father of an infant, who has no legal interest in its estate, to appeal from an order authorizing the guardian of the infant to lease its land. In re Cook, 99 Mich. 63, 57 N. W. 1085.

[b] On appeal from the probate to the circuit court the question of whether the lease is for the best interest of infant is not triable by jury. In re Cook, 99 Mich. 63, 57 N. W. 1085.

50. U. S.—Wallace v. Holmes, 9 Blatchf. 65, 29 Fed. Cas. No. 17,100. Ala.—Woodward v. Donally, 27 Ala.

without an order of court.⁵¹ By statute, however, the power of the guardian to sell or mortgage the personalty at will is sometimes restricted,⁵² and it is required that the court sanction the transaction,⁵³ otherwise any disposition of the personalty would be void.⁵⁴ A court of equity has power to sell the personalty of a minor for his benefit.⁵⁵

IV. CUSTODY OF INFANTS.⁵⁶—**A. JURISDICTION.**—The prerogative of the state arising out of its power and duty, as *parens patriae*, to protect the interests of infants has always been exercised by courts of chancery;⁵⁷ and courts of chancery are vested with a broad and comprehensive jurisdiction over the persons of infants.⁵⁸ Such jurisdiction

198 (*criticising dictum in Hudson v. Helmes' Exrs.*, 23 Ala. 585). **Minn.** *Humphrey v. Buisson*, 19 Minn. 182. **N. Y.**—*Field v. Schieffelin*, 7 Johns. Ch. 150, 11 Am. Dec. 441. See also Kent's Comm. (ed. of 1850), vol. 2, p. 293.

51. *Appeal of Stoughton*, 88 Pa. 198.

52. *Sample v. Lane*, 45 Miss. 556; *Washabaugh v. Hall*, 4 S. D. 168, 56 N. W. 82.

53. **Cal.**—*De La Montagnie v. Union Ins. Co.*, 42 Cal. 290; *Kendall v. Miller*, 9 Cal. 591. **Miss.**—*Sample v. Lane*, 45 Miss. 556. **Tex.**—*Harrison v. Ilgner*, 74 Tex. 86, 11 S. W. 1054.

54. *De La Montagnie v. Union Ins. Co.*, 42 Cal. 290; *Kendall v. Miller*, 9 Cal. 591.

55. *Shumard v. Phillips*, 53 Ark. 37, 13 S. W. 510.

56. See the titles "Divorce;" "Guardian and Ward;" "Habeas Corpus;" "Parent and Child."

57. *State v. Grigsby*, 38 Ark. 406; *Lindsay v. Lindsay*, 257 Ill. 328, 100 N. E. 892, Ann. Cas. 1914A, 1222, 45 L. R. A. (N. S.) 908; *Thomas v. Thomas*, 250 Ill. 354, 95 N. E. 345; *In re Vera Brown*, 117 Ill. App. 332. *Compare supra*, III, A, 1.

[a] Any matter affecting a child may become a subject of chancery jurisdiction, and it is immaterial whether it is brought to the attention of the court by bill, petition, or application for the writ of habeas corpus. *Woodruff v. Conley*, 50 Ala. 304.

[b] **Origin of Jurisdiction.**—"The jurisdiction of courts of equity over the persons and property of infants dates from a very early period in the history of these courts. In its inception this jurisdiction belonged to the King of England, the same constituting a part of his powers as *parens patriae* to protect his subjects, and was transferred by him to the court of chan-

cery." *Richards v. East Tennessee Ry. Co.*, 106 Ga. 614, 33 S. E. 193, 45 L. R. A. 712; *Com. v. Barney*, 29 Leg. Int. (Pa.) 317.

[c] In *Maguire v. Maguire*, 7 Dana (Ky.) 181, the court says that the protection of infants from brutal treatment, by their parents, formed a part of the original jurisdiction of chancery, and as such might be exercised in this country as well as in England.

[d] The control of infants and their property constituted one of the original subjects of the jurisdiction of the chancery court. *Johns v. Smith*, 56 Miss. 727; *Bacon v. Gray*, 23 Miss. 140.

Jurisdiction of guardianship proceedings, see 10 STANDARD PROC. 779.

Guardian Ad Litem.—Power of court to appoint, see 10 STANDARD PROC. 719.

58. **Ala.**—*Woodruff v. Conley*, 50 Ala. 304. **Ark.**—*Greenlee v. Rowland*, 85 Ark. 101, 107 S. W. 193; *Shumard v. Phillips*, 53 Ark. 37, 13 S. W. 510; *Myrick v. Jacks*, 33 Ark. 425. **Ga.** *Richards v. East Tennessee Ry. Co.*, 106 Ga. 614, 33 S. E. 193, 45 L. R. A. 712. **Ill.**—*Williams v. Williams*, 204 Ill. 44, 68 N. E. 449; *Ames v. Ames*, 151 Ill. 280, 37 N. E. 890; *Hartmann v. Hartmann*, 59 Ill. 103; *Lynch v. Rotan*, 39 Ill. 14; *Cowls v. Ames*, 8 Ill. 435, 44 Am. Dec. 708. **Ind.**—*M'Cord v. Ochiltree*, 8 Blackf. 15. **Mich.**—*Westbrook v. Comstock*, Walk. 314. **Miss.** *Johns v. Smith*, 56 Miss. 727. **N. J.** *In re Williams*, 77 N. J. Eq. 478, 77 Atl. 350, 79 Atl. 686; *Hesselman v. Haas*, 71 N. J. Eq. 689, 64 Atl. 165. **Tex.**—*Hall v. Whipple* (Tex. Civ. App.), 145 S. W. 308. **Wis.**—*In re Stittgen*, 110 Wis. 625, 86 N. W. 563.

[a] In *M'Cord v. Ochiltree*, 8 Blackf. (Ind.) 15, it was said that the necessity for the existence of a power to the protection of minors, was obvious, and would be implied from a

extends to the care of the persons of infants within the jurisdiction and to their protection and education,⁵⁹ the infant being regarded as the ward of the court and under its special cognizance and protection.⁶⁰

Under modern statutes the power to commit juvenile dependents and delinquents together with many of the powers formerly exercised by courts of chancery has been conferred upon the juvenile courts,⁶¹ probate courts,⁶² or various other courts.⁶³ The giving of such jurisdic-

general legislative or constitutional grant of chancery powers.

[b] **Appointment of Probation Officers.**—Probation officers like attorneys, masters in chancery, receivers, referees and other similar officers are mere assistants of the court in the performance of judicial functions. The power to appoint and remove such officers is necessary to the independent exercise of judicial power and the separation of the judicial department from the other departments of the government which are prohibited from exercising its functions. *Witter v. Cook County Com.*, 256 Ill. 616, 100 N. E. 148.

59. *Witter v. Cook County Comrs.*, 256 Ill. 616, 100 N. E. 148; *Petition of Ferrier*, 103 Ill. 367, 42 Am. Rep. 10.

[a] **Children Resident but Not Domiciled in State.**—A court of equity by virtue of its general jurisdiction over infants acquires the same authority and control over the care and custody of infants who are actually resident in the state, as it does over infants who are actually domiciled in the state. *In re Williams*, 77 N. J. Eq. 478, 77 Atl. 350, 79 Atl. 686. See *Henn v. Children's Agency*, 204 Fed. 766, 123 C. C. A. 216.

60. **Ga.**—*Richards v. East Tennessee Ry. Co.*, 106 Ga. 614, 33 S. E. 193, 45 L. R. A. 712. **Ill.**—*Williams v. Williams*, 204 Ill. 44, 68 N. E. 449. **Mich.** *Westbrook v. Comstock*, Walk. 314. **S. C.**—*Bulow v. Witte*, 3 S. C. 308.

[a] If a bill be filed relative to an infant's person or estate, the chancery court acquires jurisdiction, and the infant, whether plaintiff or defendant, immediately becomes a ward of the court. *Rivers v. Durr*, 46 Ala. 418.

61. *Lindsay v. Lindsay*, 257 Ill. 328, 100 N. E. 892, Ann. Cas. 1914A, 1222, 45 L. R. A. (N. S.) 908; *Witter v. Cook County Comrs.*, 256 Ill. 616, 100 N. E. 148. See *infra*, IV, B, 2.

62. *In re Gassaway*, 70 Kan. 695, 79 Pac. 113; *State ex rel. Stearns County v. Klasen*, 123 Minn. 382, 143 N. W. 984.

63. **La.**—Recorders in the city of New Orleans. *State ex rel. Caillouet v. Recorder*, 111 La. 225, 35 So. 529.

Md.—Justices of the peace in city of Baltimore. *Roth v. House of Refuge*, 31 Md. 329. **Neb.**—The county court. *Scott v. Flowers*, 61 Neb. 620, 85 N. W. 857. **S. D.**—Circuit or county court. *McFall v. Simmons*, 12 S. D. 562, 81 N. W. 898.

[a] **The supreme court of New York**, like the former court of chancery, exercises a general control over all minors. *People ex rel. Johnson v. Erbert*, 17 Abb. Pr. (N. Y.) 395.

[b] **In Texas** (1) the jurisdiction which under the common law and equity system of England was exercised by courts of chancery over the custody of infants has been conferred upon the district courts by art. 5, §§8 and 16 of the constitution, the county courts having no control over infants except as wards of guardians appointed by them. *Ex parte Reeves*, 100 Tex. 617, 103 S. W. 478. (2) The jurisdiction of the district court can be invoked only by an original proceeding brought in that court, and cannot be exercised on an appeal in a guardianship proceeding begun in the county court. *Estes v. Presswood* (Tex. Civ. App.), 137 S. W. 145.

[c] **Washington.**—The superior court is the only court of record having power to commit a minor to the state reform school. *In re Barbee*, 19 Wash. 306, 53 Pac. 155.

[d] **The circuit courts of Wisconsin** in dealing with the custody of minors, act judicially as courts, with all the powers, ancient and modern, of both chancellor and the court of chancery. *In re Stittgen*, 110 Wis. 625, 86 N. W. 563.

[e] Where the statute provides that proceedings for the commitment of dependent or neglected children to the state public school are to be had before the county judge, such proceedings are valid if had before the county judge sitting as a court. *State ex rel.*

tion to the probate court does not necessarily deprive the chancery court of its powers.⁶⁴

B. STATUTORY PROCEEDINGS AFFECTING THE CUSTODY OF INFANTS.

1. Generally.—In many if not most of the states statutes have been enacted providing for the care and custody of what are frequently termed dependent or delinquent children, and incidentally defining certain offenses on the part of adults in connection with such children.⁶⁵ The more recent of such statutes are known as "juvenile acts," and the court in which the proceedings under the statute are conducted is usually designated as the "juvenile court,"⁶⁶ or sometimes as the "children's court,"⁶⁷ or it may be given no special title; but in this discussion the term juvenile will be used with reference to all such statutes and courts.

2. Jurisdiction and Venue.—The statute provides what court shall have jurisdiction to enforce the proceedings under it.⁶⁸

Juvenile courts have original jurisdiction in all cases coming within the terms of the juvenile acts,⁶⁹ but only such jurisdiction as is given by statute.⁷⁰

The county of the infant's residence is ordinarily the proper venue for proceedings respecting the child's care and custody under such statutes.⁷¹

3. Purpose and Construction of Juvenile Acts.

— Juvenile acts

Spritka v. Parsons, 153 Wis. 20, 139 N. W. 825.

[f] All courts having power to issue writs of habeas corpus, and to hear and determine questions arising under them, may control the custody, education and management of a minor child. *Commonwealth v. Barney*, 29 Leg. Int. (Pa.) 317.

64. *State v. Grigsby*, 38 Ark. 406; *Myrick v. Jacks*, 33 Ark. 425.

65. See the statutes.

Crimes defined by the juvenile acts are treated in a subsequent section. See *infra*, VI.

66. Ark.—Acts, 1911, Act 215, §1. Cal.—St., 1913, ch. 673, §5. Del.—Laws, 1911, ch. 262, §1. D. C.—Code of Laws, 1910, p. 20. Ill.—Rev. St., 1913, ch. 23, §171. Kan.—Gen. St., 1909, §5099. Ky. St., 1909, §331e, subd. 2. Mich.—Pub. Acts, 1907, No. 325, §2. Mo.—Laws, 1911, p. 179, §2. Neb.—Comp. St., 1911, §2796c. N. J.—Laws, 1912, ch. 353, §1. N. D.—Laws, 1911, ch. 177, §4. Okla. Comp. Laws, 1909, §595. Ore.—Lord's Laws, §4408. Pa.—Purdon's Dig., vol. 2, p. 1881. Tenn.—Pub. Acts, 1911, ch. 58, §3. Tex.—Gen. Laws, 1905-7, ch. 65, §2. Utah.—Laws, 1913, ch. 54, §1. Wash.—Laws, 1909, ch. 190, §3. Wis. Laws, 1907, §573.

67. Ga. Code, 1911, vol. 2, art. 11; N. H. Laws, 1911, ch. 125, §3, the session for children.

68. See the statutes.

[a] **Probate Court.**—Idaho Session Laws, 1911, art. 17, §153; Mich. Pub. Acts, 1907, No. 325, §2.

69. Colo.—Ann. St., 1911, §553. D. C.—Code of Law, 1910, p. 21, §8. Ga.—Code, 1911, vol. 2, §888. Ill.—Rev. St., 1913, ch. 23, §170. Ia.—Supp. Code, 1907, ch. 5-B.

70. *In re Shelton*, 26 Pa. Co. Ct. 583, 11 Pa. Dist. 155.

[a] The juvenile court is without jurisdiction to require the reputed father of a legitimate child to provide for its support. *Moss v. United States*, 29 App. Cas. (D. C.) 188, 35 Wkly. L. R. 179.

[b] The juvenile court is one of special and limited jurisdiction, having to do only with the punishment and protection of children. It is without jurisdiction of a prosecution under the act of March 3, 1906, making it a criminal offense for a husband to fail to support his wife. *United States v. West*, 34 App. Cas. (D. C.) 12, 37 Wkly. L. R. 737, affirming 37 Wkly. L. R. 402.

71. The inquiry as to whether an infant is a delinquent child under Act

should be liberally construed to the end that their purpose may be carried out.⁷² Proceedings against children as delinquent, dependent or incorrigible are ordinarily not for the purpose of punishment, but for the purpose of reformation,⁷³ the prime consideration being the child's welfare and not the legal right to custody.⁷⁴

4. Proceedings How and at Whose Instance Commenced.—The statutes in most jurisdictions provide that certain designated persons may file a petition setting forth the facts showing a child to be within the purview of the act,⁷⁵ a frequent provision being that any reputable

No. 6, Pub. Acts Extra Sessions, 1907, should take place in the county of her residence. *In re Mould*, 162 Mich. 1, 126 N. W. 1049; Mont. Laws, 1911, ch. 122, §7.

72. Ark.—Acts, 1911, Act 215, §17. Colo.—Ann. St., 1911, §560. Fla. Laws, 1911, ch. 6216, §15. Ga.—Code, 1911, vol. 2, §885. Ill.—Rev. St., 1913, ch. 23, §189. Ia.—Supp. Code, 1907, ch. 5-B, §254a, 28. Kan.—Gen. St., 1909, §5113. Ky.—St., 1909, §331e, subd. 18. Mass.—St., 1906, ch. 413, §2. Mo.—Laws, 1911, p. 185, §22. Mont. Laws, 1911, ch. 122, §24. Neb.—Comp. Laws, 1911, §2796r. N. H.—Laws, 1907, ch. 125, §19. N. J.—Laws, 1912, ch. 353, §22. N. Y.—Laws, 1910, ch. 611, §1. N. D.—Laws, 1911, ch. 177, §21. Ohio.—Gen. Code, 1910, §1683. Okla. Comp. Laws, 1909, §603. Ore.—Lord's Laws, §4424. Tenn.—Pub. Acts, 1911, ch. 58, §17. Tex.—Gen. Laws, 1905-7, ch. 65, §10. Wash.—Laws, 1909, ch. 190, §14.

73. Cal.—*Ex parte Nichols*, 110 Cal. 651, 43 Pac. 9. D. C.—Rule v. Geddes, 23 App. Cas. 31. Ga.—Code of 1911, vol. 2, §885. Ia.—State v. Ragan, 125 La. 121, 51 So. 89. Mich.—Pub. Acts, 1907, No. 325, §2. N. Y.—Laws, 1907, ch. 611, §7. Ohio.—Prescott v. State, 19 Ohio St. 184, 2 Am. Rep. 388. Okla. *Ex parte Powell*, 6 Okla. Crim. 495, 120 Pac. 1022. Utah.—Mill v. Brown, 31 Utah 473, 88 Pac. 609, 120 Am. St. Rep. 935.

[a] **Not Penal Act.**—An act to provide for the care of delinquent children is not a penal or criminal statute in its nature, but is rather paternal, benevolent and charitable in its purposes and operation, and is intended to confer and grant favors, privileges and opportunities rather than to impose penalties, burdens or exactions. *In re Sharp*, 15 Idaho 120, 96 Pac. 563, 18 L. R. A. (N. S.) 886.

[b] A child coming under the pro-

visions of the act shall be treated, not as a criminal, but as misdirected and in need of aid and encouragement. N. J. Laws, 1912, ch. 353, §22.

[c] **In the Nature of Guardianship Proceedings.**—The proceeding by which a child is committed to the children's home is one substantially in the nature of a guardianship proceeding. *State v. Kelley*, 32 S. D. 526, 143 N. W. 953. See, however, *State v. Brown*, 50 Minn. 353, 52 N. W. 935, 36 Am. St. Rep. 651, 16 L. R. A. 691.

[d] **Marriage of a minor takes such minor out of the class known as children and minors, under the act concerning dependent children.** *In re Lewis*, 3 Cal. App. 738, 86 Pac. 996. See *McPherson v. Day*, 162 Iowa 251, 144 N. W. 4.

74. *State v. White*, 123 Minn. 508, 144 N. W. 157. See also *Woodruff v. Conley*, 50 Ala. 304.

75. **Arizona and Arkansas.**—Upon the petition of any citizen, resident of the county, setting forth that a child is neglected, dependent, incorrigible, or delinquent, and is in need of the care of the court, or when any child under eighteen is charged with a crime. *Ariz. Civ. Code*, 1913, §3564; *Acts of Ark.*, 1911, Act 215, §4.

[a] **In California** any person may file a petition showing that there is within the county, or residing therein, a neglected, dependent or delinquent person, and praying that such person be dealt with according to the "juvenile court law." St., 1913, p. 1285.

[b] **In Colorado**, any officer of the state board of child and animal protection or the juvenile court, or any person who is a resident of the county, having knowledge of a child in his county who appears to be a dependent or neglected child, may file the petition. *Ann. St.*, 1911, §554.

[c] **Delaware and New Hampshire.** Under Del. Laws, 1911, ch. 262, §8,

person, being a resident of the county, may file a petition.⁷⁶ In some states the proceedings are commenced by the filing of an affidavit.⁷⁷

5. Petition, Complaint or Affidavit.—The petition, complaint or affidavit, by which the proceedings are commenced, to obtain an adjudication of the status or condition of the child must state facts sufficient to confer jurisdiction upon the court,⁷⁸ so it must state the facts constituting neglect, dependency or delinquency as defined in the stat-

providing for a juvenile court in the city of Wilmington, any reputable citizen of said city having knowledge of a child who appears to be either neglected, dependent, or delinquent may file petition. To the same effect, N. H. Laws, 1911, ch. 125, §4.

[d] **In Florida**, any probation officer being a resident in the county where there shall be found any dependent or delinquent child may file a petition. Laws of Fla., 1911, ch. 6216, §3.

[c] **In Georgia**, any ordinary, recorder, or judge of a superior or city court may upon oath being made before him by a probation or police officer, or any citizen, that having made due inquiry he believes any child to be a delinquent or wayward child, issue his summons for the appearance of such child before the children's court. Code, 1911, vol. 2, §891.

[f] **In Idaho** all proceedings are by information or sworn complaint to be filed by the prosecuting attorney of the county as in other cases under the general laws of the state. Session Laws, 1911, art. 17, §154. But see §162, providing that when a child is a juvenile disorderly person within the meaning of §161, the truant officer, or any school teacher, or other reputable person may make complaint in the probate court of the county in which such child resides.

[g] **In Indiana**, by the board of children's guardians. Burns' Ann. St., 1908, §3659.

[h] **In Michigan** the officer making the arrest of a child under the age of seventeen shall file a petition. Pub. Acts, 1911, No. 325, §6.

[i] **New Jersey, New York and Texas.**—Any person having knowledge or information that child residing in or actually within the county is a delinquent child within the provisions of the act, may file a petition. N. J. Laws, 1912, ch. 353, § 6. To the same effect, N. Y. Laws, 1910, ch. 611, §3; Tex. Gen. Laws, 1905-7, ch. 64, §3.

[j] **In North Dakota**, any reputable

person being a resident of the state may file with the judge or clerk of the court, a petition. Laws, 1911, ch. 177, §5.

[k] **Pennsylvania.**—As to when the powers of the court may be exercised in Pennsylvania, see Purdon's Dig., vol. 2, p. 1881.

[l] **In Utah**, proceedings in the interest of juveniles as defined by the Act, shall be commenced by a complaint or sworn statement filed with the clerk of the court. Laws, 1913, ch. 54, §4.

[m] **In West Virginia** by board of trustees or directors of any orphan asylum or children's home in the state. Code, 1913, §6.

76. **Ill.**—Rev. St., 1913, ch. 23, §172. **Ia.**—Supp. Code, ch. 5-B, §254a, 15. **Kan.**—Gen. St., 1909, §5102. **Ky.**—St., 1909, §331e, subd. 4. **La.**—Const. & Rev. Laws, 1908, vol. 3, p. 394. **Mich.** Pub. Acts, 1907, No. 325, §5. **Mo.** Laws, 1911, p. 180, §3. **Mont.**—Laws, 1911, ch. 122, §5. **Nev.**—Rev. Laws, 1912, §731. **Okla.**—Comp. Laws, 1909, §598. **Ore.**—Lord's Laws, §4409. **Tenn.** Pub. Acts, 1911, ch. 58, §4. **Wash.** Laws, 1909, ch. 190, §4.

77. **La.** Const. & Rev. Laws, 1908, vol. 3, p. 394.

[a] **In Ohio**, any person having knowledge of a minor coming within the purview of the statute may file an affidavit setting forth the facts. Gen. Code, 1910, §1647.

78. *In re Lewis*, 3 Cal. App. 738, 86 Pac. 996; *In re Mundell*, 3 Cal. App. 472, 86 Pac. 833; *State ex rel. Rea v. Kinmore*, 54 Minn. 135, 55 N. W. 830.

[a] A petition which is void as not stating facts sufficient to give the court jurisdiction will be disregarded in subsequent proceedings affecting the same matter. *Moore v. Superior Court*, 22 Cal. App. 156, 133 Pac. 990.

[b] Where original petition was void and subsequently a valid petition is filed, it is immaterial that the second petition is designated "an amended or supplemental petition," and contains recitals that it was made by permission

ute,⁷⁹ should describe the child to be affected by the proceedings,⁸⁰ state the names and residence, if known to petitioner, of the parents or

of the court and is indorsed and filed under the same number as the first so-called petition. It is not what it is called, but what it is that fixes character of the pleading. *Moore v. Superior Court*, 22 Cal. App. 156, 133 Pac. 990.

79. Cal. St., 1913, p. 1285, §6; Idaho Session Laws, art. 17, §154.

[a] A petition alleging that a child is under the age of fifteen years, and was a dependent child under the act of February 26, 1903, in this, "that the said child is without proper guardianship and her home is an unfit place for such child," is not sufficient to confer jurisdiction upon the court, where the statute above referred to provides "the words 'dependent child' shall mean any child under the age of sixteen years . . . found wandering and not having any home or any settled place of abode, or proper guardianship, or visible means of subsistence; . . . or whose home, by reason of neglect, cruelty, or depravity on the part of its parents, guardian, or other person in whose care it may be, is an unfit place for such child." *In re Mundell*, 3 Cal. App. 472, 86 Pac. 833.

[b] A complaint which shows that the infant's guardian, because of his advanced age, cannot exercise that control and restraint which is necessary to prevent the infant from becoming an evil member of society, and showing also that he is vicious, and associates "late at night with immoral, drunken and dissolute persons, at his own pleasure," is sufficient. *Jarrard v. State*, 116 Ind. 98, 17 N. E. 912.

[c] A complaint charging a child with having been found "improperly exposed and neglected and wandering" in a public park "without any proper guardianship," is insufficient in that it does not charge that she was so exposed by those having her in charge. *People v. N. Y. Catholic Protectory*, 106 N. Y. 604, 13 N. E. 435, 925.

[d] Where the petition or application merely states that the child belongs "to one of the classes enumerated by the statutes," the probate court does not acquire jurisdiction to proceed against the child or its natural or legal guardian. *State ex rel. Rea v. Kimmere*, 54 Minn. 135, 55 N. W. 830.

[e] An order of commitment, issued

out of the juvenile court which is based on a petition praying that a child be taken into custody as a dependent child, but stating no facts such as are required by the statute to constitute said child a dependent child, is made without jurisdiction, and such child will be discharged on habeas corpus. *Ex parte Burner*, 23 Cal. App. 637, 139 Pac. 90.

[f] In Louisiana, a charge before the juvenile court suffices when the affidavit sets forth in general terms the facts constituting neglect or delinquency. *State v. Johnson*, 131 La. 8, 53 So. 1015.

[g] In Maine, the allegation in a complaint, that a person is "an idle, ungovernable boy, and a habitual truant," describes no offense under any statute. *Lewiston v. Fairfield*, 47 Me. 481.

[h] In Michigan, under Act No. 200, Pub. Acts, 1905; 3 Comp. Laws, §11,765, a charge that respondent was a disorderly juvenile offender, in that she neglected and refused to go to school and was a truant and is an unmanageable child, is insufficient to sustain a conviction. *People v. Turja*, 157 Mich. 530, 122 N. W. 177.

[i] In Missouri, under §1546, Rev. St., 1909, as the statute does not individuate the offense, it is therefore necessary that the information set out the facts which constitute the alleged offense, and an allegation that a girl of the age of sixteen years, "was then and there unlawfully incorrigible to such an extent that she could not be controlled by her parents and guardians, and that the associations of her . . . were then and there immoral and criminal and bad and vicious;" is insufficient. *Ex parte See*, 241 Mo. 292, 145 S. W. 419.

[j] The information should be precise and bring it clearly within the statute; when it omits any essential ingredient or circumstance, and the defect is not supplied by the evidence, the conviction is bad. *People v. N. Y. Catholic Protectory*, 106 N. Y. 604, 13 N. E. 435, 925.

80. Laws of Fla., 1911, ch. 6216, §3.

[a] Children should be named in petition, but failure to do so will be cured by failure of a parent appearing

guardian of such child,⁸¹ or person in whose immediate care the child may be,⁸² and the particular occasion for the institution of the proceedings.⁸³

In some states it is necessary to allege that the minor's parents are unable to support him and that he is not in attendance upon an educational institution,⁸⁴ or that both of its parents have abandoned the child or are unfit.⁸⁵ The petition is required to be in writing and to be verified by affidavit.⁸⁶ The petition⁸⁷ or affidavit⁸⁸ may be on information and belief. The requirement that a petition be filed is mandatory,⁸⁹ as the filing of a complaint or petition is a condition precedent to right to make any order affecting the custody of the child,⁹⁰ though objections to the complaint or petition may be waived.⁹¹

to make objection. *In re East Minors*, 143 Iowa 370, 122 N. W. 153.

81. Cal. St., 1913, p. 1285, §6.

82. Laws of Fla., 1911, ch. 6216, §3.

83. Laws of Fla., 1911, ch. 6216, §3.

84. In Georgia, in order to convict a minor between the ages of sixteen and twenty-one years, of the offense of vagrancy, under the act of August 7, 1903, p. 46, the state must allege and prove, in addition to the usual allegations, that the minor's parents were unable to support him, and that he was not in attendance upon an educational institution. *Collins v. State*, 125 Ga. 15, 53 S. E. 809; *Braswell v. State*, 119 Ga. 72, 45 S. E. 963; *Rogers v. State*, 4 Ga. App. 392, 61 S. E. 496; *Turner v. State*, 2 Ga. App. 386, 58 S. E. 492; *Jacobs v. State*, 1 Ga. App. 519, 57 S. E. 1063.

85. In Washington, under Laws. 1903, p. 60, in order to authorize a charitable society to have the exclusive possession of a child it must be alleged that both of its parents have abandoned the child or are unfit, etc., to have its custody. *State ex rel. Le Brook v. Wheeler*, 43 Wash. 183, 86 Pac. 394.

86. Cal.—St., 1913, p. 1285, §6. Colo. Ann. St., 1911, §554. Del.—Laws, 1911, ch. 262, §8. Fla.—Laws, 1911, ch. 6216, §3. Ill.—Rev. St., 1913, ch. 23, §172. Ind.—Burns' Ann. St., 1908, §3659. Ia. Supp. Code, 1907, ch. 5-B, §254a, 15. Kan.—Gen. Sts., 1909, §5102. Mo. Laws, 1911, p. 180, §3. Mont.—Laws, 1911, ch. 122, §5. Neb.—Comp. St., 1911, §2796d. N. H.—Laws, 1907, ch. 125, §4. N. J.—Laws, 1911, ch. 353, §6. N. D. Laws, 1911, ch. 177, §5. Okla.—Comp. Laws, 1909, §596. Ore.—Lord's Laws, §4409. Tenn.—Pub. Acts, 1911, ch. 58 §4. Tex.—Gen. Laws, 1905-7, ch. 61,

§3. Wash.—Laws, 1909, ch. 190, §4.

[a] An unverified petition is insufficient to give the court jurisdiction even to issue a summons, and this defect is fatal to all subsequent proceedings. *Mansfield's Case*, 22 Pa. Super. 224.

[b] In Massachusetts, the complaint shall be reduced to writing and subscribed by the complainant. Laws, 1906, ch. 413, §3.

87. N. Y. Laws, 1910, ch. 611, §3.

88. Del.—Laws, 1911, ch. 262, §8. Fla.—Laws, 1911, ch. 6216, §3. Ill. Rev. St., 1913, ch. 23, §172. Ia.—Supp. Code, 1907, ch. 5-B, §254a, 15. Kan. Gen. St., 1909, §5103. Mo.—Laws, 1911, p. 180, §3. Neb.—Comp. St., 1911, §2796d. N. J.—Laws, 1912, ch. 353, §6. N. D. Laws, 1911, ch. 177, §5. Ohio.—Gen. Code, 1910, §1647. Okla.—Comp. Laws, 1909, §596. Ore.—Lord's Laws, §4409. Tenn.—Pub. Acts, 1911, ch. 58, §4. Tex. Gen. Laws, 1905-7, ch. 64, §3. Wash. Laws, 1909, ch. 190, §4.

89. *Cullins v. Williams*, 156 Ky. 57, 160 S. W. 733.

90. *Cullins v. Williams*, 156 Ky. 57, 160 S. W. 733.

91. *In re East Minors*, 143 Iowa 370, 122 N. W. 153.

[a] Although the complaint in a proceeding to commit neglected children to a children's home may have been defective in failing to name the children, and also because too general in its statements of the nature of the charges, still where the complaint alleges abandonment and neglect, tending to induce the children to lead dissolute, vicious and immoral lives, and there is an appearance by one of the parents in resistance of the application, without objection to its sufficiency, the court acquires jurisdiction, and the parent so appearing waives objection

Trifling and ridiculous statements will not vitiate a complaint otherwise sufficient.⁵²

6. Citation or Summons, Warrant and Notice.—a. *Citation or Summons.*—The statutes generally require that upon the filing of the petition or complaint, a citation or summons shall issue to certain specified persons, fixing the day and time of the hearing,⁹³ requiring such person to appear with the child,⁹⁴ and show cause why the court should not make provision for the custody of the child.⁹⁵

Generally the citation must be directed to the person having the custody or control of the child,⁹⁶ or to a person with whom the child may

to the complaint. *In re East Minors*, 143 Iowa 370, 122 N. W. 153.

[b] **Objections or pleas technical in nature** must be summarily disposed of by the court, and the court's ruling thereon is final. Idaho Session Laws, 1911, art. 17, §154.

92. *Jarrard v. State*, 116 Ind. 98, 17 N. E. 912.

93. **Ark.**—Acts, 1911, Act 215, §5. **Cal.**—St., 1913, p. 1285, §7. **Colo.**—St. Ann., 1911, §555. **Del.**—Laws, 1911, ch. 262, §8. **Fla.**—Laws, 1911, ch. 6216, §4. **Ill.**—Rev. St., 1913, ch. 23, §173. **Ia.**—Supp. Code, 1907, ch. 5-B, §254a, 16. **Ky.**—Sts., 1909, §331e, subd. 4. **Mich.**—Pub. Acts, 1911, No. 262, §5. **Mo.**—Laws, 1911, p. 180, §4. **Mont.**—Laws, 1911, ch. 122, §5. **Neb.**—Comp. St., 1911, §2796e. **Nev.**—Rev. Laws, 1912, §732. **N. H.**—Laws, 1907, ch. 125, §5. **N. J.**—Laws, 1912, ch. 353, §7. **N. Y.**—Laws, 1910, ch. 611, §4. **N. D.**—Laws, 1911, ch. 177, §6. **Ohio.**—Gen. Code, 1910, §1648. **Okl.**—Comp. Laws, 1909, §597. **Ore.**—Lord's Laws, §4409. **Tenn.**—Pub. Acts, 1911, ch. 58, §5. **Wash.**—Laws, 1909, ch. 190, §5.

[a] **Signature of Officer.**—The officer, who is charged with the duty of issuing the process, must attach to it his official signature. *Cullins v. Williams*, 156 Ky. 57, 160 S. W. 733.

[b] The summons or warrant (1) must be signed by the judge. *N. J. Laws*, 1912, ch. 353, §7. (2) By the judge or special clerk of the court. *N. Y. Laws*, 1910, ch. 611, §4.

94. **Mass.**—Laws, 1907, ch. 195. **Mont.**—Laws, 1911, ch. 122, §5. **Nev.**—Rev. Laws, 1912, §732. **N. H.**—Laws, 1907, ch. 125, §5. **N. J.**—Laws, 1912, ch. 353, §7. **N. Y.**—Laws, 1910, ch. 611, §4. **N. D.**—Laws, 1911, ch. 177, §6. **Ohio.**—Gen. Code, 1910, §1648. **Okl.**—Comp. Laws, 1909, §597. **Ore.**—Lord's Laws, §4410. **Tenn.**—Pub. Acts, 1911, ch. 58, §5. **Tex.**—Gen. Laws, 1905-7,

ch. 64, §4. **Wash.**—Laws, 1909, ch. 190, §5.

95. **Mass.**—Laws, 1906, ch. 413. **Mont.**—Laws, 1911, ch. 122, §5. **N. J.**—Laws, 1912, ch. 353, §7. **N. Y.**—Laws, 1910, ch. 611, §4. **Tex.**—Gen. Laws, 1905-7, ch. 64, §4.

[a] **Answer by Defendant.**—"Every defendant who shall be duly summoned shall be held to appear and answer either in writing or orally in open court on the return day of the summons." *Nev. Rev. Laws*, 1912, §732; *N. D. Laws*, 1911, ch. 177, §6.

96. **Ariz.**—Civ. Code, 1913, §3564. **Ark.**—Acts, 1911, Act 215, §4. **Cal.**—St., 1913, p. 1285, §7. **Del.**—Laws, 1911, ch. 262, §8. **Fla.**—Laws, 1911, ch. 6216, §4. **Ill.**—St., 1913, ch. 23, §173. **Ind.**—Burns' Ann. St., 1908, §3659. **Ia.**—Supp. Code, 1907, sec. 254a, 16. **Kan.**—Gen. St., 1909, §5103. **Ky.**—St., 1909, §331e, subd. 4. **La.**—Const. & Rev. Laws, 1908, vol. 3, p. 394. **Mich.**—Pub. Acts, 1911, No. 262, §5. **Mo.**—Laws, 1911, p. 180, §4. **Mont.**—Laws, 1911, ch. 122, §5. **Neb.**—Comp. St., 1911, §2796e. **Nev.**—Rev. Laws, 1912, §731. **N. H.**—Laws, 1907, ch. 125, §5. **N. J.**—Laws, 1912, ch. 353, §7. **N. Y.**—Laws, 1910, ch. 611, §4. **N. D.**—Laws, 1911, ch. 177, §6. **Ohio.**—Gen. Code, 1910, §1648. **Okl.**—Comp. Laws, 1909, §597. **Ore.**—Lord's Laws, §4410. **Tenn.**—Pub. Acts, 1911, ch. 58, §5. **Wash.**—Laws, 1909, ch. 190, §5. **Wyo.**—Comp. St., 1910, §3118.

[a] **In order to avoid the incarceration of the child**, if practicable, a notice of the proceedings must be served on one parent, or guardian, or if neither be in the state, then upon some relative, or any proper person who gives a promise to be responsible for the presence of the child at the hearing of the case. Idaho Session Laws, 1911, art. 17, §155. To the same effect, *Mont. Laws*, 1911,

be,⁹⁷ or to one or both of the parents,⁹⁸ or guardian if there be no parent,⁹⁹ or some relative if there be no parent or guardian residing in the county or known to petitioner,¹ the probaton officer,² or the county agent.³ No summons can be issued until the petition is filed.⁴

The child itself, should be served in some jurisdictions.⁵

Service of this process is regulated by the statutes.⁶ Service must be made at least twenty-four hours before the time stated therein for the appearance.⁷

b. *Warrant*.—Under certain circumstances specified in the statute a warrant may issue either for parent or custodian, or for the child itself.⁸

c. *Notice*.—Generally notice of the pendency of the proceedings

ch. 122, §5; Tex. Gen. Laws, 1905-7, ch. 65, §4.

97. *Ariz.*—Civ. Code, 1913, §3564. *Del.*—Laws, 1911, ch. 262, §8. *Fla.* Laws, 1911, ch. 6216, §4. *Ia.*—Supp. Code, 1907, ch. 5-B, §254a, 16. *Kan.* Gen. St., 1909, §5103. *Ky.*—St., 1909, §331e, subd. 4. *Mass.*—Laws, 1906, ch. 413, §4. *Mich.*—Pub. Acts, 1911, No. 262, §5. *Mo.*—Laws, 1911, p. 180, §3. *Neb.*—Comp. St., 1911, §2796e. *N. H.* Laws, 1907, ch. 125, §5. *N. J.*—Laws, 1912, ch. 353, §7. *N. Y.*—Laws, 1910, ch. 611, §4. *Ohio.*—Gen. Code, 1910, §1648. *Okla.*—Comp. Laws, 1909, §597. *Ore.*—Lord's Laws, §4410. *Tenn.*—Pub. Acts, 1911, ch. 58, §5. *Wash.*—Laws, 1907, ch. 190, §5.

98. *Ark.*—Acts, 1911, Act 215, §4, to each of parents or surviving parent. *Cal.*—St., 1913, p. 1285, §7, if residing in county and residence known to petitioner. *Colo.*—St. Ann., 1911, §555. *Ind.*—Burns' Ann. St., 1908, §3659. *Ky.*—St., 1909, §331e, subd. 4. *Mass.* Laws, 1906, ch. 413, §4. *N. J.*—Laws, 1912, ch. 353, §7. *N. Y.*—Laws, 1910, ch. 611, §4. *Tex.*—Gen. Laws, 1905-7, ch. 64, §4. *Utah.*—Laws, 1913, ch. 54, §5. *Wyo.*—Comp. Laws, 1910, §3318.

[a] A judge of probate has no jurisdiction to sentence a boy to the state reform school for crime under Gen. St., ch. 76, §21, without first issuing a summons to the father, if living and resident in the place where the boy is found; and such defect of jurisdiction is not cured by the presence of the father at the trial and his examination as a witness. *Fitzgerald v. Com.*, 5 Allen (Mass.) 509.

[b] In Washington, a preliminary order, under Rem. & Ball. Code, §1701, for the temporary custody of an abandoned child until notice could be given the mother and a hearing had, is no

defense to habeas corpus by the mother to recover possession of her child, where no process was served on her as required by the statute and no further proceedings were had or final order made. *State ex rel. Stitt v. Reynolds*, 60 Wash. 12, 110 Pac. 633.

99. *Ark.*—Acts, 1911, Act 215, §4. *Cal.*—St., 1913, p. 1285, §7, if within county and residence is known to petitioner. *Colo.*—St. Ann., 1911, §555. *Ky.*—St., 1909, §331e, subd. 4. *Mass.* Laws, 1907, ch. 195. *N. J.*—Laws, 1912, ch. 353, §7. *N. Y.*—Laws, 1910, ch. 611, §4. *Tex.*—Gen. Laws, 1905-7, ch. 64, §4. *Utah.*—Laws, 1913, ch. 54, §5. *Wyo.*—Comp. Laws, 1910, §3318.

1. *Cal.* St., 1913, p. 1285, §7.
2. *Mass.* St., 1906, ch. 413, §3; *Mich.* Pub. Acts, 1911, No. 262, §5.
3. *Mich.* Pub. Acts, 1911, No. 262, §5.
4. *Cullins v. Williams*, 156 Ky. 57, 160 S. W. 733.

5. *Mass.*—Laws, 1906, ch. 413, §3. *Mo.*—Laws, 1911, p. 180, §4. *Ohio.* Gen. Code, 1910, §1648.

[a] In Kansas, summons shall issue in name of the state requiring the child to be present. Gen. St., 1909, §5103.

6. *Service of Summons*.—See *Mass.* Laws, 1907, ch. 195; *N. Y.* Laws, 1910, ch. 611, §6.

7. *Cal.*—St., 1913, ch. 673, §7. *Del.* Laws, 1911, ch. 262, §8. *Kan.*—Gen. St., 1909, §5103, unless otherwise directed by the court. *Ky.*—St., 1909, §331e, subd. 4. *Mo.*—Laws, 1911, p. 180, §4. *Neb.*—Comp. St., 1911, §2796e. *N. H.*—Laws, 1907, ch. 125, §5. *Okla.* Comp. Laws, 1909, §597. *Ore.*—Lord's Laws, §4410. *Wash.*—Laws, 1909, ch. 190, §5.

8. *Ill.*—Rev. St., 1913, ch. 23, §173. *Ia.*—Supp. Code, 1907, §254a, 16. *Nev.* Rev. Laws, 1912, §732.

must be given to the parents, guardian, next of kin or person having the custody of the child.⁹ Under some statutes, however, such notice is not required.¹⁰ The usual provision is that the parents of the child, if living and their residences be known, or legal guardian, or if there is neither parent or guardian, or if the residence of the parent or guardian is not known, then some relative, if there be one, and his residence be known, shall be notified of the proceedings.¹¹

Failure to give the required notice renders the proceedings void.¹²

9. *People v. Lynch*, 223 Ill. 346, 79 N. E. 70; *People ex rel. Aikins v. State Industrial School*, 33 Misc. 396, 67 N. Y. Supp. 674; *People ex rel. James v. New York, etc.*, 19 Misc. 561, 44 N. Y. Supp. 1098.

[a] Where written notice was served upon the mother and the stepfather appeared, it was held sufficient notice, an opportunity being afforded to be present. *Petition of Ferrier*, 103 Ill. 367, 42 Am. Rep. 10.

[b] A mother is not bound by an order made by a probate judge sending her child to the state public school without any notice to her, if she was within the county, or to any of the child's friends or relations; and she can sue out the writ of habeas corpus to regain their custody. *Goodchild v. Foster*, 51 Mich. 599, 17 N. W. 74.

[c] All persons named in the petition shall be notified of the proceedings by summons. *Ark.*—Acts, 1911, Act 215, §4. *Nev.*—Rev. Laws, 1912, §731. *N. D.*—Laws, 1911, ch. 177, §5.

[a] Notice by publication is sufficient. *Nev. Rev. Laws*, 1912, §§731, 732.

10. See *People ex rel. Mengione v. Briggs*, 138 App. Div. 386, 122 N. Y. Supp. 715.

[a] In New York, a child, committed in New York city to a reformatory under the provisions of the special act, Laws, 1886, ch. 353, may be so committed without notice to either parent, as the provisions as to notice, which are contained in §291 of the Penal Code, do not apply. *People ex rel. Amato v. House of Good Shepherd*, 29 Misc. 466, 60 N. Y. Supp. 771.

[b] "No provision for notice to parents is found in the act . . . therefore when the commitment is made to the protectory, under the act . . . notice to parents is unnecessary." *People ex rel. Lopardo v. Catholic Protectory*, 61 How. Pr. (N. Y.) 445. See *People v. N. Y. Catholic Protectory*, 106 N. Y. 604, 13 N. E. 435, 925.

[c] In Ohio, the proceedings and commitment of a minor, whose father is living, to the house of refuge, under the third clause of §2087 of Rev. St., as amended (77 O. L. 217) are not void for want of notice to the father. *Cincinnati House of Refuge v. Ryan*, 37 Ohio St. 197.

[d] In Utah, under §3631, Rev. St., 1898, the parent need not be made a party to or even have notice of the proceeding against the child. *Mill v. Brown*, 31 Utah 473, 88 Pac. 609, 120 Am. St. Rep. 935.

11. *Del.*—Laws, 1911, ch. 262, §8. *Fla.*—Laws, 1911, ch. 6216, §4. *Ia.*—Supp. Code, 1907, §254a, 16; *In re East Minors*, 143 Iowa 370, 122 N. W. 153. *Kan.*—Gen. St., 1909, §5103. *Ky.*—St., 1909, §331e, subd. 4. *Mo.*—Laws, 1911, p. 180, §4. *Neb.*—Comp. St., 1911, §2796e. *N. H.*—Laws, 1907, ch. 125, §5. *Okla.*—Comp. Laws, 1909, §597. *Ore.*—Lord's Laws, §4410. *Tenn.*—Pub. Acts, 1911, ch. 58, §5. *Wash.*—Laws, 1909, ch. 190, §5.

[a] In Michigan, the parent or guardian shall be notified. *Pub. Acts*, 1911, No. 262, §5.

[b] In Ohio, a probate court has no jurisdiction to hear a cause and order the girl committed to the girl's industrial home without first notifying the board of county visitors of the hearing, and the attendance of the board, either as a board or by committee. *Trustees of Girls' Industrial Home v. Steffen*, 7 Ohio N. P. 409.

[c] In Washington, not less than five days' notice shall be given to the parents, guardian or next of kin. *Laws*, 1903, p. 59, §1; *State ex rel. Le Brook v. Wheeler*, 43 Wash. 183, 86 Pac. 394.

12. *Ill.*—*People ex rel. McEntee v. Lynch*, 223 Ill. 346, 79 N. E. 70. *Mich.*—*Goodchild v. Foster*, 51 Mich. 599, 17 N. W. 74. *N. Y.*—*Matter of Heery*, 51 Hun 372, 4 N. Y. Supp. 428; *People ex rel. Cronin v. Carpenter*, 25 Misc. 341, 55 N. Y. Supp. 521.

[a] Where it was admitted that no

Notice need not be given to the child unless required by the statute.¹³

7. Commitment Pending Hearing.—a. *Generally.*—The court may commit the child to a proper person or institution pending the disposition of the case.¹⁴

b. *Child To Be Kept Apart From Adults.*—Pending a hearing a child under a certain age, shall not be placed in any apartment, cell, or place of confinement,¹⁵ or in any court room,¹⁶ or in any vehicle of transportation,¹⁷ in company with adults charged with or convicted of crime.

notice of the proceedings before the magistrate was given to the father of the child, with whom she resided, and that he was not present at the examination, although the mother was present, it was held that by reason of the omission of notice to the father the magistrate proceeded without jurisdiction. *People v. N. Y. Catholic Protectory*, 106 N. Y. 604, 13 N. E. 435, 925. See also *People ex rel. Van Heck v. N. Y. Catholic Protectory*, 101 N. Y. 195, 4 N. E. 177.

[b] If application to award custody of minor to a charitable institution is on the application of the mother, the court does not acquire jurisdiction if notice is given only to the mother and the hearing is had and order made immediately without any notice to the father. *State ex rel. Le Brook v. Wheeler*, 43 Wash. 183, 86 Pac. 394.

[c] **Habeas corpus** proper remedy in such case, see *infra*, IV, B, 14; and the title "Habeas Corpus."

[d] Where both parents appear in court at the hearing, failure to give them notice of the proceedings as required by law is immaterial. *De Kay v. Oliver*, 161 Iowa 550, 143 N. W. 508.

13. Rule v. Geddes, 23 App. Cas. (D. C.) 31; *In re East Minors*, 143 Iowa 370, 122 N. W. 153. But see *Mass. Laws*, 1906, ch. 413, §3.

[a] In a proceeding by a board of children's guardians for the custody of a child of thirteen years of age, where notice of the proceeding has been given the father and mother of the child, the court has acquired jurisdiction of the infant without serving notice of the proceeding upon it, other than by taking it into custody by the proper official. *Board of Children's Guardians v. Shutter*, 139 Ind. 268, 34 N. E. 665, 31 L. R. A. 740.

14. N. J.—*Laws*, 1912, ch. 353, §7. **N. Y.**—*Laws*, 1910, ch. 611, §10. **Ore.** *Lord's Laws*, §4410. **Tenn.**—*Pub. Acts*,

1911, ch. 58, §5. **Wash.**—*State ex rel. Stitt v. Reynolds*, 60 Wash. 12, 110 Pac. 633.

15. Ariz.—*Civ. Code*, §3569. **Ark.** *Acts*, 1911, Act 215, §11. **Ill.**—*Rev. St.*, 1913, ch. 23, §179. **Ia.**—*Supp. Code*, 1907, ch. 5-B, §254a, 24. **Kan.**—*Gen. St.*, 1909, §5104, except in case of felony. **Ky.**—*St.*, 1909, §331e, subd. 4. **La.**—*Const. & Rev. St.*, 1908, vol. 3, p. 395. **Mass.**—*Laws*, 1906, ch. 413, §3. **Mich.**—*Pub. Acts*, 1911, No. 262, §3. **Minn.**—*Rev. Laws*, 1905, §5502. **Mo.** *Laws*, 1911, p. 183, §13. **Mont.**—*Laws*, 1911, ch. 122, §5. **Neb.**—*Comp. St.*, 1911, §2796e. **Nev.**—*Rev. Laws*, 1912, §742. **N. H.**—*Laws*, 1907, ch. 125, §16. **N. Y.** *Laws*, 1910, ch. 611, §5. **Okla.**—*Comp. Laws*, 1909, §602. **Ore.**—*Lord's Laws*, §4418. **Pa.**—*Purdon's Dig.*, vol. 2, pp. 1880, 1882. **R. I.**—*Gen. Laws*, 1909, ch. 351, §4. **Tenn.**—*Pub. Acts*, 1911, ch. 58, §11. **Wash.**—*Laws*, 1909, ch. 190, §11. **Wis.**—*Laws*, 1907, §513.

[a] In Delaware, no child under fourteen is to be placed in any county jail or police station. *Laws*, 1911, ch. 262, §8.

[b] In Florida, no child shall under any circumstances be incarcerated in any common jail. *Laws*, 1911, ch. 6216, §4.

[c] In Illinois no child under twelve years of age shall be committed to a jail or police station. *Rev. St.*, 1913, ch. 23, §179.

16. Ariz.—*Civ. Code*, 1913, §3569. **Mich.**—*Pub. Acts*, 1907, No. 325, §8. **Pa.** *Purdon's Dig.*, vol. 2, p. 1880.

[a] In New Hampshire, the sessions of the juvenile court shall be separate from the trial of criminal cases, and so far as practicable shall be held in rooms not used for such trials. *Laws*, 1907, ch. 125, §3.

17. Ariz.—*Civ. Code*, 1913, §3569. **Mich.**—*Pub. Laws*, 1907, No. 325, §8. **Pa.**—*Purdon's Dig.*, vol. 2, p. 1880. **R. I.**—*Gen. Laws*, 1909, ch. 351, §4.

8. Admission to Bail.—The right of any person by law to give bond or security for appearance at the trial, is given to the child by some of the statutes.¹⁸

9. Record and Docket.—The records of all proceedings under the juvenile acts are required to be kept in a separate book or books,¹⁹ and may be withheld from indiscriminate public inspection in the discretion of the court.²⁰ A separate docket must also be kept.²¹

10. Trial, Examination or Hearing.—a. *Generally.*—At the trial or examination the court may appoint some suitable person to act on behalf of the child,²² and may appoint counsel to represent the child, without compensation,²³ or some other proper person may appear on its behalf.²⁴

The child, in some jurisdictions,²⁵ or any friend of or person inter-

18. Ky.—St., 1909, §331e, subd. 5. **Mich.**—Pub. Acts, 1911, No. 262, §4. **N. Y.**—Laws, 1910, ch. 611, §8. **N. D.**—Laws, 1911, ch. 177, §16. **Tenn.**—Pub. Acts, 1911, ch. 58, §5.

19. Ark.—Acts, 1911, Act 215, §3. **Cal.**—St., 1913, p. 1285, §5. **Del.**—Laws, 1911, ch. 262, §5. **Fla.**—Laws, 1911, ch. 6216, §2. **Idaho.**—Session Laws, 1911, art. 17, §153. **Ill.**—Rev. St., 1913, ch. 23, §171. **Ky.**—St., 1909, §331e, subd. 2. **Mich.**—Pub. Acts, 1911, No. 262, §3. **Mo.**—Laws, 1911, p. 180, §2. **Mont.**—Laws, 1911, ch. 122, §3, the juvenile delinquent record. **Neb.**—Comp. St., 1911, §2796c. **N. D.**—Laws, 1911, ch. 177, §4. **Okla.**—Comp. Laws, 1909, §595. **Ore.**—Lord's Laws, §4408. **Tenn.**—Pub. Acts, 1911, ch. 58, §3. **Tex.**—Gen. Laws, 1905-7, ch. 65, §2. **Wash.**—Laws, 1911, ch. 56, §1. **Wis.**—Laws, 1907, §573.

[a] If it shall be determined by the court that there is no ground for complaint, no permanent record shall be made by the court. **Kan.** Gen. St., 1909, §5102.

20. N. J. Laws, 1912, ch. 353, §8; **N. Y.** Laws, 1910, ch. 611, §7.

21. Del.—Laws, 1911, ch. 262, §5. **Idaho.**—Session Laws, 1911, art. 17, §153, to be known as "The Juvenile Docket." **Ky.**—St., 1909, §331e, subd. 2. **Mont.**—Laws, 1911, ch. 122, §3. **N. H.**—Laws, 1907, ch. 125, §3. **Okla.**—Comp. Laws, 1909, §595. **Tenn.**—Pub. Act, 1911, ch. 58, §3.

22. Ark.—Acts, 1911, Act 215, §5. **Fla.**—Laws, 1911, ch. 6216, §4. **Ill.**—Ames v. Ames, 151 Ill. 280, 37 N. E. 890. **Ia.**—Supp. Code, 1907, ch. 5-B, §254a, 16. **Kan.**—Gen. St., 1909, §5103, may appoint person or association. **Ky.**—St., 1909, §331e, subd. 4. **Mass.**—Laws,

1907, ch. 195. **Mo.**—Laws, 1911, p. 180, §4. **Nev.**—Rev. Laws, 1912, §732. **N. H.**—Laws, 1907, ch. 125, §5. **Okla.**—Comp. Laws, 1909, §597. **Ore.**—Lord's Laws, §4410. **Tenn.**—Pub. Acts, 1911, ch. 58, §5. **Tex.**—Gen. Laws, 1905-7, ch. 64, §4. **Wash.**—Laws, 1909, ch. 190, §5.

23. Fla.—Laws, 1911, ch. 6216, §4. **Ga.**—Code, 1911, vol. 2, §894; *Rooks v. Tindall*, 138 Ga. 863, 76 S. E. 378. **Idaho.**—Session Laws, 1911, art. 17, §155. **Ia.**—Const. & Rev. St., 1908, vol. 3, p. 396. **N. Y.**—Laws, 1910, ch. 611, §6. **N. D.**—Laws, 1911, ch. 177, §16.

[a] **Not Obligated To Appoint Attorney.**—*Rooks v. Tindall*, 138 Ga. 863, 76 S. E. 378.

[b] **In Michigan** the court may appoint counsel to appear and defend on behalf of the child, who shall be paid out of the general fund of the county or city, as the court may direct. **Pub. Acts**, 1911, No. 262, §3.

24. The probation officer shall be present at every hearing in the interest of the child. **Ia.**—Supp. Code, 1907, §254a, 19. **Mont.**—Laws, 1911, ch. 122, §8. **Ohio.**—Gen. Code, 1910, §1663.

[a] **In Louisiana**, in all preliminary proceedings against the child it need not appear in person, but, in the discretion of the court, may be represented by the probation officer. **Const. & Rev. Laws**, 1908, vol. 3, p. 396.

[b] **Agent of the State Board of Charity.**—**Mass.** Laws, 1907, ch. 195.

25. Ga. Code, 1911, vol. 2, §894. But see *Rule v. Geddes*, 23 App. Cas. (D. C.) 31, holding that the child herself, having no right to control her own action or to select her own course of life, had no legal right to be heard in the proceedings. *Compare Ex parte Becknell*, 119 Cal. 496, 51 Pac. 692.

ested in the child, on its behalf, may put in defense.²⁶ And under some statutes any person interested has the right to appear and be represented by counsel.²⁷ Under other statutes all persons named in the petition must be made defendants by name.²⁸

b. *Place and Manner of Hearing.*—The juvenile acts usually provide that the court shall proceed to hear and dispose of the case in a summary manner,²⁹ and in some states it is provided that the court may conduct the case without the assistance of counsel.³⁰ It is held that there are few inflexible rules of procedure governing such cases.³¹

The hearing should be held in chambers or in private so far as may lawfully be done,³² to the exclusion of those not having a direct interest in the case,³³ or who are not necessary to the hearing of the case.³⁴

c. *Right to Jury Trial.*—The right of a jury trial is denied the child in some jurisdictions,³⁵ while in other states a jury trial may be

26. Colo.—St. Ann., 1911, §556. Fla.—Laws, 1911, ch. 6216, §4. Ga.—Code, 1911, vol. 2, §894.

See *Ex parte Becknell*, 119 Cal. 496, 51 Pac. 692.

27. Colo. St., Ann., §553; Tex. Gen. Laws, 1905-7, ch. 64, §2.

28. Ark.—Acts, 1911, Act 215, §4. Mont.—Laws, 1911, ch. 122, §5. Nev. Rev. Laws, 1912, §731. N. D.—Laws, 1911, ch. 177.

29. Del.—Laws, 1911, ch. 262, §8. Ia.—Supp. Code, 1907, ch. 5-B, §254a, 6. Kan.—Gen. St., 1909, §5103. Mo. Laws, 1911, p. 180, §4. Neb.—Comp. St., 1911, §2796e. Ohio.—Gen. Code, 1910, §1650. Okla.—Comp. Laws, 1909, §597. Ore.—Lord's Laws, §4410. Tenn. Pub. Acts, 1911, ch. 58, §5. Wash. Laws, 1909, ch. 190, §5.

[a] The court will not go beyond the statute to hold the tribunal whose peculiar duty it is to guard the interests of minors to a strict regularity in summary proceedings. *Shaw v. Smith*, 8 Ind. 485.

[b] "The proceeding . . . is summary in character, is not one conducted according to the course of the common law, nor is it a proceeding within the general jurisdiction of the district court. *People ex rel. Van Riper v. N. Y. Catholic Protectory*, 106 N. Y. 604, 13 N. E. 435; *Matter of Knowack*, 158 N. Y. 482, 53 N. E. 676, 44 L. R. A. 699." *Kelsey v. Carroll (Wyo.)*, 138 Pac. 867. Compare *Ex parte Becknell*, 119 Cal. 496, 51 Pac. 692.

30. N. J. Laws, 1912, ch. 353, §8; N. Y. Laws, 1910, ch. 611, §7.

31. *Cullins v. Williams*, 156 Ky. 57, 160 S. W. 732.

[a] Investigations before juvenile

courts need not be conducted as trials usually are, still these courts should not disregard all rules of procedure. *Mill v. Brown*, 31 Utah 473, 88 Pac. 609, 120 Am. St. Rep. 935.

32. Ariz.—Civ. Code, 1913, §3562. Del.—Laws, 1911, ch. 262, §8. Ga.—Code, 1911, vol. 2, §889. Ky.—St., 1909, §331e, subd. 4. Mass.—Laws, 1907, ch. 195. Mont.—Laws, 1911, ch. 122, §8. N. J. Laws, 1912, ch. 353, §8. N. Y. Laws, 1910, ch. 611, §7. Wash.—Laws, 1911, ch. 56, §3.

[a] In California, at request of the person charged with being dependent, delinquent, or neglected, or either of his parents or guardian, such hearing may be had privately and in the manner provided by law for private hearings at preliminary examinations. St., 1913, p. 1285, §25.

[b] *Minors Excluded From Hearings.*—N. H. Laws, 1907, ch. 125, §3.

33. N. J.—Laws, 1912, ch. 353, §8. N. Y.—Laws, 1910, ch. 611, §7. Wash. Laws, 1911, ch. 56, §3.

[a] *Immediate friends or relatives* of the child may be present. Kan. Gen. St., 1909, §5088.

34. Ia.—Supp. Code, 1907, ch. 5-B, §254a, 19. Mass.—Laws, 1907, ch. 195. Minn.—Rev. Laws, 1905, §5503. Mont. Laws, 1911, ch. 122, §8.

[a] In Michigan, the judge may exclude from the court room in trials under the act, any person whose presence is deemed prejudicial to the interests of the child or the public, when such person does not have a recognized personal interest in the case. Pub. Acts, 1911, No. 262, §3.

35. Ariz. Civ. Code, 1913, §3562;

had on demand of the infant or other interested person, or the judge may on his own motion call a jury.³⁶ Unless a jury is demanded it is deemed to be waived,³⁷ but one cannot be imprisoned as a criminal without a trial by jury.³⁸

11. Findings and Judgment or Order.—If the allegations of the petition be found to be true the court may adjudge the child a delinquent, dependent, or neglected child, as the case may be.³⁹

12. Sentence and Commitment.—a. *In General.*—The commitment of a minor should not be made without the intervention of a com-

Com. v. Fisher, 213 Pa. 48, 62 Atl. 198.

[a] A delinquent child is not entitled to a jury trial. State ex rel. Olson v. Brown, 50 Minn. 353, 52 N. W. 935, 36 Am. St. Rep. 651, 16 L. R. A. 691.

[b] In Indiana, a proceeding in the juvenile court, for the commitment of an eleven-year old girl to the girls' industrial school is not a criminal action, and she is not entitled to a jury trial. Dinson v. Drosta, 39 Ind. App. 432, 80 N. E. 32. Compare *Ex parte* Becknell, 119 Cal. 496, 51 Pac. 692.

36. Colo.—St. Ann., §553, a jury of six or twelve. Ga.—Code, 1911, vol. 2, §890; Rooks v. Tindall, 138 Ga. 863, 76 S. E. 378. Ill.—Rev. St., 1913, ch. 23, §170 (jury of six); held constitutional in Lindsay v. Lindsay, 257 Ill. 328, 100 N. E. 892, Ann. Cas. 1914A, 1222, 45 L. R. A. (N. S.) 908. Mich.—Pub. Acts, 1907, No. 325, jury of six. Mont. Laws, 1911, ch. 122, §3. Neb.—Comp. Laws, 1911, §2796b. Nev.—Rev. Laws, 1912, §729. Okla.—Comp. Laws, 1909, §595. Ore.—Lord's Laws, §4407, jury of six. Tenn.—Pub. Acts, 1911, ch. 58, §2. Tex.—Gen. Laws, 1905-7, ch. 64, §1; Windham v. State (Tex. Crim.), 150 S. W. 613. Wash.—Laws, 1909, ch. 190, §2.

[a] In Indiana, issues of fact are tried under the rules and procedure relating to civil causes. Burns' Ann. St., 1908, §3659.

[b] In Missouri, procedure usual in criminal cases applies when the child is charged with a violation of the criminal statutes of the state and in such case, the child, his parent or any person standing in loco parentis to him may on his behalf demand a jury trial. In all other cases the trial is had before the court without a jury. Laws, 1911, p. 180, §2.

37. Colo.—Ann. St., §553. Ga.—Code, 1911, vol. 2, §890; Rooks v. Tindall, 138

Ga. 863, 76 S. E. 378. Mo.—Laws, 1911, p. 180, §2. Nev.—Rev. Laws, 1912, §729.

Contra, as to a boy of fourteen years of age. Mansfield's Case, 22 Pa. Super. 224.

38. Cal.—*Ex parte* Becknell, 119 Cal. 496, 51 Pac. 692. Mo.—Laws, 1911, p. 180, §2. N. J.—Laws, 1912, ch. 353, §8. Compare Dinson v. Drosta, 39 Ind. App. 432, 80 N. E. 32.

39. Mich.—Pub. Acts, 1911, No. 262, §5. N. J.—Laws, 1912, ch. 353, §8. N. Y.—Laws, 1910, ch. 611, §7.

[a] Specific Written Findings Required.—Ark.—Acts, 1911, Act 215, §3. Neb.—Comp. St., 1911, §2796e. Utah. Laws, 1913, ch. 54, §9.

[b] In Nebraska, under §9736, Ann. St., a finding by the court that "the accused is a fit subject for the industrial school," is sufficient without a written finding that the accused is a boy of sane mind and under eighteen years of age. Leiby v. State, 79 Neb. 485, 113 N. W. 125. See *Ex parte* Williams, 87 Cal. 78, 24 Pac. 602, 25 Pac. 248.

[c] The order or decree should adjudge both that the child is a delinquent, within the meaning of that term as defined in the act, and that he is either without care and protection of a parent or guardian, or that the parent or guardian is neglecting and failing to discharge the duties he owes to the child. *In re* Sharp, 15 Idaho 120, 96 Pac. 563, 18 L. R. A. (N. S.) 886; Nill v. Brown, 31 Utah 473, 88 Pac. 609, 120 Am. St. Rep. 935. See also *In re* Kelley, 152 Mass. 432, 25 N. E. 615; Farnham v. Pierce, 141 Mass. 203, 6 N. E. 830, 55 Am. Rep. 452; Milwaukee Industrial School v. Supervisors, etc., 40 Wis. 328, 22 Am. Rep. 702.

[d] In *Ex parte* See, 241 Mo. 292, 145 S. W. 419, the court said: "We furthermore think the judgment is insufficient in that it fails to show that

petent tribunal.⁴⁰ Notice to specified persons, of the pendency of the proceedings before the sentence or commitment is sometimes provided for.⁴¹

b. *Form and Contents.*—The order of commitment should state the jurisdictional facts,⁴² giving the age of the minor,⁴³ and residence if any,⁴⁴ together with other required facts.⁴⁵ The order of commitment may be changed, modified or set aside at the discretion of the court.⁴⁶

any trial was had, and fails to show that the petitioner was found guilty of any offense covered by section 1546. It does not find that she was incorrigible, or that her associations were immoral or criminal, bad or vicious. The justice finds simply that 'she is a fit subject to be committed to the State Industrial Home for Girls,' and therefore the justice proceeded to sentence her to the State Industrial Home for Girls 'for said offense.' We apprehend that the law does not contemplate that a justice of the peace may sentence a girl to the industrial home simply because he reaches the conclusion that she is a fit subject for that institution."

40. *Com. ex rel. Joseph v. M'Keagy*, 1 Ashm. (Pa.) 248.

41. But the failure to give such notice is not fatal to the validity of the sentence, where the statute does not give it that effect. *Fanning v. Com.*, 120 Mass. 388.

42. *People ex rel. Slatzkata v. Baker*, 3 N. Y. Supp. 536.

[a] The mittimus should show the jurisdiction of the court, and where it fails to show that the complainants were three respectable inhabitants of the city or town where the infant was found, as required by statute, it is insufficient. *Hibbard v. Bridges*, 76 Me. 324.

[b] "Although the statute does not expressly provide what the commitment or the order committing the child shall contain, we think clearly that in this kind of a proceeding under the statute in question, since the jurisdiction is limited, it is necessary for the order or commitment to show the case to be one within the jurisdiction of the court under the statute." *Kelsey v. Carroll* (Wyo.), 138 Pac. 867.

[c] *Commitment Prima Facie Valid.* *In re Diss Debar*, 3 N. Y. Supp. 667.

43. *Mich.*—*In re Gates*, 93 Mich. 644, 53 N. W. 914. N. Y.—*People ex rel. Safian v. Superintendent of the House of Mercy*, 62 Misc. 25, 115 N. Y. Supp.

946. But see *People ex rel. Kuhn v. Protestant Episcopal House of Mercy*, 133 N. Y. 207, 30 N. E. 853. *Wyo.* *Kelsey v. Carroll*, 138 Pac. 867.

[a] Should show that the minor is within the ages that he must be in order to render the commitment legal. *O'Malia v. Wentworth*, 65 Me. 129.

[b] The infant may be released on *habeas corpus* if the facts of age and residence are not stated. *Kelsey v. Carroll* (Wyo.), 138 Pac. 867.

[c] A mistake in the age does not vitiate a sentence, and where the court has sentenced an infant as of a given age this matter cannot be inquired into collaterally. *Matter of Mason*, 8 Mich. 70.

44. *Kelsey v. Carroll* (Wyo.), 138 Pac. 867.

45. See Me. Laws, 1907, ch. 31, §1.

[a] The report of the county agent should be attached to the mittimus. *In re Gates*, 93 Mich. 644, 53 N. W. 914.

46. Cal.—St., 1913, ch. 673, §8. Del. Laws, 1911, ch. 262, §11. Fla.—Laws, 1911, ch. 6216, §6. Ky.—St., 1909, §331e, subd. 9. La.—State *ex rel. Cailouet v. Recorder*, 111 La. 225, 35 So. 529. Mont.—Laws, 1911, ch. 122, §14. Neb.—Comp. St., 1911, §2796h. Ore. Lord's Laws, §4410. Tenn.—Pub. Acts, 1911, ch. 58, §9. Tex.—Gen. Laws, 1905-7, ch. 65, §7. Utah.—Laws, 1913, ch. 54, §10.

[a] Though the time of appeal from an order granting an association the custody of plaintiff's children has expired, the court has jurisdiction to consider plaintiff's petition for an order granting him their custody, when such petition alleges that since the former order his circumstances have changed, and that he is now able to provide and care for them, since such petition is not to review or reverse the former order, but is to procure a new judgment on a new state of facts. *McFall v. Simmons*, 12 S. D. 562, 81 N. W. 898.

A definite sentence need not be fixed in the order,⁴⁷ where the law terminates the period of commitment when the child arrives at the age of majority.⁴⁸ The child cannot be committed beyond that time in many jurisdictions,⁴⁹ though in others commitment until the age of twenty-one is permitted, in which event marriage or arrival at majority at an earlier age does not terminate the restraint.⁵⁰ A sentence for a longer period than that allowed by the statute is void.⁵¹

The order of commitment will not be deemed invalid because of any imperfection or defect in form.⁵²

Alternative sentences are permissible in some states.⁵³

Suspended Sentence.—The judge may suspend sentence upon such terms as he may impose where imprisonment is part of the punishment.⁵⁴

c. Place of.—A child found to be dependent, delinquent or neglected may be committed to the care and custody of certain designated parties or institutions,⁵⁵ as the child's own good and the best interests

47. *Leiby v. State*, 79 Neb. 485, 113 N. W. 125; *People v. Degnen*, 54 Barb. (N. Y.) 105.

[a] Even if the order of commitment was subject to criticism as fixing the period of detention for a certain designated time, the commitment would not be null and void in its entirety. The commitment would hold good, the period of detention being left open to be met by future contingencies. *State ex rel. Caillouet v. Recorder*, 111 La. 225, 35 So. 529.

48. *Ariz.*—Civ. Code, 1913, §3570. *Neb.*—*Leiby v. State*, 79 Neb. 485, 113 N. W. 125. *N. Y.*—*People v. Degnen*, 54 Barb. 105.

49. *Del.*—Laws, 1911, ch. 262, §10. *Fla.*—Laws, 1911, ch. 6216, §8. *Idaho.*—Session Laws, 1911, art. 17, §§157, 162. *Kan.*—Gen. St., 1909, §5107. *Ky.*—St., 1909, §331e, subd. 7. *La.*—Const. & Rev. Laws, 1908, vol. 3, p. 397. *Neb.*—Comp. St., 1911, §2796i. *Ohio.*—Gen. Code, 1910, §1652. *Ore.*—Lord's Laws, §4416. *Pa.*—Purdon's Dig., vol. 2, p. 1882. *Tenn.*—Pub. Acts, 1911, ch. 58, §9. *Utah.*—Laws, 1913, ch. 54, §10. *Wash.*—Laws, 1911, ch. 56, §3.

50. *McPherson v. Day*, 162 Iowa 251, 144 N. W. 4.

51. *Lewiston v. Fairfield*, 47 Me. 481.

52. *Matter of Nichols*, 19 Abb. N. C. (N. Y.) 138.

53. *O'Malia v. Wentworth*, 65 Me. 129.

54. *Me.*—See *O'Malia v. Wentworth*, 65 Me. 129. *Mont.*—Laws, 1911, ch. 122, §11. *N. H.*—Laws, 1907, ch. 125, §8. *Ohio.*—Gen. Code, 1910, §1666. *Tex.*—Gen. Laws, 1905-7, ch. 65, §9.

[a] The execution of a sentence

may be delayed, and the fact that the minor was not committed to the reform school until a year after the sentence does not authorize his release from imprisonment, as such delay could not operate to his prejudice but only made his term of imprisonment so much shorter. *O'Malia v. Wentworth*, 65 Me. 129.

55. See: *Ariz.*—Civ. Code, 1913, §3566. *Ark.*—Acts, 1911, Act 215, §7. *Cal.*—St., 1913, p. 1285, §8. *Del.*—Laws, 1911, ch. 262, §11. *Fla.*—Laws, 1911, ch. 6216, §6. *Ga.*—Code, 1911, vol. 2, §895. *Idaho.*—Session Laws, 1911, art. 17, §§157, 162. *Ill.*—Rev. St., 1913, ch. 23, §177. *Ind.*—Burns' Ann. St., 1908, §3659. *Ia.*—Supp. Code, 1907, ch. 5-B, §254a, 20. *Kan.*—Gen. St., 1909, §5105. *Ky.*—St., 1909, §331e, subd. 7. *La.*—Const. & Rev. Laws, 1908, vol. 3, p. 397. *Md.*—Laws, 1906, ch. 78, §1. *Mass.*—Laws, 1906, ch. 413, §8. *Mich.*—Pub. Acts, 1911, No. 262, §5. *Mo.*—Laws, 1911, p. 181, §5. *Neb.*—Comp. St., §2796i. *N. J.*—Laws, 1912, ch. 353, §12. *Okl.*—Comp. Laws, 1909, §599. *Pa.*—Purdon's Dig., vol. 2, p. 1883.

[a] A magistrate of the city of New York may, under Laws, 1886, ch. 353, commit a female, over twelve years of age, charged by her mother with wilful disobedience to her, found guilty of being in danger of being morally depraved, and who has not been an inmate of the penitentiary, to one of the three institutions named in the statute, but he cannot lawfully commit her to any other institution or to the New York Magdalen Benevolent Society. *People ex rel. Joyce v. New York M. B. Soc.*, 39 Misc. 583, 80 N. Y. Supp. 608.

of the state may require,⁵⁶ and so far as practical with persons of the same religious beliefs as the parents of such children.⁵⁷ Such institution or person may be required to make reports from time to time concerning the child.⁵⁸

If the condition or health of the child require it, the child may be placed in a public hospital or institution for treatment.⁵⁹

Children To Be Kept Separate From Adults.—When any child is sentenced to confinement in any institution to which adult convicts are sentenced, it shall be kept separate and apart from the adult convicts,⁶⁰ and in some jurisdictions no child shall be sentenced to confinement in any institution wherein adult convicts may be confined.⁶¹

d. Approval of Higher Court.—In case of proceedings before and a commitment by an inferior court a review and approval by a higher court or judge is sometimes provided for.⁶²

13. Appeal and Review.—Many statutes give the right to appeal to any person affected by the proceedings,⁶³ and under some statutes

[b] The institution so authorized to have the custody of the child, is left to take and hold the child for the time, and in the manner, and under the regulations prescribed by its fundamental law. *People ex rel. Van Heck v. N. Y. Catholic Protectory*, 101 N. Y. 195, 4 N. E. 177.

56. *Ariz. Civ. Code*, 1913, §3566. See *Cullins v. Williams*, 156 Ky. 57, 160 S. W. 733.

57. *Mont.*—Laws, 1911, ch. 122, §16. *N. H.*—Laws, 1907, ch. 125, §17. *N. J.* Laws, 1912, ch. 353, §15. *N. Y.*—Laws, 1910, ch. 611, §15. *N. D.*—Law, 1911, ch. 177, §18. *Ohio.*—Gen. Code, 1910, §1679. *Pa.*—Purdon's Dig., vol. 2, p. 1182.

[a] It is the duty of magistrates under §1466 of the Consolidation Act, to commit females found in houses of prostitution or of assignation, or frequenting the society of prostitutes, to a reformatory institution of the same religious faith as such persons or their parents, if practicable. Such a commitment is not impracticable, unless it appears that such institution is overcrowded or has refused to receive such person under commitment from any magistrate. *People ex rel. Plot v. Poly*, 17 Misc. 162, 40 N. Y. Supp. 990.

58. *Mont.*—Laws, 1911, ch. 122, §14. *Ore.*—Lord's Laws, §4418. *Tenn.*—Pub. Acts, 1911, ch. 58, §12.

59. *Mont.*—Laws, 1911, ch. 122, §14. *Neb.*—Comp. St., 1911, §2796g. *Nev.* Rev. Laws, 1912, §738. *N. J.*—Laws, 1912, ch. 353, §14. *N. Y.*—Laws, 1910, ch. 611, §14. *N. D.*—Laws, 1911, ch. 177, §6. *Okla.*—Comp. Laws, 1909,

§599. *Tenn.*—Pub. Acts, 1911, ch. 58, §7.

60. *Ark.*—Acts, 1911, Act 215, §11. *Ill.*—Rev. St., 1913, ch. 23, §179. *Ia.* Supp. Code, 1907, ch. 5-B, §254, 24. *Mich.*—Pub. Acts, 1911, No. 325, §8. *Minn.*—Rev. Laws, 1905, §5502. *Mo.* Laws, 1911, p. 183, §13. *Mont.*—Laws, 1911, ch. 122, §14. *Neb.*—Comp. St., 1911, §2796e. *Nev.*—Rev. Laws, 1912, §742. *Okla.*—Comp. Laws, 1909, §602. *Ore.*—Lord's Laws, §4418. *Wash.* Laws, 1909, ch. 190, §11. *Wis.*—Laws, 1907, §573.

61. *N. H.* Laws, 1907, ch. 125, §16.

62. Where it is required that the probate or district judge shall examine the evidence and approve the conviction and commitment, a failure to reduce the evidence to writing and submit the same to the district judge renders the commitment void for want of jurisdiction. *Matter of O'Leary*, 25 Mich. 144; *State v. Brown*, 47 Minn. 472, 50 N. W. 920.

[a] The certificate of approval must show that the court or judge has reviewed "the proceedings and testimony taken or had on the trial," as he is required by statute to do. *In re Pierce*, 74 Mich. 239, 41 N. W. 908; *Matter of O'Leary*, 25 Mich. 144.

63. See the following statutes and decisions: *Ark.*—Acts, 1911, Act 215, §21. *Ga.*—Code, 1911, vol. 2, §889. *Idaho.*—*In re Sharp*, 15 Idaho 120, 96 Pac. 563, 18 L. R. A. (N. S.) 886. *Ill.* Rev. St., 1913, ch. 23, §190d. *Ind.* Burns' Ann. St., 1908, §3659. *Mass.* Laws, 1906, ch. 413, §5. *Nev.*—Rev. Laws, 1912, §753. *N. Y.*—Laws, 1910,

an appeal may be taken on behalf of the infant by the parent or guardian,⁶⁴ custodian,⁶⁵ or by any relation of such infant within the given degree of kinship.⁶⁶

On appeal it will be presumed, in the absence of record evidence to the contrary, that the judge of the trial court acted in accordance with the provisions of the statute in committing the minor.⁶⁷ Some statutes fail to make provision for an appeal and in such none will lie;⁶⁸ in such states relief can be had by the aggrieved party through the writ of habeas corpus,⁶⁹ or writ of prohibition.⁷⁰

14. Collateral Attack.—The judgment of the court cannot be collaterally impeached by habeas corpus proceedings, or otherwise,⁷¹

ch. 611, §9. **N. D.**—Laws, 1911, ch. 177, §25. **Utah.**—Laws, 1913, ch. 50, §11. **W. Va.**—Code, 1913, §3310.

[a] Relief from the judgment of the court may be taken just as in any other proceeding, by appeal, bill or review, or any other method known to the law for relief against erroneous judgments. *Board of Children's Guardians v. Shutter*, 139 Ind. 268, 34 N. E. 665, 31 L. R. A. 740.

[b] **Waiver of Errors.**—Alleged errors are waived where no exceptions were reserved. *Egoff v. Board of Children's Guardians*, 170 Ind. 238, 84 N. E. 151.

[c] **In Massachusetts**, the child must be informed of its right to appeal. *Mass. Laws*, 1906, ch. 413, §5.

[d] **In Nebraska**, appeal may be had to the district court in the same manner as provided in civil cases. *Comp. Laws*, 1911, §2796b.

[e] **On Questions of Law.**—*N. J. Laws*, 1912, ch. 353, §9.

[f] **In New York**, appeals from the court of special sessions in the borough of Brooklyn are to the appellate division. But appeals from orders by the children's court of that city in cases of charges against children not amounting to crime, where the justices of said court act as magistrates, lie to the county court. *People v. O'Neill*, 117 App. Div. 826, 102 N. Y. Supp. 988.

64. *Kan. Gen. St.*, 1909, §5110; *Mo. Laws*, 1911, p. 185, §20.

65. *Kan. Gen. St.*, 1909, §5110; *Mo. Laws*, 1911, p. 185, §20.

66. *Kan. Gen. St.*, 1909, §5110; *Mo. Laws*, 1911, p. 185, §20.

67. *Lindsey v. State*, 82 Ind. 7, holding it will be presumed to be with minor's consent where such is required by statute and nothing appears to the contrary.

68. *Marlowe v. Com.*, 142 Ky. 106, 133 S. W. 1137.

[a] **General Statutes of Appeal Inapplicable.**—In Michigan, from special proceedings in probate court relating to juvenile delinquents, no appeal lies; the statute providing for appeals generally from orders of the probate court, not applying to such proceedings. *Van Leuven v. Ingham Circuit Judge*, 166 Mich. 115, 131 N. W. 531, two justices dissenting.

[b] In *Foster v. Myers*, 59 Ore. 549, 117 Pac. 806, the court said: "In our opinion chapter 34 of the Laws of 1907 (L. O. L. secs. 4406-4424, inclusive), providing for the creation of juvenile courts and prescribing the practice therein, is, in so far as it relates to those subjects, complete in itself, and the general statutes relating to appeals from the county courts have no application. . . . No right of appeal having been provided by the act none exists as to this proceeding."

69. *Marlowe v. Com.*, 142 Ky. 106, 133 S. W. 1137. See *In re Wares*, 161 Mass. 70, 36 N. E. 586; and generally the title "**Habeas Corpus.**"

[a] The parent may show at any time by a writ of habeas corpus that the object of the commitment has been accomplished. *In re Kelley*, 152 Mass. 432, 25 N. E. 615.

70. Where the statute fails to make provision for an appeal the writ of prohibition is the only adequate, but not the exclusive, remedy of the aggrieved party. *Cullins v. Williams*, 156 Ky. 57, 160 S. W. 733.

71. *Mich.*—*Board of Children's Guardians v. Shutter*, 139 Ind. 268, 34 N. E. 665, 31 L. R. A. 740; *Matter of Mason*, 8 Mich. 70. *Neb.*—*Buchanan v. Mallalien*, 25 Neb. 201, 41 N. W. 152. *N. Y.*—*People ex rel. Kuhn v. Protestant*

though if the court has no jurisdiction because of failure to observe the statutory requirements as to notice to parents,⁷² or if the process under which the infant is committed is void,⁷³ or the commitment has not been reviewed and approved as provided by law,⁷⁴ collateral attack is permissible.

15. Control of Infant After Commitment.—The authority of the person or institution or the infant committed to their custody continues during the period fixed by law and the order of commitment, and is superior to the rights of a guardian.⁷⁵

16. Discharge From Custody.—Where the statute gives the state school officers power to release an infant committed to such school be-

Episcopal House of Mercy, 133 N. Y. 207, 30 N. E. 853.

[a] "The question of the custody of a minor child, once properly and finally adjudicated, whether in a habeas corpus proceeding or otherwise, is settled for all time, unless there is an appeal, and the judgment rendered is impregnable as against a collateral assault." *Brooke v. Logan*, 112 Ind. 183, 13 N. E. 669, 2 Am. St. Rep. 177.

[b] The age of the child can be inquired into on certiorari but not collaterally by habeas corpus. *People ex rel. McCabe v. Superintendent of House of Refuge*, 8 Abb. Pr. N. S. (N. Y.) 112.

[c] But see *Com. ex rel. Joseph v. M'Keagy*, 1 Ashm. (Pa.) 248, in which it is held that in a commitment by an alderman or justice of the peace to the House of Refuge, the adjudication is in no respect conclusive of the truth of its contents, and the whole subject is open on the hearing of a writ of habeas corpus, when it is incumbent on the managers to show affirmatively, and from evidence, that the child detained in their custody, is a proper subject for the House of Refuge, within the true intent and meaning of their charter.

[d] **Petition To Set Aside Decree of Court Awarding Custody of Child.** A petition to set aside a decree of court committing the children of petitioner to the custody of the defendant, alleging, substantially, that neither of the children were "at any time abandoned, neglected, or cruelly treated, nor were they of vicious habits, nor were their surroundings of such a character as to lead to their demoralization;" that the petitioner was incapable of comprehending or doing anything because of her great grief over the loss of her children, and the petitioner is now willing and able to make provision

for their support, comfort and welfare, and to give them an education, will be denied. The petition merely denies the facts upon which the decree was granted and under this attack it will be conclusively presumed that there was evidence fully supporting the court in granting the decree. *Van Walters v. Board of Children's Guardians*, 132 Ind. 567, 32 N. E. 568, 18 L. R. A. 431.

72. *Goodchild v. Foster*, 51 Mich. 599, 17 N. W. 74.

73. In *Amidon's Case*, 40 Mich. 628, a justice committed an offender to the reform school until he should be twenty-one, and the judge of probate approved the commitment. The extreme limit allowed by law was the age of eighteen and the justice altered the commitment accordingly; and the amended process which was not approved, remained the only warrant for detaining the prisoner. It was held on habeas corpus, that the process was void, and the infant was discharged.

[a] **Failure to attach to the mittimus the certificate as to age and the report of the county agent.** *In re Gates*, 93 Mich. 644, 53 N. W. 914.

74. *Matter of O'Leary*, 25 Mich. 144; *State v. Brown*, 47 Minn. 472, 50 N. W. 920.

75. *Armstrong v. Board of Control*, 88 Minn. 382, 93 N. W. 3, either previously or subsequently appointed.

[a] **Binding Out Infant.**—Where the statute gives the managers of such institutions the power to put to service and bind out infants committed to their care, they may bind such infants to persons residing out of the state, where there is no statute restricting their so doing. *People ex rel. Tobano v. Governors of House of Refuge*, 18 How. Pr. (N. Y.) 409.

fore majority, the matter rests in the discretion of such officers and courts will not interfere.⁷⁶

V. CRIMINAL PROSECUTIONS AGAINST INFANTS.—Some of the juvenile acts, which have hereinbefore been discussed,⁷⁷ provide for the trial of all criminal prosecutions against minors under a certain age in the juvenile court,⁷⁸ and that in such case the infant shall be entitled to a jury trial.⁷⁹

VI. CRIMINAL PROSECUTIONS UNDER STATUTES FOR PROTECTION OF INFANTS.—A. UNDER THE JUVENILE ACTS.—

1. Generally.—The so-called juvenile acts usually define certain crimes on the part of persons who cause or contribute to the dependency or delinquency of juveniles.⁸⁰ In the absence of statutory provision to the contrary the prosecutions under such acts should be conducted in the same manner as other criminal prosecutions.⁸¹

2. In What Court.—Under some statutes the prosecution is in the juvenile court;⁸² while under others it is in the same court as are other criminal cases.⁸³

3. Indictment, Information or Affidavit.—a. *Necessity and Propriety of.*—In some states, prosecutions under the juvenile acts must

76. *Armstrong v. Board of Control*, 88 Minn. 382, 93 N. W. 3.

[a] **The order of the board of directors of a reformatory discharging one from custody should be duly made at a meeting of such board, and not by having a majority of the board sign the order of release at their respective places of business.** *Ex parte Walker*, 8 Ohio Dec. (Reprint) 480.

77. See *supra*, IV.

78. Ark.—Acts, 1911, Act 215, §10. **Cal.**—St., 1913, p. 1285, §§18, 20. See *Ex parte Becknell*, 119 Cal. 496, 51 Pac. 692. **D. C.**—Code Laws, 1910, p. 21, §8. **Fla.**—Laws, 1911, ch. 6216, §9. But see §10, excluding cases where minor is charged with certain crimes. **Idaho.** Session Laws, 1911, art. 17, §156, except in felony cases. **Kan.**—Gen. St., 1909, §5109. **Ky.**—St., 1909, §331e, subd. 5. **Mich.**—Pub. Acts, 1907, No. 325, §6, except child over fourteen charged with felony. **Mo.**—Laws, 1911, p. 181, §6. **Mont.**—Laws, 1911, ch. 122, §6. **Neb.**—Comp. St., 1911, §2796k. **Ohio.**—Gen. Code, 1910, §1659.

[a] **Upon indictment or presentment of a grand jury.** N. J. Laws, 1912, ch. 353, §8.

[b] **On information by the corporation counsel or his assistant and in name of the District of Columbia or United States as the case may be.** Code of Laws, 1910, p. 23, §12; *Moss v. United States*, 29 App. Cas. (D. C.) 188, 35 W. L. R. 179.

[c] **The court may in a proper case withhold sentence and make other provision for the custody of the child.** Mont. Laws, 1911, ch. 122, §14.

[d] **The probation officer is required to make an investigation of the case and render a report to the court.** Mont. Laws, 1911, ch. 122, §14; N. H. Laws, 1907, ch. 125, §8.

79. Mo.—Laws, 1911, p. 180, §2. **Neb.**—Comp. Laws, 1911, §2796b. **N. J.** Laws, 1912, ch. 353, §8.

See *Ex parte Becknell*, 119 Cal. 496, 51 Pac. 692. But see *supra*, IV, B, 10, c.

80. See the statutes.

81. State v. Eisen, 53 Ore. 297, 99 Pac. 282, 100 Pac. 257; *Mill v. Brown*, 31 Utah 473, 88 Pac. 609, 120 Am. St. Rep. 935. See *In re Sing*, 13 Cal. App. 736, 110 Pac. 693.

82. See *People v. Budd*, 24 Cal. App. 176, 140 Pac. 714; *Gardner v. Superior Court*, 19 Cal. App. 548, 126 Pac. 501; *Edington v. Superior Court*, 18 Cal. App. 739, 124 Pac. 450, 128 Pac. 338.

[a] **The juvenile court has jurisdiction of a charge that the mother, by reason of her shameful conduct, is an unfit person to have the custody of her child.** *State v. Johnson*, 131 La. 8, 58 So. 1015.

83. A prosecution for contributing to the delinquency of a child is properly tried in the criminal and not the juvenile department of the superior court, where there is nothing to indi-

be either by indictment, or information filed after a preliminary hearing and commitment by a magistrate;⁸⁴ in others by an affidavit.⁸⁵

b. *Allegations.* — (I.) *Generally.* — Where the juvenile court is one of limited jurisdiction the facts showing its jurisdiction must be alleged.⁸⁶

It has been held that it was not the purpose of the juvenile act to provide additional methods of punishing crime or cumulative penalties for crimes already provided for by statute and that therefore an information under the act is insufficient where it describes a crime cognizable under the provision of other statutes.⁸⁷ But a charge that an adult has committed an offense against a delinquent minor suffices to give the juvenile court jurisdiction.⁸⁸

The pleading must show that the juvenile in question is neglected, dependent or delinquent,⁸⁹ or that the acts of the defendant tended to lead the child to become a delinquent,⁹⁰ and generally this must be done by setting forth the particular facts, unless there has been a previous adjudication of the juvenile's status.⁹¹ But it is not necessary to al-

lege that the accused is a juvenile. *State v. Williams*, 73 Wash. 678, 132 Pac. 415.

84. *People v. Budd*, 24 Cal. App. 176, 140 Pac. 714; *Gardner v. Superior Court*, 19 Cal. App. 548, 126 Pac. 501, because the prosecution is in the superior court sitting as a juvenile court, and the constitution requires criminal prosecutions in the superior court to be by indictment or information.

85. *State v. Rose*, 125 La. 1080, 52 So. 165.

86. *State v. Rose*, 125 La. 1080, 52 So. 165.

87. *State v. Eisen*, 53 Ore. 297, 99 Pac. 282, 100 Pac. 257.

88. *State v. Fink*, 127 La. 190, 53 So. 519.

[a] An affidavit charging that defendant caused and encouraged a certain girl under the age of fifteen to commit an act of delinquency "in this, to-wit: that the said (defendant) held illicit sexual intercourse with the said" girl, and that he also aimed to assist her "to make her escape from the Indiana Girls' School, of which institution she is an inmate," charges a misdemeanor for contributing to the delinquency of the child, and not rape. *Tullis v. Shaw*, 169 Ind. 662, 83 N. E. 376.

89. *State v. Rose*, 125 La. 1080, 52 So. 165, a prosecution for permitting minors to appear on the stage.

[a] It is sufficient that the affidavit briefly sets forth in general terms the facts constituting neglect or delinquen-

cy. *State v. Johnson*, 131 La. 8, 58 So. 1015. Compare *State v. Fink*, 127 La. 190, 53 So. 519.

90. *State v. Dunn*, 53 Ore. 304, 99 Pac. 278, 100 Pac. 258, unnecessary to allege that he had in fact become a delinquent.

91. *In re Goldsworthy*, 22 Cal. App. 354, 134 Pac. 352; *People v. Pierro*, 17 Cal. App. 741, 121 Pac. 689, in this case the averment was that she "was a minor female child under the age of eighteen years, and was then and there a dependent child within the meaning of that certain act," etc., held insufficient. But see *State v. Fink*, 127 La. 190, 53 So. 519.

[a] **Information Held Sufficient.** "The information . . . alleges that the petitioner endeavored to induce and persuade the female minor therein named to lead an idle, dissolute, and immoral life, by importuning and coercing her to enter a house of prostitution, and that he had sexual relations with her. Obviously, the acts of the petitioner with and upon said minor as thus disclosed by the information constituted her a dependent person, the acts themselves having contributed to and caused such dependency. We cannot conceive of anything more which could have been alleged to charge the petitioner with the crime of contributing to the dependency of said minor." *In re Goldsworthy*, 22 Cal. App. 354, 134 Pac. 352.

[b] An affidavit that F. was or about the 1st day of March, 1909, and at

lege an adjudication of dependency or delinquency unless such adjudication is relied upon.⁹²

An allegation that the child is a minor is sufficient without stating his age.⁹³ A statement in an indictment of the age of the child alleged to have been abandoned cannot be changed on motion of the district attorney.⁹⁴

(II.) **Negating Exceptions.**—The information or indictment must negative exceptions expressly or impliedly included in the statute.⁹⁵

4. **Review.**—The judgment of a juvenile court even though erroneous cannot be collaterally attacked in a habeas corpus proceeding where the court has jurisdiction.⁹⁶ An appeal being the sole remedy for the correction of mere defects in the proceedings of the trial court,⁹⁷ so a conviction in a juvenile court will not be reviewed on writs of certiorari and prohibition when there is an adequate remedy by appeal.⁹⁸

B. **CRUELTY TO CHILD AND FAILURE TO GIVE MEDICAL ATTENTION.** Indictments based upon cruelty to children or failure to provide them medical or other attention⁹⁹ follow the general rules elsewhere

divers other days and times between that date and the first day of April, 1910, did unlawfully aid, abet, induce, cause, encourage and contribute to the delinquency of L. S., a female minor child, and further stating facts, means and methods by which he contributed to such delinquency, states an offense, and is not bad for duplicity. *Fisher v. State*, 84 Ohio St. 360, 95 N. E. 908. 908.

[c] **Charge in Language of Statute.** An information charges the statutory offense of contributing to the delinquency of a child, in the language of the statute, or in words of similar import, and is therefore sufficient, when it alleges that the child was a delinquent child and a lewd and dissolute person who associated with vicious and disreputable persons, and that the accused wilfully encouraged, caused and contributed to her delinquency by enticing and encouraging her to drink intoxicating liquors, and consort with immoral persons and committed an act of sexual intercourse with the accused. *State v. Williams*, 73 Wash. 678, 132 Pac. 415.

92. *Edington v. Superior Court*, 18 Cal. App. 739, 124 Pac. 450, 128 Pac. 338. See also *People v. Pierro*, 17 Cal. App. 741, 121 Pac. 689.

93. *State v. Callicutt*, 1 Lea (Tenn.) 714.

94. *People v. Frank*, 88 App. Div. 294, 85 N. Y. Supp. 55.

Amendment of indictment generally,

see the title "**Indictment and Information.**"

95. *State v. Eisen*, 53 Ore. 297, 99 Pac. 282, 100 Pac. 257, holding that an information under the juvenile act for contributing to a child's delinquency, alleging that a specified female under eighteen years old was pregnant, is insufficient, as it does not negative pregnancy in a lawful manner, or as a result of marriage; the presumption being that it was lawful. See generally the title "**Indictment and Information.**"

96. *Tullis v. Shaw*, 169 Ind. 662, 83 N. E. 376.

97. *Tullis v. Shaw*, 169 Ind. 662, 83 N. E. 376.

98. *State v. Nicolosi*, 128 La. 836, 55 So. 475.

99. See the title "**Indictment and Information.**"

[a] **An indictment for cruelty and unlawfully punishing a child** is sufficiently specific in using the language of the statute defining the offense. *People v. Loomis*, 161 Mich. 651, 126 N. W. 985.

[b] **Indictment for cruelty to children** held sufficient in *People v. Loomis*, 161 Mich. 651, 126 N. W. 985.

[c] **Criminal Exposure.**—An indictment against a woman, which charges that she assaulted a female infant child, and wilfully and maliciously exposed her and left her exposed in the street in the night time, without the care of any person, and without sufficient,

discussed. The same is true as to instructions to the jury in such cases.¹

C. PERMITTING MINOR TO ENTER OR FREQUENT CERTAIN PLACES OR PLAY CERTAIN GAMES.²—Indictments, informations, or complaints under statutes which make it a crime to permit minors to enter or frequent certain places such as pool or billiard rooms, or to play certain forbidden games, must in general conform to the rules of criminal pleading elsewhere discussed.³

An indictment for permitting a minor to play a game must charge

proper or necessary clothing, shelter or protection against the weather and the cold, does not allege a criminal exposure or neglect, but will support a sentence for assault. *Com. v. Stoddard*, 9 Allen (Mass.) 280.

[d] **Failure To Provide Medical Attendance to Minor Child.**—An indictment under a statute providing that "A person who, 1, willfully omits without lawful excuse, to perform a duty by law imposed upon him to furnish food, clothing, shelter or medical attendance to a minor . . . or, 4, neglects, refuses or omits to comply with any provisions of this section, . . . is guilty of a misdemeanor," which charges that the defendant willfully, maliciously and unlawfully omitted, without lawful excuse, to perform a duty imposed upon him by law, to furnish medical attendance for his minor child, said minor child being ill and suffering from catarrhal pneumonia, and that he willfully, maliciously and unlawfully neglected and refused to allow said minor to be attended and provided for by a regularly licensed and practicing physician, is not bad because it fails to allege that the case was one in which a regularly licensed and practicing physician should have been called, and, therefore, fails to charge a criminal offense, since that is necessarily implied from the language used; if the medical attendance was not necessary it was not a duty required of the defendant to furnish it; if it was necessary then it was his duty to furnish it and his failure to do so is an unlawful omission to perform a duty imposed, and constitutes a misdemeanor." *People v. Pierson*, 176 N. Y. 201, 68 N. E. 243, 98 Am. St. Rep. 666, 63 L. R. A. 187, reversing 80 App. Div. 415, 81 N. Y. Supp. 214.

1. See generally the title "Instructions."

[a] **Instructions.—Religious Beliefs.** "In submitting the case to the jury the trial court charged, in substance,

that before the jurors could convict the defendant they must find that he knew the child was ill, and deliberately and intentionally failed or refused to call a physician, or to give the child such medicines as the science of the age would say would be proper that a child in its condition should have; that if at the time he refused to call a physician he knew the child to be dangerously ill, his belief constitutes no defense whatever to the charge made. In other words, no man can be permitted to set up his religious belief as a defense to the commission of an act which is in plain violation of the law of the state." Held proper. *People v. Pierson*, 176 N. Y. 201, 68 N. E. 243, 98 Am. St. Rep. 666, 63 L. R. A. 187, reversing 80 App. Div. 415, 81 N. Y. Supp. 214.

2. For prosecutions under statutes forbidding the sale or gift of liquor to minors, or permitting minors to be present in saloons, etc., see the title "Intoxicating Liquors."

Permitting minor to gamble, see 10 STANDARD PROC. 357.

3. See the title "Indictment and Information."

[a] **Indictment Held Sufficient.**—An indictment which charges the defendant with "being the owner and having control of billiard and pool tables, similar to tables called pigeon-hole tables, did unlawfully, wilfully and knowingly suffer and permit, for compensation and reward, . . . a person then under twenty-one years of age, to play games on said tables and without written permission from the father, mother, or guardian, or other person having the custody or control of said minor, authorizing him so to do," is a good indictment, and a demurrer thereto should be overruled. *Com. v. Wills*, 26 Ky. L. Rep. 515, 82 S. W. 236.

[b] **Indictment for permitting minors to congregate in a public pool hall**

that a game was played,⁴ must state the name of the person with whom the minor was playing,⁵ or give reasons why he is not named;⁶ but it is not required that the indictment allege that anything was lost or won upon the game,⁷ or that the minor bet on the game,⁸ unless the charge is permitting him to bet.⁹

Time. — The indictment should show that the facts constituting the alleged offense existed at the time of the commission of the offense.¹⁰

Criminal intent on the part of the defendant, where not an essential element of the offense, need not be alleged.¹¹

Ownership. — There must be an allegation¹² that the defendant was the

held sufficient in *Faber v. State*, 66 Ind. 600; *Manheim v. State*, 66 Ind. 65.

4. *Zook v. State*, 47 Ind. 463.

[a] The omission of the word "at" or "upon" before the words "said table," in an indictment against the owner of a billiard table for permitting a minor to play on such table, renders such indictment defective. *Donniger v. State*, 52 Ind. 326.

[b] **Duplicity.**—An indictment alleging that the defendant permitted a minor to play four games of pool is not bad for duplicity as stating four separate and distinct offenses. *Kiley v. State*, 120 Ind. 65, 22 N. E. 99.

[c] A complaint alleged that one E. P. was a minor, and that on the 12th day of March, 1870, at a specified place, he "did play a game of billiards on a billiard table kept" at that place by the defendant "for profit;" and that defendant "did on that day, and at divers other days since that time, the 12th of March, 1870, and this day, permit for pay, said E. P., a minor as aforesaid, to play billiards on his said billiard table kept for profit as aforesaid," etc. It was held: 1. That the billiard table was charged with sufficient certainty to have been kept for profit on the 12th of March, 1870, at the place named, although the technical words "then and there" were omitted. 2. That the defendant was sufficiently charged with being the keeper of the billiard table, although the word "keeper" found in the statute, is not used in the complaint. 3. That the words "at divers other days," etc., may be rejected as surplusage, and do not invalidate the complaint. *Gallagher v. State*, 26 Wis. 423.

5. *Donniger v. State*, 52 Ind. 326.

6. *Zook v. State*, 47 Ind. 463.

7. *Ready v. State*, 62 Ind. 1; *State*

v. Ward, 57 Ind. 537. See also *Williams v. Warsaw*, 60 Ind. 457.

8. *Green v. Com.*, 5 Bush (Ky.) 327.

9. See 10 STANDARD PROC. 357.

10. *Sikes v. State*, 67 Ala. 77.

[a] "The indictment in this case is defective. It charges that 'J. S., who is the owner or keeper of a saloon in which vinous, spirituous, or other intoxicating liquors are kept for sale, having a billiard table connected therewith on which the public can play,' &c. All these averments relate to the time present, when the indictment was found. They should have been charged to exist at the time the alleged misdemeanor was committed; for, it is those attendant facts and conditions which make the act charged an indictable offense." *Sikes v. State*, 67 Ala. 77.

11. See generally the title "Indictment and Information."

[a] It is not necessary that a complaint against the keeper of a billiard room for admitting a minor thereto without consent of his parent or guardian, aver guilty intent of the defendant. *Com. v. Emmons*, 98 Mass. 6.

[b] Where the statute does not require that the act shall be knowingly done, the use of the word "knowingly" will be treated as surplusage. *Teritory v. Church*, 14 N. M. 226, 91 Pac. 720.

12. *State v. Ward*, 57 Ind. 537. See generally the title "Indictment and Information."

[a] Allegation "which said billiard table he, the said . . . then and there being the owner of, and then and there having the care, control and management of," is sufficient. *Hipes v. State*, 73 Ind. 39.

[b] **Averment as to Ownership of Table Held Insufficient.**—An indictment charging the defendant with having

owner of, or that the defendant had the care, management, or control of the billiard table.¹³

Permitting Minor To Frequent Dance House.—A complaint against a defendant for permitting a minor to frequent a dance house need not describe the character of the dance house, or allege that it was a place injurious to morals.¹⁴

D. EXHIBITING IMMORAL PUBLICATION.—On a prosecution for giving or showing to minors any paper or publication illustrating or describing immoral deeds it is not necessary that the indictment set out the supposed prohibited publication or paper, or excuse a failure to do so.¹⁵

VII. CONCEALMENT OF BIRTH AND DEATH.—**A. INDICTMENT.**¹⁶—Another person may be jointly indicted with the mother for concealing the death of an infant.¹⁷

An indictment charging concealment of birth of a child in the language of the statute is sufficient.¹⁸ The indictment must distinctly aver

allowed a person under the age of twenty-one "to play at a certain game on a billiard table, called billiards, then and there in his saloon, . . . of which he was then and there the owner;" etc., was held insufficient as to the allegation of ownership, the court saying: "The pleader intended to allege in the indictment that the appellee was the owner of the billiard table; but we do not think that the averment is sufficiently plain. In the sentence, 'of which he was then and there the owner,' the pronoun 'which' can not safely be referred past 'his saloon' to 'a billiard table,' as its antecedent. Such a construction would be altogether too loose for criminal pleading." State v. Ward, 57 Ind. 537.

13. *Hanrahan v. State*, 57 Ind. 527, in which the court said: "We do not think the words 'having the control and management of said saloon in which were kept billiard tables,' as averred in the indictment, are equivalent to the words, 'having the care, management, or control of any billiard table,' as used in the statute. Having the control and management of a saloon is clearly different from having the care, management or control of a billiard table, although the table be within the saloon. The right to control the saloon might be in one person, and the right to control a billiard table in the saloon in another person."

14. *State v. Rosenfield*, 111 Minn. 301, 126 N. W. 1068, 137 Am. St. Rep. 557, 29 L. R. A. (N. S.) 331, public dance hall defined.

15. *Strohm v. People*, 160 Ill. 582, 43 N. E. 622, affirming 60 Ill. App. 128. See also *Fuller v. People*, 92 Ill. 182; *Cole v. People*, 84 Ill. 216; *Warriner v. People*, 74 Ill. 346; *McCutcheon v. People*, 69 Ill. 601.

16. **Joinder with count for murder**, see note to *Pennsylvania v. McKee*, Add. (Pa.) 1.

17. *Com. v. Moll*, 39 Pa. Super. 107. See *Rex v. Douglas*, 7 Car. & P. 644, 32 E. C. L. 801.

18. *State v. Ihrig*, 106 Mo. 267, 17 S. W. 300; *State v. White*, 76 Mo. 96.

[a] An indictment under statute forbidding the concealment of the death of any issue of the body of the defendant "so that it may not come to light whether it was born dead or alive, or whether it were murdered or not," which omits the quoted part of the statute and charges merely the concealment of the death of the child so that it might not come to light; with intent to conceal such death is fatally defective. *Com. v. Clark*, 2 Ashm. (Pa.) 105, 113.

[b] **Allegations To Put Mother to Proof Child Was Stillborn.**—Under 21 Jac., ch. 27, providing the guilty mother shall suffer as in murder unless she prove by one witness the child is born dead, the indictment to put her to proof of this fact must allege that she was born of a child which was a bastard, that it was born alive, and that she killed it. It need not allege that she concealed it. 2 Hale P. C. 288.

[c] **The following indictment was**

the child's birth,¹⁹ its death,²⁰ an endeavor to conceal its birth,²¹ and under some statutes, that if born alive it would be a bastard.²² No specific intent need be alleged.²³

B. TRIAL. — It is a question of fact whether the defendant disposed of the child's body;²⁴ or if done by another, whether he was defend-

held sufficient in *State v. Stewart*, 93 N. C. 539:

State of
North Carolina, } Superior Court,
Burke County. } Spring Term, 1885.

The jurors for the State, upon their oath, present that Laura Stewart, late of the county of Burke, on the first day of March, A. D. 1885, with force and arms at and in the county aforesaid, unlawfully and wilfully did endeavor to conceal the birth of a new-born male child, not yet named, of her, the said Laura Stewart, by then and there secretly placing and leaving the dead body of said child in a secret place, contrary, etc.

J. S. Adams, Solicitor.

[d] **Form of Indictment.**—[Commencement] "in the county aforesaid, being then and there big with a male child, was then and there delivered of the said child alive, which said male child then and there instantly died; and that the said A. S., being so delivered of the said male child as aforesaid, did then and there unlawfully endeavor to conceal the birth of the said child by secretly burying (by secret burying or otherwise disposing of) the body of the said child; against the form of the statute in such case made and provided, and against the peace of our lord the King, his crown and dignity." Add a second count stating that the child was born dead, and state the means of concealment specially when it is otherwise than by secret burying. Archb. Cr. Pl. 435. See also Wharton's *Proc. of Ind. & P.*, §§183, 185.

[e] **Conclusion.**—The statute 21 Jac., ch. 27, provides that a mother of a bastard concealing its death shall suffer as in murder. 2 Hale P. C. 288. Consequently the indictment may conclude *contra pacem*, etc., instead of *contra formam statuti*. Kel. 32, 84 Eng. Reprint 1068; 2 Hale P. C. 289. Compare *Dunn v. State*, 59 Ark. 560, 22 S. W. 212; *State v. Ellis*, 43 Ark. 93, holding the statute defines a new offense.

19. *Douglass v. Com.*, 8 Watts (Pa.) 535.

20. Ark.—*State v. Ellis*, 43 Ark. 93. Pa.—*Douglass v. Com.*, 8 Watts 535. Eng.—*Perkins' Case*, 1 Lew. C. C. 44; Russell, *Law of Crimes*, 778.

[a] **Whether the infant died before, at, or after its birth** need not be alleged. *State v. Ellis*, 43 Ark. 93; *Reg. v. Coxhead*, 1 Car. & K. 622, 47 E. C. L. 622.

[b] **Sufficient Averment of Death.** (1) An averment that the said Sarah, "the said infant having on the day and year, &c, died, did endeavour, privately, to conceal the death of the said infant," is a positive averment of death. *Boyles v. Com.*, 2 Serg. & R. (Pa.) 40. (2) But in *Douglass v. Com.*, 8 Watts (Pa.) 535, an allegation "that the said Martha Douglass did endeavour privately to conceal the death of the said female bastard child," was held to be an insufficient averment of the death, the death being alleged only by way of recital. See also *State v. Ellis*, 43 Ark. 93.

21. *Douglass v. Com.*, 8 Watts (Pa.) 535.

[a] **The details of the manner of concealment** need not be alleged. *State v. Ellis*, 43 Ark. 93; *Boyles v. Com.*, 2 Serg. & R. (Pa.) 40; *Com. v. Clark*, 2 Ashm. (Pa.) 105. But see *Foster v. Com.*, 12 Bush (Ky.) 373, the acts must be stated. An allegation that the appellant "did feloniously conceal the birth of a bastard child" is a statement of a conclusion of law. See 2 Bish. New Crim. Proc., §527.

[b] **Allegation of place of concealment** is surplusage. *Wright v. United States*, 4 Ind. Ter. 116, 69 S. W. 819.

22. *Sullivan v. State*, 36 Ark. 64; *Douglass v. Com.*, 8 Watts (Pa.) 535.

[a] The statute, 9 Geo. 4, ch. 31, makes it unnecessary to charge that the child was a bastard. *Rex v. Douglas*, 7 Car. & P. 644, 32 E. C. L. 801.

23. *State v. Ihrig*, 106 Mo. 267, 17 S. W. 300; *State v. White*, 76 Mo. 96.

24. *Rex v. Douglas*, 7 Car. & P. 644, 32 E. C. L. 801.

ant's agent;²⁵ whether or not there was a secret disposition of the body;²⁶ and whether the act was done with the intent to conceal the birth.²⁷

Where there is no evidence of concealment, it may be left to the jury to say whether or not the child was murdered by wounds.²⁸ An instruction substantially in the language of the statute is proper.²⁹

C. VERDICT. — The verdict should conform to the general rules elsewhere discussed.³⁰

A conviction of manslaughter is not allowable under an indictment charging the concealment of the birth of a bastard.³¹

25. *Rex v. Douglas*, 7 Car. & P. 644, 32 E. C. L. 801.

26. *Reg. v. Brown*, 11 Cox C. C. (Eng.) 517.

[a] Whether the body was thrown into the privy by the prisoner or whether it came from her unawares while there for another purpose was left to the jury in *Reg. v. Coxhead*, 1 Car. & K. 49 E. C. L. 622.

27. *Rex v. Douglas*, 7 Car. & P. 644, 32 E. C. L. 801.

28. *Pennsylvania v. M'Kee*, Add. (Pa.) 1.

29. *Com. v. Hopkins*, 9 Ky. L. Rep. 432, 5 S. W. 392. See *Com. v. Moll*,

39 Pa. Super. 107, setting out instructions condemned as not being of the calm, impartial and dignified character called for.

30. See the title "Verdict."

[a] A verdict, guilty of concealment in manner and form, etc., is sufficient to cover the element of bastardy. *Boyles v. Com.*, 2 Serg. & R. (Pa.) 40.

31. *Dunn v. State*, 57 Ark. 560, 22 S. W. 212, the statute provides that the mother guilty of concealing the birth of a child shall suffer the same punishment as for manslaughter. It does not make such offense manslaughter.

IN FORMA PAUPERIS. — See Paupers.

INFORMATION. — See Indictment and Information.

Vol. XII

INFORMATION AND BELIEF

By the Editorial Staff.

I. AFFIDAVITS, 889

- A. *In General*, 889
- B. *Effect Upon Positive Statement of Averment of Information and Belief*, 892
- C. *Source of Knowledge or Belief*, 893
 - 1. *When Made Positively*, 893
 - 2. *Where Made on Information*, 894
 - 3. *Sufficiency of Source*, 895
 - 4. *Manner of Alleging Sources*, 895
- D. *By Agent or Attorney*, 896
- E. *Specific Cases*, 897
 - 1. *Arrest*, 897
 - 2. *Attachment*, 897
 - 3. *Default*, 898
 - 4. *Extradition*, 898
 - 5. *Forfeiture*, 898
 - 6. *Injunction*, 898
 - 7. *Mandamus*, 898
 - 8. *Affidavits of Merits and Defense*, 898
 - 9. *Ne Exeat*, 899
 - 10. *Pleas in Abatement*, 899
 - 11. *Replevin*, 899
 - 12. *Search Warrants*, 899

II. PLEADINGS, 899

- A. *Declaration, Complaint, or Bill*, 899
 - 1. *Generally*, 899
 - 2. *When Permitted*, 900
 - 3. *Form of Allegation*, 901
 - a. *Of the Information and Belief*, 901
 - b. *Of the Facts*, 901
- B. *Defendant's Pleadings*, 902
 - 1. *In Equity*, 902
 - a. *Generally*, 902
 - b. *Information and Belief Not Evidence*, 904
 - 2. *At Law*, 904

- a. *Affirmative Matter*, 904
- b. *Denials*, 905
 - (I.) *On Information and Belief*, 905
 - (II.) *Of Information and Belief*, 907
 - (III.) *By Corporations*, 909

C. *Replication*, 910

III. VERIFICATION ON, 910

IV. STATEMENTS ON AS PERJURY, 910

CROSS-REFERENCES:

Bill of particulars, as to matters stated on, see 4 STANDARD PROC. 390.

In admiralty, see 1 STANDARD PROC. 456, 463.

For further references and cross-references, see the index to this work.

I. AFFIDAVITS.—A. IN GENERAL.—Where the facts are such that the affiant can have no personal knowledge of them, an affidavit setting up those facts¹ may generally be made on information and be-

1. **U. S.**—*In re Keller*, 36 Fed. 681. **Cal.**—*Gay v. Torrance*, 145 Cal. 144, 78 Pac. 540; *Rue v. Quinn*, 137 Cal. 651, 66 Pac. 216, 70 Pac. 732; *Fleming v. Wells*, 65 Cal. 336, 4 Pac. 197. **Ill.** *Grace v. Oakland Bldg. Assn.*, 166 Ill. 637, 46 N. E. 1102; *Hays v. Loomis*, 84 Ill. 18. **Ind.**—*Champ v. Kendrick*, 130 Ind. 549, 30 N. E. 787; *Bonsell v. Bonsell*, 44 Ind. 476; *Curry v. Baker*, 31 Ind. 151; *McNamara v. Ellis*, 14 Ind. 516; *State v. Ellison*, 14 Ind. 380; *Trew v. Gaskill*, 10 Ind. 265; *Simpkins v. Malatt*, 9 Ind. 543. **Ia.**—*Jordan v. Wapello County Circ. Ct.*, 69 Iowa 177, 28 N. W. 548. **Mass.**—*Clement v. Bulens*, 159 Mass. 193, 34 N. E. 173; *Binnely v. Globe Nat. Bank*, 150 Mass. 574, 23 N. E. 380, 6 L. R. A. 379; *American Carpet-Lining Co. v. Chipman*, 146 Mass. 385, 16 N. E. 1; *O'Neil v. Glover*, 5 Gray 144. **Mo.**—*Steamboat Osprey v. Jenkins*, 9 Mo. 643; *Crane Co. v. Epworth Hotel Constr., etc. Co.*, 121 Mo. App. 209, 98 S. W. 795; *Finley v. West*, 51 Mo. App. 569, lien law. **Mont.** *Smith v. Collis*, 42 Mont. 350, 112 Pac. 1070, Ann. Cas. 1912A, 1158. **Neb.** *Leigh v. Green*, 62 Neb. 344, 86 N. W. 1093, 89 Am. St. Rep. 751, 64 Neb. 533, 90 N. W. 255, 101 Am. St. Rep. 592, *affirmed*, 193 U. S. 79, 24 Sup. Ct. 390, 48 L. ed. 623. **N. Y.**—*Pratt v. Stevens*, 94 N. Y. 387; *Miller v. Adams*, 52 N. Y. 409; *City Bank v. Lumley*, 28 How. Pr. 397; *Attorney General v. Bank of Columbia*, 1 Paige Ch. 511; *Whitlock v. Roth*, 10 Barb. 78; *Meade v. Southern Tier Masonic Relief Assn.*, 119 App. Div. 761, 104 N. Y. Supp. 523; *Hart v. Ogdensburg, etc. R. Co.*, 67 Hun 556, 22 N. Y. Supp. 401; *Tefft v. Epstein*, 17 Civ. Proc. 168, 7 N. Y. Supp. 897. **N. C.**—*Paige v. Price*, 78 N. C. 10. **Ohio.**—*Sauer v. Cincinnati St. R. Co.*, 4 Ohio N. P. 252. See also *Garner v. White*, 23 Ohio St. 192; *Dunlevy v. Schartz*, 17 Ohio St. 640. **Pa.**—*Election Cases*, 65 Pa. 20, 7 Phila. 41; *Gibbons v. Sheppard*, 2 Brewst. 1. See *Winsor v. Farmers*, etc. Nat. Bank, 81* Pa. 304. **Tenn.**—*Phipps v. Burnett*, 96 Tenn. 175, 33 S. W. 925; *Bank of Alabama v. Berry*, 2 Humph. 443. **Tex.**—*Paine v. Carpenter*, 51 Tex. Civ. App. 191, 111 S. W. 430; *Young v. Jackson*, 50 Tex. Civ. App. 351, 110 S. W. 74; *Bracht v. Bracht* (Tex. Civ. App.), 107 S. W. 895.

lief; but so far as the facts may be within the knowledge of the affiant, they should be stated positively.²

This rule has been expressly recognized by statute in some cases.³ In many cases, however, the law requires an affidavit made upon the positive knowledge of the affiant. In such a case, an affidavit upon information and belief only is not sufficient.⁴

Va.—*Jackson v. Webster*, 20 Va. 462.
W. Va.—*Kesler v. Lapham*, 46 W. Va. 233, 33 S. E. 289, attachment. Wis. Howell v. Kingsbury, 15 Wis. 272.

[a] "Where a showing by affidavit is required as to facts which are necessarily matters of information and belief, an affidavit on information and belief ought to suffice. The statute should receive a construction in accordance with common sense. It was not intended to require perjury, and, as it requires affidavit to matters involving legal opinion and conclusions of law and fact, it must contemplate that such affidavit will be made upon the only basis on which such opinions and conclusions can be reached." *Leigh v. Green*, 64 Neb. 533, 90 N. W. 255, 101 Am. St. Rep. 592.

[b] "Belief is to be considered as an absolute term; hence, to swear that he believes a thing to be true, is equivalent to swearing that it is true." *Ros. Cr. Ev.* 814, quoted in *Simpkins v. Malatt*, 9 Ind. 543. See *In re Keller*, 36 Fed. 681; *Champ v. Kendrick*, 130 Ind. 549, 30 N. E. 787; *Curry v. Baker*, 31 Ind. 151.

[c] **Validity of Such Affidavit as Dependent on Sources of Information.** The authorities condemning affidavits upon information and belief are where the statements of the informer are the sole source of affiant's knowledge. They do not apply to affidavits made where the affiant obtained some of his information from other sources, as from documents. *Meade v. Southern Tier Masonic Relief Assn.*, 119 App. Div. 761, 104 N. Y. Supp. 523.

[d] When the facts are not disputed, an affidavit on information and belief is sufficient. *Hart v. Ogdensburg & L. C. R. Co.*, 67 Hun 556, 22 N. Y. Supp. 401.

[e] There is no presumption that the facts are personally known to the affiant of an affidavit upon information and belief. *Crowns v. Vail*, 51 Hun 204, 4 N. Y. Supp. 324.

2. *Whitlock v. Roth*, 10 Barb. (N. Y.) 78.

3. Cal.—*Gay v. Torrance*, 145 Cal. 144, 78 Pac. 540, in verifications of pleadings and in case of applications for continuances on the ground of absence of witnesses. Mo.—*Ackerman v. Green*, 107 Mo. App. 341, 81 S. W. 509, affidavit for order for examination of judgment creditor. Neb.—*Clarke v. Nebraska Nat. Bank*, 57 Neb. 314, 77 N. W. 805, 73 Am. St. Rep. 507, proceeding relating to the issuance of a summons in garnishment.

[a] Statutes sometimes discriminate between facts to be sworn to positively and those on information and belief. *Wilson v. Arnold*, 5 Mich. 98.

[b] **Statutory Form Should Be Followed.**—A statute requiring an affidavit made to the best of the knowledge and belief of the affiant is not complied with by an affidavit made according to the best information and belief of the affiant. *Ackerman v. Green*, 107 Mo. App. 341, 81 S. W. 509.

[c] An affidavit using language referring to the disposal of defendant's property stating "as this deponent has good reason to believe, has disposed of his property, with the intent," etc., is a sufficient compliance with a statute requiring the affiant to state "he has good reason to believe the facts stated." *Nicolls v. Lawrence*, 30 Mich. 395.

[d] **An averment that affiant "thinks" a thing is true is not equivalent to a statement that he "believes" it to be true and is insufficient.** *Rittenhouse v. Harman*, 7 W. Va. 380.

4. Ark.—*Waggoner v. Fogleman*, 53 Ark. 181, 13 S. W. 729, affidavit for a warning order. Cal.—*Gay v. Torrance*, 145 Cal. 144, 78 Pac. 540; *Moore v. Thompson*, 138 Cal. 23, 70 Pac. 930; *People v. Findley*, 132 Cal. 301, 64 Pac. 472; *Forbes v. Hyde*, 31 Cal. 342 (affidavit for publication of summons); *People v. Smith*, 1 Cal. 9. Ga.—*Early v. Oliver*, 63 Ga. 11. Ill.—*Groves, etc. R. Co. v. Herman*, 206 Ill. 34, 69 N. E. 36; *Aetna Indemn. Co. v. Spencer*, 135

Ill. App. 54. See *Booth v. Rees*, 26 Ill. 45. **Kan.**—*Thompson v. Higginbotham*, 18 Kan. 42. **La.**—*Reboul's Heirs v. Behrens*, 5 La. 79. **Neb.**—*Ludden v. State*, 31 Neb. 429, 48 N. W. 61, proceeding for contempt. **N. Y.**—*Mowry v. Sanborn*, 65 N. Y. 581; *Gawtry v. Doane*, 51 N. Y. 84. **Ore.**—*State ex rel. Jones v. Conn.*, 37 Ore. 596, 62 Pac. 289, *distinguishing and disapproving* *State v. McKinnon*, 8 Ore. 487, proceeding relating to contempt not committed in the immediate view of the court. **S. D.**—*Freeman v. Huron*, 8 S. D. 435, 66 N. W. 829, contempt. **W. Va.** *Quesenberry v. Peoples' Bldg., etc. Assn.*, 44 W. Va. 512, 30 S. E. 73. **Wis.** See *Phillips v. Portage Transit Co.*, 137 Wis. 189, 118 N. W. 539.

[a] "This court formerly said that when a statute requires proof, for instance to obtain a warrant from a justice, it meant legal evidence. . . . It was always difficult for me to perceive upon what ground a piece of evidence, which would never be thought of there as competent, could be received in another court professing to proceed by the same rules, and acted upon as sufficient to sustain any proceeding. Who ever heard of a witness being allowed, before a jury, to express his naked belief, or information, or that he had reason to suspect?" *Ex parte Haynes*, 18 Wend. (N. Y.) 611, 614. See *Thompson v. Higginbotham*, 18 Kan. 42, 44.

[b] "It may, as a general rule, be safely affirmed that, in the sense of the law, a general assertion of a fact in an affidavit upon information and belief proves nothing. A witness would not be allowed on the trial of a case, in any court, to give evidence of a fact which he only knew from information." *Mowry v. Sanborn*, 65 N. Y. 581, 584.

[c] **An affidavit to be used as evidence must be positive.** **Cal.**—*Pelegrinelli v. McCloud River Lumber Co.*, 1 Cal. App. 593, 82 Pac. 695. **Ind.** *Marshall v. Matson*, 171 Ind. 238, 86 N. E. 339; *Henderson v. Reynolds*, 168 Ind. 522, 81 N. E. 494, 11 L. R. A. (N. S.) 960. See *Spurgeon v. Rhodes*, 167 Ind. 1, 78 N. E. 228. **Kan.**—*Ft. Scott v. Elliott*, 68 Kan. 805, 74 Pac. 609; *Thompson v. Higginbotham*, 18 Kan. 42; *Achison v. Bartholow*, 4 Kan. 124. **Mass.**—*American Carpet Lining Co. v. Chipman*, 146 Mass. 385, 16 N. E. 1. **Mont.**—*Wetzstein v. Boston & M. Consol., etc. Min. Co.*, 26 Mont.

193, 66 Pac. 943. **Okla.**—*Shanboltzer v. Thompson*, 24 Okla. 198, 103 Pac. 595, 138 Am. St. Rep. 877.

See also *Gay v. Torrance*, 145 Cal. 144, 78 Pac. 540. But see *Harris v. Heberton*, 5 How. (Miss.) 575, in which an affidavit as to the verity of the record of a notary made on information and belief was held properly admitted in evidence.

[d] That the person who knew the facts refused to make an affidavit will not authorize an affidavit upon information and belief where a positive affidavit is necessary. *Gay v. Torrance*, 145 Cal. 144, 78 Pac. 540.

[e] If the affiant could not know the facts a positive affidavit will be held insufficient. **Ill.**—*Ferris v. Commercial Nat. Bank*, 158 Ill. 237, 41 N. E. 1118; *James E. Pepper Dist. Co. v. Alexander*, 137 Ill. App. 369. **Mich.** *Conrad v. Van Buren Circ. Judge*, 144 Mich. 492, 108 N. W. 347. *Compare* *Dummer v. Nungesser*, 107 Mich. 481, 65 N. W. 564. **N. Y.**—*Cole v. Core*, 121 App. Div. 632, 106 N. Y. Supp. 306; *Wilson v. Collins*, 119 App. Div. 88, 103 N. Y. Supp. 1038; *Wolter v. Liebmann*, 52 Misc. 517, 102 N. Y. Supp. 487; *Hodgman v. Barker*, 60 Hun 156, 20 Civ. Proc. 341, 14 N. Y. Supp. 574.

[f] The fact of the deponent's knowledge must be expressly stated, or appear from the contents of the affidavit. *Robinson v. Branch Circuit Judge*, 142 Mich. 70, 77, 105 N. W. 25; *Wright v. Wayne Circuit Judge*, 119 Mich. 499, 78 N. W. 545, *citing* *Shaw v. Ashford*, 110 Mich. 534, 68 N. W. 281; *Graham v. Cass Circ. Judge*, 108 Mich. 425, 66 N. W. 348; *Marble v. Curran*, 63 Mich. 283, 29 N. W. 725; *Sheridan v. Briggs*, 53 Mich. 569, 571, 19 N. W. 189; *Badger v. Reade*, 39 Mich. 771; *Brown v. Kelley*, 20 Mich. 33; *Proctor v. Prout*, 17 Mich. 473. See *United States v. Moore*, 2 Low. 232, 26 Fed. Cas. No. 15,803.

[g] Where the facts are positively stated it sufficiently appears they are made upon the affiant's personal knowledge, and it is not necessary in express terms so to state. *Newman v. Goddard*, 12 App. Cas. (D. C.) 404. See *Paulus v. Grobben*, 104 Mich. 42, 47, 62 N. W. 160.

[h] In order to secure the services of another judge to preside at the trial the affidavit showing bias and prejudice of the regular judge must be positive.

A statute that requires proof by affidavit to the satisfaction of the court demands legal evidence, not information and belief.⁵

B. EFFECT UPON POSITIVE STATEMENT OF AVERMENT OF INFORMATION AND BELIEF.—A positive affidavit is not vitiated by the addition of a statement as to the information and belief of the affiant.⁶ Thus it has been held that the addition "verily believes it to be true" does

People v. Findley, 132 Cal. 301, 64 Pac. 472.

5. **Kan.**—*Campbell v. Hall & Co.*,—*McCahon* 53. **Minn.**—*Pierce v. Smith*, 1 Minn. 60. **Neb.**—*Clarke v. Nebraska Nat. Bank*, 57 Neb. 314, 77 N. W. 805, 73 Am. St. Rep. 507. **N. Y.**—*National Broadway Bank v. Barker*, 60 Hun 578, 14 N. Y. Supp. 529, 38 N. Y. St. 597.

[a] "The code provides that 'a temporary injunction may be ordered upon it appearing satisfactorily to the court or judge, by the affidavit of the plaintiff or his agent, that the plaintiff is entitled thereto.' . . . The code defines an affidavit to be a declaration under oath, made without notice to the adverse party. By the next section, a deposition is said to be a declaration under oath, made upon notice to the adverse party. Each is a declaration under oath, the only difference being, one is made without notice, the other upon notice. Now, it would not be pretended that it would be admissible testimony, if, in a deposition a witness should say that a certain statement was, 'according to the best of his knowledge, information and belief, true, in substance and in fact.' " *Atchison v. Bartholow*, 4 Kan. 124, 139.

[b] Where statute requires certain things to be "verified by affidavit," an affidavit of the truth and not the probable truth is required. *King v. Haines*, 23 Ill. 280; *Aetna Indem. Co. v. Spencer*, 135 Ill. App. 54.

6. **U. S.**—*In re Keller*, 36 Fed. 681. **Ga.**—*Howard v. Munford*, 80 Ga. 166, 4 S. E. 907. **Ill.**—*Grace v. Oakland Bldg. Assn.*, 166 Ill. 637, 46 N. E. 1102. **Ind.**—*Wheat v. Ragsdale*, 27 Ind. 191. **N. Y.**—*Pratt v. Stevens*, 94 N. Y. 387; *Blatchford v. Paine*, 24 App. Div. 140, 48 N. Y. Supp. 783. **Tex.**—*Webb v. Texas Christian Univ.*, 48 Tex. Civ. App. 264, 107 S. W. 86.

But see *Burgess & Co. v. Martin*, 111 Ala. 656, 20 So. 506 (the oath was "to the best of his knowledge, information and belief"); *Hadley v. Watson*, 143 Mass. 27, 9 N. E. 806, affidavit to the

best of our knowledge, information and belief.

[a] "The addition of the words 'to deponent's best knowledge, information, and belief' does not modify or detract from the words previously employed. The general rule is that an oath taken before a competent officer merely verifies the truth of the facts stated, according to the best knowledge, information, and belief of the affiant. The positive affirmation of the facts sworn to in an affidavit is in most cases supposed and understood to be according to the best knowledge, information, and belief of the witness." *Pratt v. Stevens*, 94 N. Y. 387.

[b] An affidavit on knowledge or information and belief is not objectionable as being in the alternative. *Cunningham v. Doyle*, 5 Misc. 219, 25 N. Y. Supp. 476.

[c] **Affidavit Held To Be on Information.**—In *Siegmund v. Ascher*, 37 Ill. App. 122, the affidavit read that "he has read said complaint and knows the contents thereof, and the same is true of his own knowledge except as to matters stated on information and belief, and as to those he believes it to be true." The court said: "We have decided that this form of oath makes the whole answer on information and belief, as there is no way of distinguishing between matters so stated, and those of which the complainant has knowledge." See: *Fla.*—*Coxetter v. Huertas*, 14 Fla. 270. **Ill.**—*Neil v. Oldach*, 86 Ill. App. 354 (citing local cases); *Werner Co. v. First Nat. Bank of Miamisburg*, 55 Ill. App. 321; *Stirlen v. Neustadt*, 50 Ill. App. 378; *Deimel v. Brown*, 35 Ill. App. 303. **N. Y.** *Gawtry v. Doane*, 51 N. Y. 84.

Contra.—**La.**—*Schuber v. Bosgereau*, 17 La. 174 ("but a person swearing in this way should be held to state distinctly in his petition the facts which are within his knowledge and those he has only reason to believe"); *Livingston v. Dick*, 1 La. Ann. 323. **Va.**—*Southern R. Co. v. Washington*,

not vitiate a positive statement.⁷ But it is held that if a statement of fact is so qualified by a further statement or phrase as to the affiant's information and belief, as to render it doubtful whether or not the fact is stated on information and belief, the statement cannot be regarded as a positive one.⁸

C. SOURCE OF KNOWLEDGE OR BELIEF. — 1. When Made Positively. Where the affidavit states the facts as of the personal knowledge of the affiant, the sources of his knowledge need not be stated,⁹ for it will

etc. R. Co., 102 Va. 483, 46 S. E. 784. *W. Va.*—Chesapeake, etc. R. Co. v. Huse, 5 W. Va. 579.

7. Leigh v. Green, 64 Neb. 533, 90 N. W. 255, 101 Am. St. Rep. 592, affirmed, 193 U. S. 79, 24 Sup. Ct. 390, 48 L. ed. 623.

[a] "Where the law allows a statement on belief, either form of expression is equally an allegation of such fact." Howell v. Fraser, 6 How. Pr. (N. Y.) 221.

[b] "The plaintiff swears that he has reason to believe and does verily believe, that Hale and Malatt are about to remove, etc. The language of the statute is that the plaintiff or his agent shall make an affidavit that the plaintiff is about to remove, etc." Held sufficient. Simpkins v. Malatt, 9 Ind. 543.

[c] "It is a statement of a fact which the deponent, in testifying to, verily believes to be true. A man swears to what he believes to be true; and, when he states a fact under oath, he says he verily believes it to be true. I do not think it is faulty on that account. I think this affidavit is sufficient." *In re Keller*, 36 Fed. 681.

[d] Where the statement was qualified by "as he is informed and verily believes," the court said: "The statute requires that the statement specifying the grounds of contest shall be verified by the affidavit of the elector; that is, literally, made out to be true by such affidavit. No statement can go beyond the belief of the party making it. That belief may arise from personal observation, from sight or from sound, from information derived from others, or as the result of a logical conclusion from other known facts." . . . "They can, at most, when united, produce but one result, conviction of the mind, or in other words, belief. When, therefore, one states his belief in the truth of a statement, the assertion is as

strong as language can make it." *Curry v. Baker*, 31 Ind. 151, 155.

[e] The clause "verily believes to be true" is to be taken as surplusage of form, merely. *Pitkins v. Boyd*, 4 Greene (Iowa) 255.

8. The following qualifications to statements have been held to reduce them to mere statements of information and belief: (1) "As affiant believes, and has reason to believe." *Clarke v. Nebraska Nat. Bk.*, 57 Neb. 314, 77 N. W. 805, 73 Am. St. Rep. 507. (2) "That he has good reason to believe and does believe the same to be true." *Swart v. Kimball*, 43 Mich. 443, 5 N. W. 635. (3) "That this affiant has good reason to believe and does believe." *People v. Heffron*, 53 Mich. 527, 19 N. W. 170. (4) "To the best of his knowledge and belief." *Morgan v. Eureka Co. Comrs.*, 9 Nev. 360. (5) "On his best knowledge, information, and belief." *Ex parte Lane*, 6 Fed. 34. (6) "And that the facts therein contained are true, as he verily believes." *State ex rel. Otto v. County Comrs.*, 49 Neb. 51, 68 N. W. 336. (7) "Are true as affiant 'verily believes.'" *State ex rel. Roberts v. Mayor*, 4 Neb. 260. (8) "As affiant believes." *Thompson v. Higginbotham*, 18 Kan. 42.

[a] "The language used in the affidavit must be such as not to leave it doubtful whether the oath is positive or not. The requisite of positiveness forbids all ambiguity. What is ambiguous is not positive. An affidavit by the creditor's attorney, that 'to the best of his knowledge and belief' the indebtedness exists, and that the debtor resides out of this state, is ambiguous, for the phrase, 'to the best of his knowledge and belief,' may qualify both propositions. On an indictment for perjury, the affiant would be protected as to either proposition by the qualifying words." *Neal v. Gordon*, 60 Ga. 112.

9. U. S.—*Postley v. Higgins*, 2 Mc-

be presumed such statements were made of his personal knowledge,¹⁰ unless the facts are such that they could not have been within the personal knowledge of the affiant.¹¹ If the facts are such that the affiant is not presumed to know them, although the allegations are positive, it should be alleged how and in what manner the knowledge came to him.¹²

2. Where Made on Information.—Where an affidavit on information and belief is permitted, the affidavit should set out the sources of information or grounds of belief,¹³ so that the court can see that they

Lean 493, 19 Fed. Cas. No. 11,304. **Ill.**—James E. Pepper Dist. Co. v. Alexander, 137 Ill. App. 369. **N. Y.**—Pierson v. Freeman, 77 N. Y. 589; Brooklyn Daily Union v. Hayward, 11 Abb. Pr. (N. S.) 235; Ballouhey v. Cadot, 3 Abb. Pr. (N. S.) 122. See Cole v. Core, 121 App. Div. 632, 106 N. Y. Supp. 306. **Wis.**—Anderson v. Wehe, 58 Wis. 615, 17 N. W. 426. **Eng.**—Halliday v. Lawes, 3 Bing. N. C. 541, 32 E. C. L. 252; Andrioni v. Morgan, 4 Taunt. 231, 128 Eng. Reprint 317. **Can.**—Halifax Bkg. Co. v. Smith, 25 N. Bruns. 610.

10. Hayden v. Mullins, 76 App. Div. 69, 78 N. Y. Supp. 553; Wicker v. Elmira Heights, 42 App. Div. 426, 59 N. Y. Supp. 130; Lackner v. Dreher, 38 App. Div. 75, 55 N. Y. Supp. 979; Bruen v. Nickels, 30 App. Div. 396, 51 N. Y. Supp. 352; Hanson v. Marcus, 8 App. Div. 318, 40 N. Y. Supp. 951; Ladenburg v. Commercial Bank, 5 App. Div. 219, 39 N. Y. Supp. 119; Anderson v. Wehe, 58 Wis. 615, 17 N. W. 426.

11. Ferris v. Commercial Nat. Bank, 153 Ill. 237, 41 N. E. 1118; James E. Pepper Dist. Co. v. Alexander, 137 Ill. App. 369, 372; Cole v. Core, 121 App. Div. 632, 106 N. Y. Supp. 306; Hayden v. Mullins, 76 App. Div. 69, 78 N. Y. Supp. 553; Lackner v. Dreher, 38 App. Div. 75, 55 N. Y. Supp. 979; Bruen v. Nickels, 30 App. Div. 396, 51 N. Y. Supp. 352; Hanson v. Marcus, 8 App. Div. 318, 40 N. Y. Supp. 951; Ladenburg v. Commercial Bank, 5 App. Div. 219, 39 N. Y. Supp. 119; Hodgman v. Barker, 60 Hun 156, 14 N. Y. Supp. 574, 20 Civ. Proc. 341, affirming 21 N. Y. Civ. Rep. 121, 3 Silv. Ct. 518, 128 N. Y. 601, 27 N. E. 1029; Crowns v. Vail, 51 Hun 204, 4 N. Y. Supp. 324.

[a] An affidavit that the jury arrived at a quotient verdict which does not disclose whether the affiant speaks as of his personal knowledge or on information, will not be presumed to have been made upon his personal knowledge because it avers facts oc-

curring where he could not legally be. The Groves & Sand Ridge R. Co. v. Herman, 206 Ill. 34, 69 N. E. 36.

12. Cole v. Core, 121 App. Div. 632, 106 N. Y. Supp. 306; Price v. Levy, 93 App. Div. 274, 87 N. Y. Supp. 740; Finlay v. Castroverde, 68 Hun 59, 22 N. Y. Supp. 716.

13. **Cal.**—Peterson v. Nesbitt, 11 Cal. App. 370, 105 Pac. 135; Neves v. Costa, 5 Cal. App. 111, 89 Pac. 860. **Ill.**—Hitchcock v. Herzer, 90 Ill. 543. **Md.**—Moffat v. Calvert Co. Comrs., 97 Md. 266, 54 Atl. 960; Fowble v. Kemp, 92 Md. 630, 48 Atl. 379. **Mich.**—Gardiner v. Wayne Circ. Judge, 155 Mich. 414, 119 N. W. 432 (for a *capias ad respondendum*); Luton v. Newaygo Circ. Judge, 70 Mich. 152, 38 N. W. 13; Hackett v. Wayne Circ. Judge, 36 Mich. 334. **Nev.**—Morgan v. Eureka County, 9 Nev. 360. **N. Y.**—Pierson v. Freeman, 77 N. Y. 589; Whitlock v. Roth, 10 Barb. 78; Clafin v. Baere, 57 How. Pr. 78; City Bank v. Lumley, 28 How. Pr. 397; Penn Oil & S. Co. v. Cohn, 131 App. Div. 929, 116 N. Y. Supp. 124; Cole v. Core, 121 App. Div. 632, 106 N. Y. Supp. 306; Meade v. Southern Tier Masonic Relief Assn., 119 App. Div. 761, 104 N. Y. Supp. 523; Gumbes v. Hicks, 116 App. Div. 120, 101 N. Y. Supp. 741; Fox v. Peacock, 97 App. Div. 500, 90 N. Y. Supp. 137; Lassen v. Burt, 46 Misc. 582, 92 N. Y. Supp. 796; Murphy v. Jack, 76 Hun 356, 27 N. Y. Supp. 802. **N. C.**—Judd v. Crawford Gold Min. Co., 120 N. C. 397, 27 S. E. 81; Wilson v. Barnhill, 64 N. C. 121. **N. D.**—Kaepler v. Red River Valley Nat. Bank, 8 N. D. 406, 79 N. W. 869. **Ohio.**—Garner v. White, 23 Ohio St. 192; Dunlevy v. Schartz, 17 Ohio St. 640. **S. D.**—Hart v. Grant, 8 S. D. 248, 66 N. W. 322.

[a] In an affidavit for arrest there is a "distinction between alleging things done and those about to be done," in that the grounds of belief in the latter case must be set out.

are relevant and competent to establish the principal fact.¹⁴

3. Sufficiency of Source.—It is sufficient if the facts are derived from public records,¹⁵ or from books of account,¹⁶ or over a telephone.¹⁷

4. Manner of Alleging Sources.—The facts constituting the sources of information must be set forth in detail and not conclusions from facts.¹⁸ If the information be derived from documents, the documents

Judd v. Crawford Gold Min. Co., 120 N. C. 397, 27 S. E. 81.

[b] **Personal Knowledge of Facts Required.**—"The principle deducible from these cases is that an affidavit which is used as the basis of a writ which will deprive a person of his liberty, must not only set forth the facts and circumstances in detail, and not conclusions or inferences from facts, but they must be facts within the personal knowledge of the deponent." *Sheridan v. Briggs*, 53 Mich. 569, 19 N. W. 189, *quoted* with approval in *Conrad v. Van Buren Circ. Judge*, 144 Mich. 492, 496, 108 N. W. 347.

14. *Dyer v. Flint*, 21 Ill. 80, 74 Am. Dec. 73; *Murphy v. Jack*, 142 N. Y. 215, 36 N. E. 882, 40 Am. St. Rep. 590, 31 Abb. N. C. 201; *Ex parte Haynes*, 18 Wend. (N. Y.) 611, 615; *City Bank v. Lumley*, 28 How. Pr. (N. Y.) 397; *Fox v. Peacock*, 97 App. Div. 500, 90 N. Y. Supp. 137.

[a] "The Code of Civil Procedure provides that 'a motion to set aside a final judgment for irregularity shall not be heard after the expiration of one year since the filing of the judgment roll.' To avoid the effect of this statute, a clear case, based upon sufficient evidence of fraud, must be made out. The moving affidavit is made by the plaintiff and solely upon information and belief, without stating the sources of the information or the ground of the relief, and is therefore insufficient. *Eicher v. Metropolitan St. R. Co.*, 114 App. Div. 247, 99 N. Y. Supp. 870.

[b] The reason that the sources of information should be stated is found in the very nature of an affidavit whose office is to present evidence to the court from which it may draw conclusions as to facts, thus differing from pleadings generally. *Thompson v. Best*, 51 Hun 441, 4 N. Y. Supp. 229. See also *Knepler v. Red River Val. Nat. Bank*, 8 N. D. 406, 79 N. W. 869.

[c] In an affidavit for arrest, where the averments of facts were as upon personal knowledge, the affidavit was

held insufficient for the reason that "no facts are stated from which the court can see, or even infer, that the maker of the affidavit has any personal knowledge on the subject." *Price v. Levy*, 93 App. Div. 274, 87 N. Y. Supp. 740.

[d] In an affidavit for attachment, although the allegations are positive in form, enough circumstances must be stated to enable the court to see that the allegations are not made on information and belief. *Hoormann v. Climax Cycle Co.*, 9 App. Div. 579, 41 N. Y. Supp. 710.

15. *Robinson v. Branch Circuit Judge*, 142 Mich. 70, 77, 105 N. W. 25.

[a] A certificate from a county clerk being set out therein is sufficient basis for an affidavit on information and belief. *Ennis v. Untermeyer*, 93 App. Div. 375, 87 N. Y. Supp. 695.

16. Affidavit of administratrix "that the above account is truly extracted from the books of the deceased, and that she believes the same to be a just and true account, and that since the death of the intestate she has received no part thereof," held sufficient to hold to bail. *McLaughlin v. Johns*, 1 Cranch C. C. 372, 16 Fed. Cas. No. 8,871; *Lowe v. Mayson*, 3 McCord (S. C.) 313.

17. Information conveyed through the medium of the telephone is sufficient if the affiant was acquainted with the informant and recognized his voice. *Murphy v. Jack*, 142 N. Y. 215, 36 N. E. 882, 40 Am. St. Rep. 590, 31 Abb. N. C. 201; *Murphy v. Jack*, 76 Hun 356, 27 N. Y. Supp. 802. Compare *Gumbes v. Hicks*, 116 App. Div. 129, 101 N. Y. Supp. 741.

18. Mich.—*Conrad v. Van Buren Circ. Judge*, 144 Mich. 492, 108 N. W. 347; *Sheridan v. Briggs*, 53 Mich. 569, 19 N. W. 189; *Hackett v. Wayne Cir. Judge*, 36 Mich. 334. Nev.—*Morgan v. Eureka County*, 9 Nev. 360. N. Y. *Markey v. Diamond*, 19 N. Y. Supp. 181, 46 N. Y. St. 283.

should be set out,¹⁹ unless a satisfactory reason for their nonproduction be given.²⁰ On the other hand, if the information be derived from a person having personal knowledge of the facts, his affidavit should be annexed,²¹ or the reason for a failure so to do be stated.²²

D. BY AGENT OR ATTORNEY.—Generally an affidavit by an agent or attorney must be made positively.²³ It should be as positive as that of his principal or client.²⁴

The general rules, hereinbefore discussed, as to affidavits on information and belief ordinarily apply to affidavits by an agent or attorney.²⁵

19. *Gardiner v. Wayne Circ. Judge*, 155 Mich. 414, 119 N. W. 432; *Robinson v. Branch Circuit Judge*, 142 Mich. 70, 105 N. W. 25 (in which certified copies of the record were set up); *Gumbes v. Hicks*, 116 App. Div. 120, 101 N. Y. Supp. 741; *Barrell v. Todd*, 65 App. Div. 22, 72 N. Y. Supp. 527; *Ladenburg v. Commercial Bank*, 87 Hun 269, 33 N. Y. Supp. 821; *Thompson v. Best*, 51 Hun 641, 4 N. Y. Supp. 229; *Moore v. Becker*, 13 N. Y. St. 567.

[a] "Where a party alleges upon information and belief, and states that the sources of his information are certain writings, the court is entitled to know what the writings are, in order to see whether the affiant is justified in his belief or not." *Gumbes v. Hicks*, 116 App. Div. 120, 101 N. Y. Supp. 741; *Barrell v. Todd*, 65 App. Div. 22, 72 N. Y. Supp. 527.

20. *De Weerth v. Feldner*, 16 Abb. Pr. (N. Y.) 295.

21. *Cal.*—*Neves v. Costa*, 5 Cal. App. 111, 89 Pac. 860. *Mich.*—*Gardiner v. Wayne Circ. Judge*, 155 Mich. 414, 119 N. W. 432. *N. D.*—*Kaeppler v. Red River Val. Nat. Bk.*, 8 N. D. 406, 79 N. W. 869.

22. *Whitlock v. Roth*, 10 Barb. (N. Y.) 78; *City Bank v. Lumley*, 28 How. Pr. (N. Y.) 397 (showing sufficient); *De Weerth v. Feldner*, 16 Abb. Pr. (N. Y.) 295; *People v. Snaith*, 57 Hun 332, 10 N. Y. Supp. 589; *Markey v. Diamond*, 19 N. Y. Supp. 181, 46 N. Y. St. 283.

[a] That the persons from whom the information was secured are absent and their depositions cannot be procured must be shown in an affidavit upon information only, if their affidavit is not annexed. *Steuben County Bank v. Alberger*, 78 N. Y. 252; *Yates v. North*, 44 N. Y. 271.

23. *U. S.*—*Read v. Haynie*, Hempst. 700, 20 Fed. Cas. No. 11,608. *Kan.*—*Aiken v. Franz*, 2 Kan. App. 75, 43

Pac. 306. *N. Y.*—*Ex parte Bank of Monroe*, 7 Hill 177, 42 Am. Dec. 61; *Talbert v. Storum*, 66 Hun 635, 21 N. Y. Supp. 719; *Pach v. Geoffroy*, 65 Hun 619, 19 N. Y. Supp. 583; *Cross v. National Fire Ins. Co.*, 17 Civ. Proc. 199, 6 N. Y. Supp. 84.

[a] If a person swears to the best knowledge of another, his affidavit would be insufficient. *Osprey v. Jenkins*, 9 Mo. 643. But see *Franklin Sav. Inst. v. Wheeling M. M. Bk.*, 1 Mete. (Ky.) 156.

24. *Frink v. Flanagan*, 6 Ill. 35, 37; *Dorman v. Crozier*, 14 Kan. 224, under mechanic's lien law. See *Boston Merc. Co. v. Ould-Carter Co.*, 123 Ga. 458, 51 S. E. 466.

Verification by attorney, see the title "Verification."

25. Sources of information (1) should be stated in an affidavit upon information and belief (D. C.—See *Newman v. Goddard*, 12 App. Cas. 404, *quaere.* *Mo.*—*Eldridge v. Campbell*, 27 Mo. 595, distinguished in *Gilkeson v. Knight*, 71 Mo. 403, stating that the rule announced was never applied to any other than statutory proceedings in rem against boats. *N. Y.*—*Crowns v. Vail*, 51 Hun 204, 4 N. Y. Supp. 324; *Cribben v. Schillinger*, 30 Hun 248. *Can.*—*Halifax Bkg. Co. v. Smith*, 25 N. Bruns. 610), (2) although such is not necessary in an affidavit made upon the personal knowledge of the agent (Ill. *James E. Pepper Dist. Co. v. Alexander*, 137 Ill. App. 369. *Ia.*—*Bates v. Robinson*, 8 Iowa 318. *N. Y.*—*Wicker v. Elmira Heights*, 42 App. Div. 426, 59 N. Y. Supp. 130; *Bruen v. Nickels*, 30 App. Div. 396, 51 N. Y. Supp. 352; *Hanson v. Marcus*, 8 App. Div. 318, 40 N. Y. Supp. 951. *Wis.*—*Anderson v. Webe*, 58 Wis. 615, 17 N. W. 426). (3) It has, however, been said that it would be the better practice, and desirable in all cases where the oath is made by one not a party, or one not presumed

E. SPECIFIC CASES.—1. Arrest.—Affidavits for arrest must ordinarily be positive and not on information and belief,²⁶ in absence of express statutory authority,²⁷ and will be bad if, though positive in form, it appears to be on information.²⁸

2. Attachment.—For attachment the affidavit should state positively the non-residence, indebtedness or other essential for the issuance of the writ where these facts are susceptible of positive knowledge.²⁹

to have the information, that the affiant's means of knowledge be stated, although there is no very clear ground upon which this can be held essential. *Bates v. Robinson*, 8 Iowa 318. To the same effect see: **N. Y.**—*Ex parte* Monroe Bank, 7 Hill 177, 42 Am. Dec. 61; *Wicker v. Elmira Heights*, 42 App. Div. 426, 59 N. Y. Supp. 130; *Cribben v. Schillinger*, 30 Hun 248; *Bank of Pittsburgh v. Murphy*, 18 N. Y. Supp. 575. **N. C.**—*Cowles v. Hardin*, 79 N. C. 577. **Wis.**—*Sloane v. Anderson*, 57 Wis. 123, 13 N. W. 684, 15 N. W. 21; *McCabe v. Sumner*, 40 Wis. 386. *Contra*, *Anderson v. Wehe*, 58 Wis. 615, 17 N. W. 426, *disapproving* the obiter to the contrary in *Wiley v. Aultman*, 53 Wis. 560, 11 N. W. 32.

[a] An attorney is not required to state the means of his knowledge any more than the party himself. *Anderson v. Wehe*, 58 Wis. 615, 17 N. W. 426.

[b] There is a presumption that facts are personally known to the agent, making a positive affidavit, unless the contrary appears. *Newman v. Goddard*, 12 App. Cas. (D. C.) 404; *Nicolls v. Lawrence*, 30 Mich. 395.

[c] **Personal knowledge of the facts** by the attorney who is affiant must be shown. *Aiken v. Franz*, 2 Kan. App. 75, 43 Pac. 306.

26. Cal.—*Ex parte* Yonetaro Fkumoto, 120 Cal. 316, 52 Pac. 726. **N. Y.** *Markey v. Diamond*, 1 Misc. 97, 20 N. Y. Supp. 847. **N. D.**—*Kaeppeler v. Red River Val. Nat. Bank*, 8 N. D. 406, 411, 79 N. W. 869.

See generally the titles "**Arrest in Civil Cases**," "**Warrants**,"

[a] "I think the affidavits on which the warrant was issued are insufficient, in not furnishing the facts other than by way of hearsay. No facts are established on the knowledge of the affiants which prove any one of the grounds stated in the warrant. The allegations consist almost wholly of statements of others, and conclusions

of the affiants founded thereon." *De-laney v. Bouse*, 91 App. Div. 437, 86 N. Y. Supp. 880.

[b] "The cause of action was an account and affidavit by one of the plaintiffs, that the above account, as stated is 'true and correct, according to the best of his knowledge and belief.' . . . *Per curiam*.—The affidavit is not sufficient to hold to bail. It is not such as would support a prosecution for perjury." *Smith v. Watson*, 1 Cranch (C. C.) 311, 22 Fed. Cas. No. 13,124.

Preliminary complaint or affidavit, see the title "**Indictment and Information**."

[c] **In Support of Criminal Warrant.**—**Cal.**—*People v. Smith*, 1 Cal. 9. **Neb.**—*In re Balcom*, 12 Neb. 316, 11 N. W. 312. **N. Y.**—*Blodgett v. Race*, 18 Hun 132.

[d] "A mere affidavit in the form of an information, containing no evidence, and followed by no deposition stating any fact tending to show guilt, is insufficient to support a warrant. The liberty of a citizen cannot be violated upon the mere expression of an opinion under oath that he is guilty of a crime." *Ex parte Dimmig*, 74 Cal. 164, 166, 15 Pac. 619.

[e] The verification of an information was "that he has good reason to believe and does believe the same to be true as therein set forth." Held, insufficient to sustain the issue of a warrant. *Swart v. Kimball*, 43 Mich. 443, 5 N. W. 635. To the same effect, *People v. Heffron*, 53 Mich. 527, 19 N. W. 170.

27. 2 STANDARD PROC. 936.

28. 2 STANDARD PROC. 939.

29. See the title "**Attachment**," and the following: **Ark.**—*Hellman v. Fowler*, 24 Ark. 235. **Ga.**—*Neal v. Gordon*, 60 Ga. 112. **Ill.**—*Archer v. Claf-lin*, 31 Ill. 306; *Dyer v. Flint*, 21 Ill. 80, 74 Am. Dec. 73. **Kan.**—*Campbell v. Hall*, *McCahon* 53. **Mich.**—*Wilson v. Arnold*, 5 Mich. 98. **Minn.**—*Pierse*

But affidavits on information and belief are permissible in some jurisdictions and under proper circumstances.³⁰

3. **Default.**—Application for relief from default should be supported by positive statements.³¹

4. **Extradition.**—An affidavit for extradition generally must be positive and not on information and belief.³²

5. **Forfeiture.**—In proceedings for forfeiture, affidavits on information and belief are ordinarily insufficient.³³

6. **Injunction.**—The sufficiency of affidavits on information and belief in injunction proceedings is elsewhere fully discussed.³⁴

7. **Mandamus.**—An application for a writ of mandamus should not be based on statements or affidavits made merely on information and belief.³⁵

8. **Affidavits of Merits and Defense.**—Affidavits of merits or defense should either be positive or should show why they are made on information and belief and the sources thereof.³⁶

r. Smith, 1 Minn. 60. **Neb.**—*Clarke v. Nebraska Nat. Bank*, 57 Neb. 314, 77 N. W. 805, 73 Am. St. Rep. 507, 511. **N. Y.**—*Steuben County Bank v. Alberger*, 78 N. Y. 252; *Claffin v. Baere*, 57 How. Pr. 78. **Ohio.**—*Garner v. White*, 23 Ohio St. 192; *Dunlevy v. Schartz*, 17 Ohio St. 640. **R. I.**—*Greene v. Tripp*, 11 R. I. 424.

[a] "The statute does not say that the order for examination may issue upon an affidavit made upon information and belief, but before the order can go, it is required to be established to the satisfaction of the court or judge by affidavit of the judgment creditor or otherwise that the statutory grounds exist for the issuance of the order. An affidavit made upon information and belief merely, or upon the belief of the affiant, does not meet the requirements." *Clarke v. Nebraska Nat. Bank*, 57 Neb. 314, 77 N. W. 805, 73 Am. St. Rep. 507, 511.

30. See the title "Attachment."

31. *Hitchcock v. Herzer*, 90 Ill. 543. See generally the title "Judgments."

[a] In an affidavit of merits in support of a motion to open a default the averments should be positive and not upon information and belief. **Cal.** *Jenkins v. Gamewell, etc. Tel. Co.*, 3 Cal. Unrep. 655, 31 Pac. 570. **Ill.** *Hitchcock v. Herzer*, 90 Ill. 543. **Ind.** *Adamson v. Wood*, 5 Blackf. 448. **Mich.**—*Brown v. Cowee*, 2 Dougl. 432. **Neb.**—*Clarke v. Nebraska Nat. Bank*, 57 Neb. 314, 77 N. W. 805, 73 Am. St. Rep. 507, 511.

32. See 8 STANDARD PROC. 839; and the following: **U. S.**—*Ex parte Morgan*, 20 Fed. 298, 307. **Cal.**—*Ex parte Spears*, 88 Cal. 640, 26 Pac. 608, 22 Am. St. Rep. 341, 343. **Tex.**—*Ex parte Rowland*, 35 Tex. Crim. 608, 31 S. W. 651.

[a] "Who, being duly sworn, saith, that on his best knowledge, information and belief." Facts so stated fail to give the commissioner jurisdiction. *Ex parte Lane*, 6 Fed. 34.

[b] "As said deponent verily believes," added to a positive statement does not vitiate. *In re Keller*, 39 Fed. 681.

33. *In re Peck*, 167 N. Y. 391, 60 N. E. 775, 53 L. R. A. 888. See the title "Penalties, Forfeitures and Fines."

34. See the title "Injunctions."

35. See the title "Mandamus," and the following: *State ex rel. Otto v. County Comrs.*, 49 Neb. 51, 68 N. W. 336; *Elder v. Bingham*, 118 App. Div. 25, 103 N. Y. Supp. 617, affirmed, 189 N. Y. 509, 81 N. E. 1163.

[a] "Our statute regulating the issuance of this writ, requires the motion therefore to be made upon an affidavit setting forth the facts upon which it is based. . . . This application is by petition, verified in the usual mode of verifying a pleading under the code, that the facts stated therein are true as affiant 'verily believes.' This is a fatal defect." *State ex rel. Roberts v. Mayor*, 4 Neb. 260.

36. See 1 STANDARD PROC. 674, 684, 685.

9. **Ne Exeat.** — A positive statement of the essential facts is necessary to the issuance of a writ of ne exeat.³⁷

10. **Pleas in Abatement.** — Affidavits in support of pleas in abatement should be positive and not on information and belief.³⁸

11. **Replevin.** — Information and belief does not satisfy the statute requiring the showing of certain facts in replevin.³⁹

12. **Search Warrants.** — Search warrants may, it seems, be issued on information and belief.⁴⁰

II PLEADINGS. — A. DECLARATION, COMPLAINT, OR BILL. — 1.

Generally. — Under proper circumstances the allegations of a declaration or complaint,⁴¹ or a bill in equity⁴² may be upon information and belief, though it has been said that at common law such allegations were not permissible.⁴³

37. See the title "**Ne Exeat**," and the following: *Jones v. Alephsin*, 16 Ves. 470, 33 Eng. Reprint 1063; *Hannay v. M'Entire*, 11 Ves. Jr. 54, 32 Eng. Reprint 1008; *Amsinek v. Barklay*, 8 Ves. Jr. 594, 32 Eng. Reprint 486; *Oldham v. Oldham*, 7 Ves. Jr. 410, 32 Eng. Reprint 410.

[a] "The affidavit must be as positive as to the equitable debt as an affidavit of a legal debt, to hold to bail." *Jackson v. Petrie*, 5 Ves. Jr. 164, 32 Eng. Reprint 806.

[b] "It was formerly thought that to obtain a ne exeat, it was enough for the plaintiff to swear to his belief that the defendant was going abroad." *Ex parte Haynes*, 18 Wend. (N. Y.) 611.

38. *Archer v. Claffin*, 31 Ill. 306; *Adamson v. Wood*, 5 Blackf. (Ind.) 448.

39. *Frink v. Flanagan*, 6 Ill. 35. See the title "**Replevin**."

[a] A statute requiring the showing of certain facts in an affidavit for a writ of replevin is not satisfied by an affidavit on information and belief. "The affiant must swear positively to the facts required." *Lewis v. Connolly*, 29 Neb. 222, 45 N. W. 622.

[b] An affidavit by the special agent of the general land office that to the best of his knowledge, information and belief the property sued for belonged to the United States is sufficient until controverted. *United States v. Bryant*, 111 U. S. 499, 4 Sup. Ct. 601, 28 L. ed. 496.

[c] An affidavit by an agent must be as positive as that of his principal. *Frink v. Flanagan*, 6 Ill. 35.

40. *Com. v. Certain Lottery Tickets*, 5 Cush. (Mass.) 369; *Humes v. Taborn*, 1 R. I. 464. See also *Baker v. Prebis*,

185 Ill. 191, 56 N. E. 1110; *State v. Plunkett*, 64 Me. 534, and the title "**Search and Seizure**."

[a] "I am of the opinion, that upon a representation to a magistrate, that a person has reason to suspect that his property has been stolen, or is concealed in a certain place, the magistrate may lawfully issue his warrant to search the place, and to bring the occupier or owner before him. It need not be a positive and direct averment upon oath that the goods are stolen, in order to justify the magistrate in granting his warrant. There are many cases in which a cautious man might not choose to swear that his property is stolen, nevertheless, he might have great reason to suspect a particular party, and the magistrate would be well warranted in granting his search warrant." *Else v. Smith*, 1 Dowl. & Ry. (Eng.) 97.

41. 6 STANDARD PROC. 694.

"It is undoubtedly true that the facts should be stated positively, and in a traversable form, but this does not necessarily prohibit the statement of a fact on information and belief, for such an averment may, nevertheless, be direct and positive." *Warburton v. Ralph*, 9 Wash. 537, 550, 38 Pac. 140.

42. **U. S.**—*Leavenworth v. Pepper*, 32 Fed. 718. **Ala.**—See *Lucas v. Oliver*, 34 Ala. 626. **Com.**—*Wells v. Bridgeport Hydraulic Co.*, 30 Conn. 316, 70 Am. Dec. 250.

43. 1 STANDARD PROC. 130.

In injunction cases, see the title "**Injunctions**."

In action to set aside fraudulent conveyance, see 10 STANDARD PROC. 172.

43. *Truscott v. Dole*, 7 Haw. Pr. (N. Y.) 221; *Greene v. J. H. McLoud*

Where allegations on information and belief are not permissible, they are subject to a motion to strike out,⁴⁴ but not to a demurrer.⁴⁵

2. When Permitted.—If the facts are not within the plaintiff's knowledge,⁴⁶ or are not presumptively within his knowledge,⁴⁷ as in a case where the act alleged was that of an agent or assignor,⁴⁸ or where the complaint is drawn and verified by an attorney,⁴⁹ they may be alleged upon information and belief. If, however, the plaintiff has knowl-

Co., 87 Vt. 242, 88 Atl. 810; *State ex rel. Ballard v. Greene*, 87 Vt. 94, 88 Atl. 515.

44. See *Jones v. Pearl Min. Co.*, 20 Colo. 417, 38 Pac. 700; and generally the titles "Motions;" "Striking Out and Withdrawal;" "Surplusage and Scandal."

[a] In *Truscott v. Dole*, 7 How. Pr. (N. Y.) 221, the court permitted the statement "on information and belief" to be stricken from the body of the complaint as redundant matter. But see *St. John v. Beers*, 24 How. Pr. (N. Y.) 377.

As frivolous pleading, see *Milwaukee v. O'Sullivan*, 25 Wis. 666.

45. "Certain allegations of the complaint are made upon information and belief, and defendants claim that, for this reason, the demurrer was properly sustained. This objection is not a ground for demurrer. It can be raised by motion only." *Jones v. Pearl Min. Co.*, 20 Colo. 417, 423, 38 Pac. 700. See also *Carpenter v. Smith*, 20 Colo. 39, 36 Pac. 789.

[a] "Violations of this rule which do not affect the substance of the cause of action, or the grounds of defense, cannot be reached by demurrer." *Stoutenburg v. Lybrand*, 13 Ohio St. 228.

46. **Cal.**—*Campbell-Kawannanakoia v. Campbell*, 152 Cal. 201, 92 Pac. 184; *McDermont v. Anaheim U. Water Co.*, 124 Cal. 112, 56 Pac. 779. **Ill.**—*Coryell v. Klehm*, 157 Ill. 462, 41 N. E. 864; *Campbell v. Paris & D. R. Co.*, 71 Ill. 611. **Ia.**—*Robinson v. Ferguson*, 119 Iowa 325, 93 N. W. 350. **N. Y.**—*St. John v. Beers*, 24 How. Pr. 377; *Kraemer v. Williams*, 131 App. Div. 236, 115 N. Y. Supp. 721. **Pa.**—*Goldbeck v. Brady*, 4 Pa. Co. Ct. 169. **S. C.**—*Aikin v. Ballard*, Rice Eq. 13.

47. *Fairbanks v. Isham*, 16 Wis. 118. *Contra*, *New York Marbled Iron Wks. v. Smith*, 4 Duer (N. Y.) 362.

[a] "As the facts alleged upon information and belief are not presum-

tively within the knowledge of the plaintiff, he is at liberty to plead them in the form adopted." *Jones v. Pearl Min. Co.*, 20 Colo. 417, 38 Pac. 700.

48. *St. John v. Beers*, 24 How. Pr. (N. Y.) 377. Compare *Truscott v. Dole*, 7 How. Pr. (N. Y.) 221.

[a] "The second alleged error is, that the witnessing and acknowledgment of the mortgage are improperly averred upon information and belief. It is said that this form of averment is unauthorized, when the facts are presumptively within the personal knowledge of the whole world. The plaintiff sues as assignee, and these facts are not presumptively within his knowledge, or that of the whole world. Hence, the pleading is good as it is." *Fairbanks v. Isham*, 16 Wis. 118.

[b] "The plaintiff has very properly stated the making of the two notes on his 'information and belief.' They being payable to other persons and assigned to him, he could properly only state the making of them on his 'information and belief.' There is no objection to stating the sale of the goods on 'information and belief,' as they may have been sold by his clerk or agent, and not by himself personally." *St. John v. Beers*, 24 How. Pr. (N. Y.) 377.

49. See the title "Verification."

[a] "If one of the plaintiffs could have made the verification, presumably the complaint might, and probably would, have averred the existence of the partnership, the indorsement of the note before maturity, and perhaps other facts positively; but as it was necessary that the verification should be made by their attorney, the averments could only be in such form as the attorney could truthfully verify. Verifications by persons not parties are expressly provided for under certain circumstances; and in such cases allegations upon information and belief are not improper and may be a necessity."

edge of the facts averred,⁵⁰ or if they are matters of public record,⁵¹ the allegation must be positive in form.

3. Form of Allegation.—a. *Of the Information and Belief.*—Both the information and belief of the plaintiff should be stated,⁵² but it has been held that an omission to aver that the plaintiff is informed of the facts does not vitiate the allegation.⁵³

Sources of Information or Belief.—Since the averment of the belief of the plaintiff is not traversable, a statement of the grounds therefor is ordinarily immaterial.⁵⁴ But it has been held that where averments are made on information and belief the sources of information must be set out.⁵⁵

b. *Of the Facts.*—In addition to the averment as to information and belief there must be a direct averment of the fact or facts,⁵⁶ since mere allegations of information and belief are generally held bad as not stating the existence of the fact believed and not raising a material issue. In some jurisdictions, however, under the liberal rules of plead-

Carpenter v. Smith, 20 Colo. 39, 36 Pac. 789.

50. Cal.—*Bryan v. Grosse*, 155 Cal. 132, 99 Pac. 499. Ill.—*Coryell v. Klehm*, 157 Ill. 462, 41 N. E. 864; *Campbell v. Paris & D. R. Co.*, 71 Ill. 611. N. H.—*Rice v. Merrimack Hosiery Co.*, 56 N. H. 114. Pa.—*Goldbeck v. Brady*, 4 Pa. Co. Ct. 169. S. C.—*Aiken v. Ballard*, *Rice Eq.* 13.

51. *Neacy v. Milwaukee*, 151 Wis. 504, 139 N. W. 409.

[a] "The allegations of the complaint on information and belief challenging the validity of appellants' title upon the ground that no license to sell the realty was granted, it is insisted, are not sufficient to raise such question. That seems to be ruled in appellant's (defendant's) favor by *Union L. Co. v. Chippewa Co.*, 47 Wis. 245, 2 N. W. 281; *State v. McGarry*, 21 Wis. 493; *Mills v. Jefferson*, 20 Wis. 50. Respondents could easily have ascertained whether there was a record of any license to sell the realty, and, if there was none, have alleged the fact positively." *Steinberg v. Saltzman*, 130 Wis. 419, 110 N. W. 198.

52. *Hyre v. Lambert*, 37 W. Va. 26, 16 S. E. 446.

[a] An allegation that plaintiff is informed a fact exists without alleging his belief in the truth of the facts and without charging the fact accordingly is insufficient. *Sandifer v. Sandifer*, 229 Ill. 523, 82 N. E. 323.

53. *Radway v. Mather*, 5 Sandf. (N. Y.) 654.

[a] "In pleading facts not within

the knowledge of the party an averment of belief is sufficient." *Robinson v. D. Ferguson & Son*, 119 Iowa 325, 328, 93 N. W. 350.

54. *Radway v. Mather*, 5 Sandf. (N. Y.) 654.

[a] **Effect of Averment of Sources of Knowledge.**—A statement of the nature and source of plaintiff's information does not vitiate his pleading. *Borrowe v. Milbank*, 5 Abb. Pr. (N. Y.) 28.

55. *Osborne v. Morgan*, 171 Ill. App. 549; *Blondheim v. Moore*, 11 Md. 365.

[a] **A charge of fraud upon information and belief is insufficient unless the grounds upon which the belief rests or some facts from which the court can infer the belief is well founded be stated.** *North v. Union Sav. & L. Assn.*, 59 Ore. 483, 117 Pac. 822.

[b] **Where complainant sues for a class in like situation with himself, an allegation that he "does not know how many others are similarly situated; but he avers on information and belief that there are many other stockholders . . . similarly situated and that their stock amounts to at least \$500,000," is insufficient to justify entertaining his bill as one by complainant on behalf of a class.** *Motley v. Southern Ry. Co.*, 184 Fed. 956.

56. **U. S.**—*Bank of North America v. Rindge*, 57 Fed. 279. Ala.—*Nix v. Winter*, 35 Ala. 399; *Lucas v. Oliver*, 34 Ala. 626; *Cameron v. Abbott*, 30 Ala. 416; *Jones v. Cowles*, 26 Ala. 612; *Read v. Walker*, 18 Ala. 323. Ill.—*Sandifer v. Sandifer*, 229 Ill. 523, 82 N. E. 323;

ing established by the code, allegations of the information and belief of the pleader have been held sufficient.⁵⁷

B. DEFENDANT'S PLEADINGS.—1. In Equity.—a. *Generally*.—In equity procedure the defendant may be compelled to answer under oath the statements of the bill, "according to the best of his knowl-

Murphy v. Murphy, 189 Ill. 360, 59 N. E. 796; Walton v. Westwood, 73 Ill. 125. Ky.—Patterson v. Caldwell, 1 Mete. 489; McDowell v. Graham, 3 Dana 73. Me. Messer v. Storer, 79 Me. 512, 11 Atl. 275. Mo.—Nichols, etc., Co. v. Hubert, 150 Mo. 620, 51 S. W. 1031. Ohio. State Bank v. Oliver, 1 Disn. 159, 12 Ohio Dec. (Reprint) 548. Wash.—Warburton v. Ralph, 9 Wash. 537, 38 Pac. 140.

[a] "The only allegation he made on the subject was that he believed it to be true," that defendant was a principal debtor. "Now this allegation was wholly immaterial. The defendant was not bound to controvert it; for although he might have been able to deny that he was a principal in the note, yet he could not have denied, nor was he required to deny, that the plaintiff *believed* that was the fact. The rules of pleading require that the facts relied upon be directly and positively alleged, and not stated by way of argument, inference, or belief." Patterson v. Caldwell, 1 Mete. (Ky.) 489, 491.

[b] "The pleader then alleges that he is informed and believes the facts therein recited, and as these recited facts are essential to plaintiff's cause of action, the defect is fatal unless this form of averment is permissible under the Code. . . . The issue tendered here is not as to the existence of these facts essential to plaintiff's cause of action, but as to the plaintiff's information and belief of their existence as facts. . . . The facts would have to be charged as facts, on information and belief, so that an issue could be joined on them." Nichols & Shepard Co. v. Hubert, 150 Mo. 620, 625, 51 S. W. 1031; State Bank v. Oliver, 1 Disn. (Ohio) 159, 12 Ohio Dec. (Reprint) 548.

[c] "To state that the plaintiff is informed or believes that a particular fact exists would be bad pleading, because it would simply be an allegation of information or belief, as to the fact, and not an averment of the existence

of the fact itself." Warburton v. Ralph, 9 Wash. 537, 550, 38 Pac. 140.

[d] An allegation that "the petitioner is informed and believes and thereon states" alleges merely the information of the petitioner. *Ex parte* Reid, 50 Ala. 439. *Contra*, Wells v. Bridgeport Hydraulic Co., 30 Conn. 316, 70 Am. Dec. 250.

[e] An averment of the existence of facts as plaintiff is informed and believes, is sufficient. Lucas v. Oliver, 34 Ala. 626; Coryell v. Klehm, 157 Ill. 462, 41 N. E. 864.

[f] An allegation that complainant has reason to believe and therefore alleges is a sufficient allegation upon information and belief. Ware Kramer Tobacco Co. v. American Tobacco Co., 180 Fed. 160.

57. Robinson v. Ferguson, 119 Iowa 325, 93 N. W. 350; McFarland v. Muscatine, 98 Iowa 199, 67 N. W. 233.

[a] For the reason that "to apply such strictness to a pleading under the code would violate its fundamental principles, for we are told . . . that 'in the construction of a pleading for the purpose of determining its effect, its allegations shall be liberally construed, with a view to substantial justice between the parties.'" Dial v. Gary & Tappen, 24 S. C. 572, 578.

[b] The plaintiff, describing her injury, alleged "her spine" (was) "so badly injured as to render her almost entirely helpless, and, *she believes*, will incapacitate her from performing any normal labor for her whole life." The court said: "We think it would be carrying technicalities to a great length to hold that the allegation in the petition is insufficient upon which to base a claim for permanent injury, because it is averred that, as the plaintiff 'believes,' she will be incapacitated from performing manual labor for her life. The word 'believe,' is evidently used by the pleader in the sense of a conviction of the truth of what follows." McFarland v. City of Muscatine, 98 Iowa 199, 67 N. W. 233.

edge, information and belief."⁵⁸ If the facts charged in the bill are within the defendant's own knowledge he must answer positively,⁵⁹ unless such time has elapsed,⁶⁰ or other reasons exist that render it impossible for him to remember the facts.⁶¹

As to facts not within the defendant's knowledge he may answer on information and belief.⁶² But he must answer statements, charges and interrogations of the bill to the extent of his information as well as of his knowledge,⁶³ and exceptions may be taken to an answer that appears evasive on the matter of information.⁶⁴ He must proceed to secure information if within his reach.⁶⁵

58. 4 STANDARD PROC. 172.

[a] "Nothing is more clear in principle, than the rule, that in the case of an interrogatory, pertinent to a charge in the bill requiring the defendant to answer it 'as to his knowledge, remembrance, information and belief' (which is the usual formulary), it is not sufficient for the defendant to answer as to his knowledge, but he must answer also, as to his information and belief." *Brooks v. Byam*, 1 Story (C. C.), 296, 301, 4 Fed. Cas. No. 1,947.

[b] The defendant is called upon to answer to the best of his knowledge, remembrance, information and belief. 1 Dan. Ch. Pl. & Pr. 722; Story Eq. Pl., §855a; *Tradesmen's Bank v. Hyatt*, 2 Edw. Ch. (N. Y.) 195.

59. 4 STANDARD PROC. 172.

[a] "Where a defendant is answering as to his own acts, or as to other matters either known to him or charged in the bill to be within his personal knowledge, he must answer the substance of each charge distinctly and particularly. If he has any information on the subject, other than such as is derived from the bill, he must answer as to such information, and to his belief and disbelief of the facts charged." *Utica Ins. Co. v. Lynch*, 3 Paige Ch. (N. Y.) 210.

60. 4 STANDARD PROC. 173; Story Eq. Pl. 854; *Carey v. Jones*, 8 Ga. 516.

[a] The lapse of time and old age might furnish an excuse, if the complainants charged only one single isolated case which had transpired many years since, and which might have escaped the recollection of the defendant. But when they exhibit charges of numerous and unmerciful yearly exactions, it is repugnant to common sense to suppose it possible that the defendant can have no knowledge, recollection or belief of such transaction, charged explicitly to be in his own

knowledge." *Sloan v. Little*, 3 Paige Ch. (N. Y.) 103, 108.

61. 4 STANDARD PROC. 173.

[a] "In the case now under consideration, the court must see that it is impossible for a man who has been collecting outstanding accounts for many years, to swear positively that he has not received any other sum than those entered on his books of account." *Hall v. Wood*, 1 Paige Ch. (N. Y.) 404, 407.

62. 4 STANDARD PROC. 173.

63. *Reed v. Cumberland Ins. Co.*, 36 N. J. Eq. 146, 154.

[a] "It is not sufficient for a defendant to say he has no knowledge of a fact charged in the bill. He must answer as to his knowledge and information." *Kinnaman v. Henry*, 6 N. J. Eq. 90, 93.

[b] "The objection to the answer upon the second exception is, that the defendant has not answered as to his information concerning the alleged insolvency of Mancks. The answer says, 'he does not know or believe' that he was insolvent. His want of knowledge and his disbelief is not enough. He is bound to answer as to his information on the subject, if he have any; and to express his belief or disbelief founded upon that information." *Robinson v. Woodgate*, 3 Edw. Ch. (N. Y.) 422.

64. *Reed v. Cumberland Ins. Co.*, 36 N. J. Eq. 146, 154; *Robinson v. Woodgate*, 3 Edw. Ch. (N. Y.) 422.

[a] "The plaintiff excepted to the answer, so far as it denied that the defendant had any knowledge of the facts alleged in the bill to which the answers applied, without adding that he had no information or belief of the facts. The court decided the exception to be well taken, and ordered the defendant to put in a better answer." *Bradford v. Geiss*, 4 Wash. (C. C.) 513, 3 Fed. Cas. No. 1,768.

65. 4 STANDARD PROC. 173. But see

The defendant must also express his belief, based on his knowledge and information, as to the truth of the allegations.⁶⁶ If he has no knowledge or information, distinct from the bill, of the allegations he is required to answer, he may answer to that effect,⁶⁷ and he will be excused from expressing his *belief*.⁶⁸

b. *Information and Belief Not Evidence.*—An answer on information and belief,⁶⁹ or that defendant has no knowledge, information, remembrance or belief⁷⁰ has not the effect of evidence, as in case of a positive statement on knowledge of the defendant which required the evidence of two witnesses, or one and the equivalent of a second, to overcome it. It has merely the effect of excusing an answer, thereby putting the plaintiff to his proof, which proof may be by a single witness.⁷¹

2. At Law.—a. *Affirmative Matter.*—Affirmative matter in a

Treadwell v. Commissioners, 11 Ohio St. 183.

[a] "The officers of the bank, if they are not the same persons who were in office at the time of a transaction inquired about, ought to go not only to the records, books, and files, for information, but to the former officers, if living, and ascertain, as near as may be, the truth of the matters about which they are interrogated." Kittredge v. Claremont Bank 1 Woodb. & M. 244, 246, 14 Fed. Cas. No. 7,859.

66. See 4 STANDARD PROC. 173, and the following: Brooks v. Byam, 1 Story (C. C.) 296, 303, 4 Fed. Cas. No. 1,947; Tradesmen's Bank v. Hyatt, 2 Edw. Ch. (N. Y.) 195.

[a] "A defendant is not at liberty thus to put in issue allegations, which he may *know*, or fully *believe*, to be true." Grady v. Robinson, 28 Ala. 289, 300.

[b] "It is the duty of a respondent, when requested, to state not only his own knowledge on the matter, but what he has been informed by others, and the belief, which all of his knowledge and information have produced." Kittredge v. Claremont Bank, 1 Woodb. & M. 244, 246, 14 Fed. Cas. No. 7,859.

[c] "If a party is interrogated as to his knowledge, remembrance, information and belief, and the answer alleges that the defendant has no knowledge or information, that a fact is not true, that is not sufficient, for he ought to state, whether he believes it to be true." Story Eq. Pl., §855a.

[d] If the defendant has any information upon a material matter al-

leged in the bill, aside from the bill itself, he is bound to state his *belief* of the truth or falsity of the allegation. Smith v. Lasher, 5 John. Ch. (N. Y.) 247; Devereaux v. Cooper, 11 Vt. 103.

67. The Holladay Case, 27 Fed. 830.

[a] "This fact being material in the case, and explicitly alleged in the stating part of the bill, it became necessary for the defendant to deny all knowledge and information upon the point, in order to excuse himself from either admitting or denying the truth of the allegation. Morris v. Parker, 3 Johns. Ch. R. 297." Devereaux v. Cooper, 11 Vt. 103.

[b] "If a man truly states, that he cannot form any belief at all respecting the truth of the fact or information, that is sufficient, and it puts the plaintiff upon proof of it." Brooks v. Byam, 1 Story (C. C.) 296, 303, 4 Fed. Cas. No. 1,947.

68. 4 STANDARD PROC. 173.

69. Clark's Exrs. v. Van Riemsdyk, 9 Cranch (U. S.) 153, 160, 3 L. ed. 688; Berry v. Sawyer, 19 Fed. 286, 290; Agnew v. McGill, 96 Ala. 496, 11 So. 537. See 1 ENCY. OF EV. 934.

[a] "The answer of a defendant to charges in the bill, must be direct and positive, and not from information, hearsay and belief, to entitle it to a claim to be responsive to the bill and make it evidence." Arline v. Miller, 22 Ga. 330, 342.

70. The Holladay Case, 27 Fed. 830.

71. U. S.—Earle v. Art Library Pub. Co., 95 Fed. 544; The Holladay Case, 27 Fed. 830; Robinson v. Mandell, 3 Cliff. 169, 20 Fed. Cas. No. 11,959. Ala.—Ag-

plea may not be alleged on information and belief,⁷² but in code states new matter in the answer may be so alleged in accordance with the general rules governing such form of allegation in complaints.⁷³

b. *Denials.*—(I.) On Information and Belief. — Denials under the codes may be upon information and belief, under certain circumstances.⁷⁴ Such denials must, however, be made in good faith and

new *v. McGill*, 96 Ala. 496, 11 So. 537; *Paulding v. Watson & Eidson*, 21 Ala. 279, 284; *Newman v. James & Newman*, 12 Ala. 29, 35. Ark.—*Fairhurst v. Lewis*, 23 Ark. 435. Ind.—*State v. Holloway*, 8 Blackf. 45, 49. N. Y. *Town v. Needham*, 3 Paige Ch. 545, 554, 24 Am. Dec. 246. Vt.—*Loomis v. Fay & Patchin*, 24 Vt. 240.

[a] "A denial upon information is a denial otherwise than by the general traverse and is sufficient to prevent facts averred in the bill from being taken at the hearing as admitted." *Carpenter v. Edwards*, 64 Miss. 595, 1 So. 764.

[b] "A denial on information and belief, of notice to another, is not sufficient to dissolve an injunction." *Piereson & Gruet v. Ryerson*, 5 N. J. Eq. 196.

[c] Upon motion to dissolve an injunction, and before the plaintiff "has had an opportunity to examine his witnesses, every allegation positively sworn to in the bill, and which is not substantially denied in the answer, upon the defendant's own knowledge, must be taken as true." *Grimstone v. Carter*, 3 Paige Ch. (N. Y.) 421, 436, 24 Am. Dec. 230.

[d] Vague and general allegations on information and belief in the answer though responsive to the bill are of little force as evidence. *Allen v. O'Donald*, 28 Fed. 17, 22.

72. *Wright v. Evans*, 53 Ala. 103; *State v. Tuffts*, 28 Ark. 502.

73. *Risdon v. Davenport*, 4 S. D. 555, 57 N. W. 482. And see *infra*, II, B, 2, a.

74. See 7 STANDARD PROC. 45 et seq., and the following: Cal.—*Mulcahy v. Buckley*, 100 Cal. 484, 35 Pac. 144. Mont.—*Lewis v. Weyerhorst*, 16 Mont. 267, 40 Pac. 589; *Raymond v. Wimsette*, 12 Mont. 551, 31 Pac. 537, 33 Am. St. Rep. 604. N. Y.—*Brotherton v. Downey*, 21 Hun 436, 59 How. Pr. 206; *Straus v. American Pub. Assn.*, 96 App. Div. 315, 89 N. Y. Supp. 172.

[a] "Under the Code of Procedure,

the denial, whether founded upon personal knowledge, or upon information and belief, was in form the same—that is, absolute. By the verification, the defendant was permitted, in a great measure, to impress upon the pleading the operation of his mind. . . . This was deemed unsatisfactory and consequently the Code of Civil Procedure provided for a distinct disclosure upon the face of the pleading, of the character of the denial. . . . The exception (in the verification) is no longer matter stated on information and belief, but matter stated to be alleged on information and belief. Of course that permits a party to so allege." *Brotherton v. Downey*, 21 Hun (N. Y.) 436. Compare *Pratt Mfg. Co. v. Jordan Iron & C. Co.*, 33 Hun (N. Y.) 544.

[b] §500 of N. Y. Code Civ. Proc., declared that the answer must contain "a general or specific denial of each material allegation of the complaint controverted by the defendant, or any knowledge or information thereof sufficient to form a belief." Held that a denial of certain allegations "upon information and belief" was sufficient. *Bennett v. Leeds Mfg. Co.*, 110 N. Y. 150, 17 N. E. 669.

[c] "Provision is made for an issue by a formal denial, where sufficient knowledge or information upon which to base a belief cannot be obtained. This implies that, if the necessary information can be obtained, a statement must be made predicated upon that." *Maclay v. Sands*, 94 U. S. 586, 24 L. ed. 211.

[d] "The answer contains the following language, 'and said defendants deny, upon information and belief, that said plaintiffs, or either of them, were, on the first day of March, 1867, or at at any time, the bona fide occupants of said land, or any part thereof' . . . This denial must be held good upon the authority of *Vassault v. Austin*, 32 Cal. 597, and *Roussin v. Stewart*, 33 Cal. 208." *Jones v. City of Petaluma*, 36 Cal. 230.

are not permissible where the party has or can readily obtain personal knowledge,⁷⁵ being governed generally by the same rules as are applied to similar allegations in a complaint.⁷⁶

The statutory form should be followed,⁷⁷ and the denial should be

[e] **In Colorado** denials on information and belief are not permissible. *Solomon v. Brodie*, 10 Colo. App. 553, 50 Pac. 1045.

75. See 7 STANDARD PROC. 48 et seq.; and *San Francisco Gas Co. v. San Francisco*, 9 Cal. 453, 467 (whether the defendant be a natural or artificial person); *State ex rel. Kennedy v. McGarry*, 21 Wis. 496.

[a] **Otherwise the Answer Will Be Frivolous.**—10 STANDARD PROC. 270, 272.

[b] **Amendment of denial** allowable, within the court's discretion, where defendant improperly made a denial on information and belief where not proper. *Avery v. Stewart*, 134 N. C. 287, 46 S. E. 519.

76. See *supra*, II, A; and 7 STANDARD PROC. 44.

[a] **When the defendant is without knowledge** as to the facts averred in the complaint, he may deny them on information and belief. **Cal.**—*Humphreys v. McCall*, 9 Cal. 59, 70 Am. Dec. 621. **N. Y.**—*Edwards v. Lent*, 8 How. Pr. 28; *Rockowitz v. Siegel*, 151 App. Div. 636, 136 N. Y. Supp. 192; *Wilsey v. Wilson*, 147 N. Y. Supp. 540; *Sharp v. Sharp*, 145 N. Y. Supp. 386; *Engel v. Georgiades*, 140 N. Y. Supp. 93. **N. D.**—*Russell v. Amundson*, 4 N. D. 112, 59 N. W. 477.

[b] **If the defendant has knowledge** of the facts a denial upon information and belief is not permissible. **U. S.**—*Peacock v. United States*, 125 Fed. 583, 60 C. C. A. 389. **Cal.**—*Sociedade Do Espirito Santo v. Santa Clara Valley Bank*, 24 Cal. App. 592, 141 Pac. 1054. **Colo.**—*Ensley v. Page*, 13 Colo. App. 452, 59 Pac. 225. **N. M.** *Chicago, R. I. & E. P. R. Co. v. Wertheim*, 15 N. M. 505, 110 Pac. 573, Ann. Cas 1912C, 148, 30 L. R. A. (N. S.) 771. **N. Y.**—*Edwards v. Lent*, 8 How. Pr. 28; *Engel v. Georgiades*, 140 N. Y. Supp. 93.

[c] **If presumed to know the facts**, (1) the defendant cannot deny them on information and belief generally. **Cal.** *Spicer v. Hurley*, 161 Cal. 1, 118 Pac. 249; *Gribble v. Columbus Brew Co.*, 100 Cal. 67, 34 Pac. 527; *Loveland v. Gar-*

ner, 74 Cal. 298, 15 Pac. 844; *Brown v. Scott*, 25 Cal. 189; *Humphreys v. McCall*, 9 Cal. 59, 70 Am. Dec. 621. **Colo.** *Hughes v. Brewer*, 7 Colo. 583, 4 Pac. 1115; *Ensley v. Page*, 13 Colo. App. 452, 59 Pac. 225. **N. Y.**—*Edwards v. Lent*, 8 How. Pr. 28; *Pardi v. Conde*, 27 Misc. 496, 58 N. Y. Supp. 410. **N. C.** *Avery v. Stewart*, 136 N. C. 426, 48 S. E. 775, 68 L. R. A. 776. **Ore.**—*Peters v. Queen City Ins. Co.*, 63 Ore. 382, 126 Pac. 1005. **Wis.**—*Carpenter v. Momsen*, 92 Wis. 449, 65 N. W. 1027, 66 N. W. 692; *Stacy v. Bennett*, 59 Wis. 234, 18 N. W. 26), (2) If, however, he, by a proper statement of facts, overcomes the presumption of knowledge a denial on information and belief may be made. *Vassault v. Austin*, 32 Cal. 597; *Brown v. Scott*, 25 Cal. 189; *Hensberry v. Clark*, 23 Misc. 37, 51 N. Y. Supp. 308.

[d] **Matters of record** cannot be denied on information and belief. **U. S.** *Peacock v. United States*, 125 Fed. 583, 60 C. C. A. 389. **Ky.**—*Herald v. Hargis*, 21 Ky. L. Rep. 1287, 54 S. W. 958. **Neb.**—*Oakes v. Ziemer*, 62 Neb. 603, 87 N. W. 350. **Utah.**—*Thompson v. Skeen*, 14 Utah 209, 46 Pac. 1103. **Wis.**—*State ex rel. Kennedy v. McGarry*, 21 Wis. 496.

[e] **The rule applies to denials** by both corporations and natural persons. *Loveland v. Garner*, 74 Cal. 298, 15 Pac. 844.

[f] **Where there are several defendants**, denials on information and belief are not improper where all the defendants do not know the facts so denied. *Straus v. American Pub. Assn.*, 96 App. Div. 315, 89 N. Y. Supp. 172.

77. **A denial as defendant is informed and believes** is insufficient as a denial upon information and belief. *Shain v. Du Jardin*, 4 Cal. Unrep. 905, 38 Pac. 529.

[a] **A denial upon information and belief** instead of in the statutory language "according to his information and belief" is sufficient. *Kirstein v. Madden*, 38 Cal. 158.

[b] **A denial according to defendant's best recollection and belief** is sufficient. *Conder v. Stallings*, 161 N. C. 17, 76 S. E. 627.

according to both the pleader's knowledge and belief.⁷⁸ The answer should clearly indicate what matters are denied on information and belief and those otherwise denied.⁷⁹

(II.) **Of Information and Belief.**—The requirements of the codes that the defendant answer under oath make necessary the provision for cases where the defendant is without information. The codes, following the chancery practice,⁸⁰ have permitted a denial "of any knowledge or information sufficient to form a belief," to raise an issue on the allegation of the complaint.⁸¹ The defendant must in

78. *Humphries v. McCall*, 9 Cal. 59, 70 Am. Dec. 621.

79. *N. K. Fairbank Co. v. Blaut*, 24 Civ. Proc. 334, 33 N. Y. Supp. 713.

80. See *supra*, II, B, 1.

81. See 7 STANDARD PROC. 45, and the following: **Cal.**—*Etchas v. Orena*, 121 Cal. 270, 53 Pac. 798. **Colo.**—*James v. McPhee*, 9 Colo. 486, 490, 13 Pac. 535; *McCrea v. Ford*, 24 Colo. App. 506, 135 Pac. 465; *Solomon v. Brodie*, 10 Colo. App. 353, 50 Pac. 1045, "that he has not and cannot obtain sufficient knowledge or information upon which to base a belief." **Idaho.**—Rev. Code, §4183 subd. 2; *Joyce v. Rubin*, 23 Idaho 296, 130 Pac. 793 (denial sufficient); *Golden v. Spokane & I. E. R. Co.*, 20 Idaho 531, 118 Pac. 1077. **Ky.**—*Taliaferro v. Dayton*, 10 Ky. L. Rep. 197. **Mont.**—Rev. Code, §6540; *Milwaukee Gold Ext. Co. v. Gordon*, 37 Mont. 209, 95 Pac. 995. **Neb.**—*Smith v. Allen*, 63 Neb. 74, 88 N. W. 155. **N. M.**—*Clark v. Apex Gold Min. Co.*, 13 N. M. 416, 85 Pac. 968. **N. Y.**—*Roehkind v. Periman*, 123 App. Div. 808, 108 N. Y. Supp. 224, 1151; *United States Casualty Co. v. Jamieson*, 122 App. Div. 608, 107 N. Y. Supp. 490; *Conolly v. Schroeder*, 121 App. Div. 634, 106 N. Y. Supp. 303; *Hidden v. Godfrey*, 88 App. Div. 496, 85 N. Y. Supp. 197 (substantial compliance); *Robert Gere Bank v. Inman*, 51 Hun 97, 5 N. Y. Supp. 457; *Pennsylvania & D. Oil Co. v. Spitechnik*, 27 Misc. 557, 58 N. Y. Supp. 311, permitted in courts of record. **S. C.**—*Gilreath v. Furman*, 57 S. C. 289, 35 S. E. 516, denial sufficient. **S. D.**—*Wilson v. Commercial Union Ins. Co.*, 15 S. D. 322, 89 N. W. 649.

[a] **The form prescribed by the statute** is that the defendant denies that he has any knowledge or information as to each or any of the allegations contained in the subdivisions of the complaint numbered (giving the numbers) sufficient to form a belief thereof.

Galbraith v. Daily, 37 Misc. 156, 74 N. Y. Supp. 837; *Johnston v. Simpson*, *Crawford Co.*, 115 N. Y. Supp. 141.

[b] But a denial "that they have any knowledge or information sufficient to form a belief as to the allegations contained in the complaint," is a sufficient denial of all the allegations of the complaint which necessarily includes each material allegation. *Hinds, Noble & Eldredge v. Bonner*, 63 Misc. 258, 116 N. Y. Supp. 663.

[c] **But an allegation that defendant has no knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in certain numbered paragraphs of the complaint is insufficient.** **Neb.** *Wilson v. Neu*, 1 Neb. (Unof.) 42, 95 N. W. 502. **N. Y.**—*New York v. Halsey*, 132 App. Div. 192, 116 N. Y. Supp. 947; *White v. Gibson*, 61 Misc. 436, 113 N. Y. Supp. 983. **N. C.**—*Woodcock v. Bostie*, 128 N. C. 243, 38 S. E. 881.

[d] But see *Milwaukee Gold Ext. Co. v. Gordon*, 37 Mont. 209, 95 Pac. 995 (holding there is no appreciable difference in the expressions (1) I say I have not sufficient knowledge (etc.), and (2) I deny that I have any knowledge or information, etc.); *Smith v. Metropolitan Life Ins. Co.*, 50 Misc. 550, 140 N. Y. Supp. 327.

[e] **Statutory Form Should Be Exactly Followed.**—*Downing North Denver Land Co. v. Burns*, 30 Colo. 283, 70 Pac. 413; *Haney v. People*, 12 Colo. 345, 21 Pac. 39; *James v. McPhee*, 9 Colo. 486, 13 Pac. 535; *Solomon v. Brodie*, 10 Colo. App. 353, 50 Pac. 1045.

[f] **Illustrations of Sufficient and Insufficient Denials.**—An answer that defendant has no knowledge or information sufficient "to enable it" to form a belief was held sufficient in *Wilson v. Commercial Union Ins. Co.*, 15 S. D. 322, 89 N. W. 649.

[g] A denial stating defendant has

good faith attempt to gain the necessary information before resorting to this form of answer,⁸² otherwise the answer will be frivolous.⁸³

This form of denial is not permissible where the facts are presumptively within the knowledge of the pleader,⁸⁴ or where the facts are

no personal knowledge and denies, etc., is sufficient. *Smith v. Allen*, 63 Neb. 74, 88 N. W. 155. See also *English v. Grant*, 102 Ga. 35, 29 S. E. 157 (a denial in the form that defendant alleges he does not know or that he does not of his own knowledge know is insufficient); *Scully v. Wolf*, 56 Misc. 468, 107 N. Y. Supp. 181, addition of words "or falsity" does not vitiate the denial on information and belief of the truth of the allegations of the complaint.

[h] **Omission of Word "Knowledge."**—A denial of "any information sufficient to form a belief" omitting the word "knowledge" is insufficient. *Ark. Haggart v. Ranney*, 73 Ark. 344, 84 S. W. 703. **N. Y.**—*Steinback v. Diepenbrock*, 52 App. Div. 437, 65 N. Y. Supp. 118; *Genninger v. Wahlig Co.*, 116 N. Y. Supp. 578. **N. D.**—*Massachusetts Loan & T. Co. v. Twitchell*, 7 N. D. 440, 75 N. W. 786.

[i] **An omission of the word "information"** would also render the denial insufficient. *Haggart v. Ranney*, 73 Ark. 344, 84 S. W. 703; *State ex rel. O'Neill v. Trask*, 135 Wis. 333, 115 N. W. 823.

[j] **In the municipal courts of New York city**, statute permits a denial of any information and belief. *Gilmour v. Kenny*, 84 N. Y. Supp. 502. But see *Pennsylvania & D. Oil Co. v. Spitelnik*, 27 Misc. 557, 58 N. Y. Supp. 311 (but denials on information and belief are permitted); *Sanchez & Haya Co. v. Hirsch*, 27 Misc. 202, 57 N. Y. Supp. 795; *Boston Woven Hose & R. Co. v. Jackson*, 25 Misc. 781, 55 N. Y. Supp. 573. And see also *Alexander v. Albany*, 55 App. Div. 238, 66 N. Y. Supp. 1084.

[k] **A denial of any knowledge or information**, etc., is not a denial that defendant has any knowledge or information and is no denial. *Burkert v. Bennett*, 35 Misc. 318, 71 N. Y. Supp. 144.

[l] **Merely a Form of General Denial.**—(1) A denial that defendant has no knowledge or information sufficient to form a belief is only one of the modes of making a general denial (*Craig v. Hasselman*, 74 Iowa 538, 38 N. W. 402; *Liberian Exodus Steamship Co. v. Rodgers*, 21 S. C. 27) (2) and does

not put in issue plaintiff's capacity to sue. *Seigler v. Southern Ry. Co.*, 85 S. C. 345, 67 S. E. 296.

82. See 7 STANDARD PROC. 48-55; and *Mulcahy v. Buckley*, 100 Cal. 484, 35 Pac. 144; *Rochkind v. Perlman*, 123 App. Div. 808, 108 N. Y. Supp. 224, 1151.

[a] "As to these alleged irregularities, which affect the legality of the taxes, the defendants" (county supervisors) "answer that they have no knowledge or information sufficient to form a belief. This answer is manifestly evasive and bad, because the public records within the reach of the defendants would enable them to positively and distinctly deny these defects in the tax proceedings if they did not exist." *Union Lumb. Co. v. Chippewa Co.*, 47 Wis. 245, 2 N. W. 281. See also *Mills v. Town of Jefferson*, 20 Wis. 54, 58.

83. *Rochkind v. Perlman*, 123 App. Div. 808, 108 N. Y. Supp. 224, 1151. See 10 STANDARD PROC. 269.

84. See 7 STANDARD PROC. 48, and the following: **Cal.**—*Brown v. Martin*, 23 Cal. App. 736, 139 Pac. 823; *Zany v. Rawhide Gold Min. Co.*, 15 Cal. App. 373, 114 Pac. 1026; *Bartlett Estate Co. v. Fraser*, 11 Cal. App. 373, 105 Pac. 130; *Brady v. Ranch Min. Co.*, 7 Cal. App. 182, 94 Pac. 85, fact of indebtedness of the defendant. **Colo.**—*Fravert v. Fesler*, 11 Colo. App. 387, 53 Pac. 288. **Ky.**—Civ. Code, §113; *Kentucky Coal Min. Co. v. Mattingly*, 133 Ky. 526, 118 S. W. 350; *Barret v. Godshaw*, 12 Bush 592; *Gridler v. Farmers' & Drovers' Bank*, 12 Bush 333; *Lucas v. Lucas*, 18 Ky. L. Rep. 661, 37 S. W. 588; *Nashville C. & St. L. R. Co. v. Hamilton*, 16 Ky. L. Rep. 68, 26 S. W. 537; *Nashville C. & St. L. R. Co. v. Carrico*, 14 Ky. L. Rep. 431. **N. M.**—*Department Store Co. v. Gauss-Longenberg Hat Co.*, 17 N. M. 112, 125 Pac. 614. **N. Y.** *Preston v. Cuneo*, 140 App. Div. 144, 124 N. Y. Supp. 1031; *In re Clement*, 132 App. Div. 598, 117 N. Y. Supp. 30; *Bloch v. Bloch*, 131 App. Div. 859, 116 N. Y. Supp. 339; *Balliett v. Metropolitan Life Ins. Co.*, 125 App. Div. 705, 110 N. Y. Supp. 77; *Rochkind v. Perlman*, 123 App. Div. 808, 108 N. Y. Supp.

readily ascertainable,⁸⁵ or where the facts thus attempted to be denied are matters of public record.⁸⁶

This form of denial must be distinguished from a denial *on* information and belief.⁸⁷

(III.) **By Corporations.**—Corporations, both public and private are governed by the same rules as natural persons with respect to denials on or for lack of information and belief.^{87a}

224, 1151; *Nichols v. Corcoran*, 38 Misc. 671, 78 N. Y. Supp. 242; *Compton v. Beecher*, 17 App. Div. 38, 44 N. Y. Supp. 887; *Schwartz v. Ribaud*, 52 Misc. 102, 101 N. Y. Supp. 599; *Granniss v. McLean Auto Co.*, 117 N. Y. Supp. 881. **Wash.**—*Raymond v. Johnson*, 17 Wash. 232, 49 Pac. 492, 61 Am. St. Rep. 908. **Wyo.**—*Appel v. State ex rel. Shutter-Cottrell*, 9 Wyo. 187, 61 Pac. 1015.

[a] **Execution of instruments** cannot be denied on want of information and belief. *Angier v. Equitable Bldg. & Loan Assn.*, 109 Ga. 625, 35 S. E. 64; *Dugan's Admr. v. Harris' Admr.*, 6 Ky. L. Rep. 596.

[b] **When the facts are evidenced by official documents** and such documents or authenticated copies thereof are filed with the pleading, a denial of any information or knowledge is insufficient. *Barret v. Godshaw*, 12 Bush (Ky.) 592.

85. See 7 STANDARD PROC. 50, and the following: **Cal.**—*Mulcahy v. Buckley*, 100 Cal. 484, 35 Pac. 144; *Mendocino County v. Peters*, 2 Cal. App. 24, 82 Pac. 1122. **Ky.**—*Douglass v. Cline*, 12 Bush 608. **N. Y.**—*In re Clement*, 132 App. Div. 598, 117 N. Y. Supp. 30; *Borough Const. Co. v. New York*, 131 App. Div. 278, 115 N. Y. Supp. 697.

86. See 7 STANDARD PROC. 50, and the following: **Cal.**—*Mullally v. Townsend*, 119 Cal. 47, 50 Pac. 1066; *Le Breton v. Stanley Cont. Co.*, 15 Cal. App. 429, 114 Pac. 1028. **Ky.**—*Walsh v. Pearce*, 148 Ky. 760, 147 S. W. 739; *Johnson v. Asher*, 32 Ky. L. Rep. 317, 105 S. W. 943. **Mont.**—*First Nat. Bank v. Silver*, 45 Mont. 231, 122 Pac. 584. **N. Y.**—*New York v. Matthews*, 180 N. Y. 41, 72 N. E. 629; *Allen v. National Surety Co.*, 144 App. Div. 509, 129 N. Y. Supp. 228; *Preston v. Cuneo*, 140 App. Div. 144, 124 N. Y. Supp. 1031; *Schwartz v. Ribaud*, 52 Misc. 102, 101 N. Y. Supp. 599; *Snow, Church & Co. v. Hall*, 19 Misc. 655, 26 Civ. Proc. 274, 44 N. Y. Supp. 427; *People v. Kenyon*,

134 N. Y. Supp. 1007. **Ohio.**—*Dennis v. Landreth*, 32 Ohio C. C. 678.

[a] **But a defendant who has no knowledge or information of the appointment of a guardian ad litem** is not required to examine the records to ascertain the fact. *Neubauer v. American Seating Co.*, 171 Fed. 273.

[b] **Defendant is presumed to have knowledge regarding proceedings for assessing taxes and a denial of information and belief in regard thereto is frivolous.** *Neubauer v. American Seating Co.*, 171 Fed. 273; *Stone v. Auerbach*, 133 App. Div. 75, 117 N. Y. Supp. 734.

87. See *supra*, II, B, 2, a.

[a] There are three conditions arising under the code provision, that the answer must contain "a general or specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief; *first*, an unqualified denial; *second*, a denial on information and belief; *third*, a denial of any knowledge or information sufficient to form a belief." *Bennett v. Leeds Mfg. Co.*, 110 N. Y. 150, 17 N. E. 669.

87a. **"A corporation is as much bound to know whether it has entered into contracts, made purchases, given promissory notes in the course of its business, and by its appropriate agents, as an individual."** The rule applying to denials on information and belief is the same whether the defendant be a natural person or a corporation. *Thorn & Maynard v. The New York Central Mills*, 10 How. Pr. (N. Y.) 19. See *Chicago R. I. & E. P. R. Co. v. Werthem*, 15 N. M. 505, 110 Pac. 573, 1912C, Ann. Cas. 148. But see *Martin v. The Erie Preserving Co.*, 48 Hun (N. Y.) 81. "Although a corporation does not itself have any knowledge of the matters alleged, but is compelled to act through its officers, whose information may be derived from others, yet it cannot place its denials upon its want of

C. **REPLICATION.**—A replication partakes of the nature of a defensive pleading and, it seems, with respect to allegations or denials upon or for lack of information and belief, should be governed by the same rules as denials, pleas and answers.⁸⁸

III. **VERIFICATION ON.**—Verification of pleadings on information and belief will be fully treated elsewhere in this work.⁸⁹

IV. **STATEMENTS ON AS PERJURY.**—Perjury may be assigned on false statement as to belief.⁹⁰ According to some authorities, however, perjury cannot be assigned because a man has rashly or recklessly sworn to statements that he believed to be true.⁹¹ But other cases hold

information and belief if the matters alleged were presumptively within the knowledge of any of its officers, even though the officer verifying the answer was himself without any information or belief upon the subject." *Sloane v. Southern Cal. R. Co.*, 111 Cal. 668, 44 Pac. 320, 32 L. R. A. 193; *Zany v. Rawhide Gold Min. Co.*, 15 Cal. App. 373, 114 P. 1026. "It is not to be tolerated that a corporation defendant, when sued on an obligation purporting to have been given by its agent directly to the party seeking his remedy upon it, may hunt up a director who is in such a blissful state of ignorance as to all the business transactions of the corporation that he can safely swear he has no knowledge or information on the subject." *Thorn & Maynard v. The New York Central Mills*, 10 How. Pr. (N. Y.) 19. When it is the duty of a railroad company by its managing officers to know whether its trains have been operated properly, a mere denial of sufficient knowledge to form a belief does not amount to a traverse. *Nashville, C. & St. L. R. Co. v. Carrico*, 95 Ky. 489, 26 S. W. 177. See *Colo. Coal & Iron Co. v. John*, 5 Colo. App. 213, 38 Pac. 399.

But where the defendant is a foreign corporation, a denial of any information and knowledge, etc., as to demands made upon it at its local agency is permissible because it cannot be presumed to know the things done by others at agencies remote from the situs of the corporation itself. *Warner v. United States Land & Inv. Co.*, 53 Hun 312, 6 N. Y. Supp. 411.

A public corporation cannot deny knowledge of facts known to its officers. *Borough Constr. Co. v. New York*, 131 App. Div. 278, 115 N. Y. Supp. 697; *Philadelphia v. Pierson*, 211 Pa. 388, 60 Atl. 999; *Carpenter v. Rolling*, 107

Wis. 559, 83 N. W. 953. See also *Loveland v. Garner*, 74 Cal. 298, 15 Pac. 844; *San Francisco Gas Co. v. San Francisco*, 9 Cal. 453. Compare *Smith v. Janesville*, 26 Wis. 291.

88. See **U. S.**—*Walton v. Wild Goose Min. & T. Co.*, 123 Fed. 209, 60 C. C. A. 155; *Kosztelnik v. Bethlehem Iron Co.*, 91 Fed. 606; *Thompson v. Seligman*, 90 Fed. 219. **Colo.**—*Erschine v. Russell*, 43 Colo. 449, 96 Pac. 249; *Adams v. Clark*, 36 Colo. 65, 85 Pac. 642. **Ky.**—*Wing v. Dugan*, 8 Bush 583. **Mont.**—*McEwen v. Union Bank & Tr. Co.*, 35 Mont. 470, 90 Pac. 359; *Floyd-Jones v. Anderson*, 30 Mont. 351, 76 Pac. 751. **N. Y.**—*Dahlstrom v. Gemunder*, 198 N. Y. 449, 92 N. E. 106; *Fallon v. Durant*, 60 How. Pr. 178; *Olsen v. Singer Mfg. Co.*, 151 App. Div. 516, 135 N. Y. Supp. 872; *Childs v. Childs*, 150 App. Div. 656, 135 N. Y. Supp. 972; *Smith v. Metropolitan L. Ins. Co.*, 79 Misc. 550, 140 N. Y. Supp. 327; *Steinway v. Steinway*, 74 Hun 423, 26 N. Y. Supp. 657.

See also *supra*, II, B, 2; and generally the title "**Replication.**"

89. See the title "**Verification.**"
90. **U. S.**—*United States v. Moore*, 2 Low. 232, 26 Fed. Cas. No. 15,803. *Miss.*—*Harris v. Heberton*, 5 How. 575. *Va.*—*Fitch v. Com.*, 92 Va. 824, 834, 24 S. E. 272. **Wis.**—*Mariet v. Marriner*, 34 Wis. 582. **Eng.**—*King v. Pedley*, 1 Leach 325.

[a.] The witness said he *thought* certain words in red ink were not his writing. "If a witness swears that he 'thinks' a certain fact took place, it may be difficult, indeed, to show that he committed wilful perjury; but it is certainly possible; and the averment is as properly a subject of perjury as any other." *Queen v. Schlesinger*, 10 Q. B. 670, 116 Eng. Reprint 255.

91. *United States v. Smith*, 19 Law

if he recklessly swore to a statement on insufficient facts, perjury may be assigned.⁹²

Rep. 91, 27 Fed. Cas. No. 16,336; United States v. Moore, 2 Low. 232, 26 Fed. Cas. No. 15,803.

[a] Perjury cannot be sustained by proof of the witness having sworn "rashly and inconsiderately to what he believed to be true." United States v. Shellmire, 27 Fed. Cas. No. 16,271; United States v. Moore, 2 Low. 232, 26 Fed. Cas. No. 15,803; United States v. Atkins, 1 Spr. 558, 24 Fed. Cas. No. 14,474; People v. Von Tiedeman, 120 Cal. 128, 52 Pac. 155.

[b] "Though he might reason very poorly, and upon data which the jury might think very unsatisfactory, yet his testimony would not be wilfully false." Com. v. Brady, 5 Gray (Mass.) 78.

92. Johnson v. People, 94 Ill. 505, 513.

[a] Swearing Without Knowledge.

State v. Gates, 17 N. H. 373, 378, citing Hawk, P. C., bk. 1, c. 69, §6.

[b] "He ought at least to have some probable cause for belief, unless the oath be taken under such circumstances of haste or surprise as afford no opportunity for deliberation." Com. v. Cornish, 6 Binn. (Pa.) 249.

[c] Defendant swore that he knew the general character of Allen for truth, and that it was bad. "It is not true that there can be no perjury where a man believes what he swears. He ought, at least, to have probable cause for his belief. If a man swear to a matter, of which he has no knowledge, although he believes it to be true, although it turns out to be true, it is perjury; for, where there is this kind of rashness and corruption, the law implies malice." State v. Knox, 61 N. C. 312. See also Com. v. Cornish, 6 Binn. (Pa.) 249.

INFORMER.—See **Indictment and Information; Penalties, Forfeitures and Fines.**

INFRINGEMENT.—See **Copyright Proceedings; Injunctions; Patents; Trade-Marks and Trade Names.**

INHERITANCE

By the Editorial Staff.

I. PROCEEDINGS TO DETERMINE HEIRSHIP, 914

- A. *General Statement*, 914
- B. *Nature and Purpose*, 916
- C. *Procedure*, 917
 - 1. *Time for Instituting Proceedings*, 917
 - 2. *Jurisdiction and Venue*, 918
 - 3. *Parties*, 918
 - 4. *Petition*, 919
 - 5. *Notice*, 921
 - 6. *Appearance and Pleading by Parties Summoned*, 922
 - 7. *Hearing or Trial*, 923
 - 8. *Judgment or Decree*, 924
 - 9. *Costs*, 926
 - 10. *Appeal and Review*, 926

II. ADVANCEMENTS, 927

- A. *Duty To Account for Advancements*, 927
- B. *Methods of Bringing Advancements Into Hotchpot*, 928
 - 1. *In General*, 928
 - 2. *On Settlement and Distribution of the Estate*, 929
 - 3. *Special Proceedings*, 929
 - 4. *Suits in Equity*, 930
 - 5. *Partition Proceedings*, 931
 - 6. *Advancements as a Defense to Actions*, 932
- C. *Procedure*, 932
 - 1. *Jurisdiction*, 932
 - 2. *Parties*, 933
 - 3. *Pleading*, 934
 - 4. *Trial*, 935
 - 5. *Judgment or Decree*, 936
 - 6. *Costs*, 938
 - 7. *Appeal*, 938

III. RETENTION OR SET-OFF OF DEBTS AND LIABILITIES OF BENEFICIARY TO ESTATE, 938

- A. *Nature of Right*, 938
- B. *General Statement of the Rule*, 939
- C. *Persons and Property as Against Whom Right Is Available*, 940
 - 1. *Interests in Personalty*, 940
 - 2. *Interests in Realty*, 941
 - 3. *Trust Funds*, 942
 - 4. *Persons Claiming Under Distributees, Legatees, Devisees, or Heirs*, 943
- D. *Character of Indebtedness*, 945
 - 1. *General Principles*, 945
 - 2. *Joint Debts*, 946
 - 3. *Debts or Liabilities in Favor of Representative or Estate*, 946
 - 4. *Debts Barred by the Statute of Limitations*, 947
 - 5. *Effect of Discharge in Bankruptcy*, 948
 - 6. *Exemptions*, 948
- E. *Manner of Enforcing Right*, 948
- F. *Recovery of Excess of Debt*, 949
- G. *Right of Legatee or Distributee To Claim Set-Off*, 950

IV. RIGHTS OF ACTION AS BETWEEN BENEFICIARY AND ESTATE, 951

- A. *Actions in Regard to Real Property*, 951
- B. *Actions in Regard to Personal Property*, 952
 - 1. *The General Rule*, 952
 - 2. *Exceptions*, 957
 - 3. *Where There Is No Administration*, 959
 - 4. *After Final Settlement*, 961
 - 5. *Pleading*, 962
- C. *Actions on Contracts*, 963
- D. *Covenants*, 963
- E. *Contracts for Purchase or Sale of Land by Decedent*, 964
- F. *Suits To Set Aside Conveyances and Transfers by the Decedent*, 967
- G. *Actions in Regard to Property Sold After Decedent's Death*, 969
- H. *Ejectment and Like Actions*, 970
- I. *Suits To Quiet Title or To Remove Clouds From Title*, 975
- J. *Actions for Injuries to Land*, 977
- K. *Partition*, 982
 - 1. *Actions in Regard to Trusts*, 983
- M. *Actions To Recover Rents and Profits*, 984

N. *Enforcement of Liens*, 986

1. *Mortgages*, 986
2. *Vendor's Liens*, 989
3. *Pleading*, 989

O. *Actions for Accounting*, 990

CROSS-REFERENCES:

Decedents' Estates;	Lands and Land Transfers;
Executors and Administrators;	Probate Courts;
Homesteads and Exemptions;	Taxation.

For further references and cross-references, see the index to this work.

I. PROCEEDINGS TO DETERMINE HEIRSHIP. — A. GENERAL STATEMENT. — Provision is sometimes made for proof of heirship or of a right to a distributive share of the estate in the proceedings for final settlement and distribution of the estate,¹ and the probate court is frequently given jurisdiction to determine such questions at that time.²

Some statutes provide for the determination of heirship and the persons entitled to share in the distribution of the estate of a deceased person, pending administration and before final settlement, and distribution by an independent proceeding instituted in the probate court for that purpose,³ and it has been held that the probate court has jurisdiction of such a proceeding though there is no statute providing specifically therefor.⁴

1. See Burns' Ann. St. (Ind.), 1908, §2929, and the statutes of the states generally.

[a] In Connecticut the ascertainment of heirs and distributees is a mere incident of the order of distribution, and is not, in itself and independent of distribution, a judicial act. Hence an application to the probate court to ascertain who are the heirs and distributees of the estate is improper. If there is any estate to distribute application should be made for an order of distribution. *Maek's Appeal*, 71 Conn. 122, 41 Atl. 242.

2. See *infra*, I, C, 2.

3. Cal.—Code Civ. Proc., §1664; *More v. More*, 133 Cal. 489, 65 Pac. 1044, 66 Pac. 76. Colo.—Ann. St., §7050. Idaho.—Rev. Code, §5840. Ill. Hurd's Rev. St., ch. 3, §139. Mont.

Code, 1907, §7670; *In re Klein's Estate*, 35 Mont. 185, 88 Pac. 798; *Kirk v. Baker*, 26 Mont. 190, 66 Pac. 942. Wyo.—Comp. St., 1910, §5704; *Weidenhofft v. Primm*, 16 Wyo. 340, 94 Pac. 453.

[a] The proceeding may be commenced at any time after the expiration of one year from the issuing of letters testamentary or of administration, though the estate is not in condition for distribution at that time. *Weidenhofft v. Primm*, 16 Wyo. 340, 94 Pac. 453.

4. See *In re Lyle's Estate*, 93 Neb. 768, 141 N. W. 1127.

[a] *Ex necessitate rei* it has jurisdiction of the subject-matter, since no settlement or distribution of the estate could be made without deter-

Provision is also sometimes made for a determination of the heirship of any deceased person, where there has been no administration,⁵ or in any case where one having title to land in the state dies,⁶ or dies intestate, or without having devised his real property to specific persons,⁷ or where land is granted or conveyed to the heirs, minor heirs, or legal representatives of a deceased person without indicating or showing who they are or were,⁸ or where government land is patented to the heirs of a deceased entryman,⁹ or for a proceeding to determine the descent of real property belonging to a decedent where there has been no administration,¹⁰ or no administration for a certain length of time after the death of the intestate,¹¹ or where there has been an administration, but the descent of the realty has not been therein determined.¹² Statutes providing for such remedies have been held to apply to cases where the decedent died before their passage.¹³

mining who were the heirs. *Ford v. Ford*, 117 Ill. App. 502.

[b] **The county court** in which administration proceedings are pending may determine who are the heirs of the decedent before the administration has reached the stage for final distribution. *In re Merchant's Estate*, 121 Wis. 526, 99 N. W. 320.

5. *Hurd's Rev. St. (Ill.)*, 1909, ch. 3, §139.

6. *Mich. Comp. Laws*, 1907, §9469; *Lorimer v. Wayne Circuit Judge*, 116 Mich. 682, 75 N. W. 133; *Miller v. Davis*, 106 Mich. 300, 64 N. W. 338.

[a] The proceeding is one to determine who are the legal heirs or representatives entitled to take. *Wright v. Wright*, 99 Mich. 170, 58 N. W. 54, 23 L. R. A. 196.

7. *N. Y. Code Civ. Proc.*, §2654; *Aubuchon v. New York, etc. R. Co.*, 137 App. Div. 834, 122 N. Y. Supp. 581.

[a] **"The basis of the surrogate's jurisdiction** to entertain such a proceeding is that a person dies intestate 'seised in fee of real property within the state.'" *Aubuchon v. New York, etc. R. Co.*, 137 App. Div. 834, 122 N. Y. Supp. 581.

8. *Mich. Comp. Laws*, 1907, §9469.

9. *Minn. Rev. Laws*, 1905, §3658.

10. *Idaho Rev. Codes*, §5840.

[a] **Pennsylvania.**—Where it is made to appear to the satisfaction of the orphan's court that the petitioner has become possessed of land under the intestate laws of the state, that the last holder thereof died intestate, and that no petition or other process has been or is liable to be had, to

designate the share or shares of the present owner or owners, which it may be desired to put on record. 2 *Purdon's Dig.*, 2004, §51.

11. *Colo.*—*Ann. St.*, §7062. *Minn. Rev. Laws*, 1905, §3654. *N. D.*—*Rev. Codes*, 1905, §8040. *Wis.*—*St.*, 1898, §3873b.

[a] **Utah.**—(1) When any person dies intestate, leaving real property in the state, and letters of administration have not been applied for, application may be made at any time after the expiration of a year from his death. *Comp. Laws*, 1907, §3980; *Garr v. Davidson*, 25 Utah 335, 71 Pac. 481. (2) Such a proceeding cannot be maintained where an administrator has been appointed within a year after the decedent's death, and the estate is in process of administration. In such case the court in which the administration proceedings are pending, has exclusive jurisdiction to hear and determine all such questions. *Garr v. Davidson*, 25 Utah 335, 71 Pac. 481.

12. *Colo.*—*Ann. St.*, §7062. *Idaho. Rev. Codes*, §5840. *Minn.*—*Rev. Laws*, 1905, §3654, where real property has been omitted in the administration or in the final decree.

13. *Miller v. Davis*, 106 Mich. 300, 64 N. W. 338.

[a] **"It is remedial in its character, takes away no vested rights, and is, like a statute establishing a rule of evidence or one designed to perpetuate testimony, unobjectionable because in a sense retroactive."** *Miller v. Davis*, 106 Mich. 300, 64 N. W. 338, *quoted in Lorimer v. Wayne Circuit Judge*, 116 Mich. 682, 75 N. W. 133.

In at least one state provision is made for a proceeding in equity to determine who are the heirs at law of one dying wholly or partially intestate and leaving real or personal property in the state.¹⁴

Remedy Not Exclusive.—Generally the special proceeding for determining heirship or the right to share in the distribution of the estate is not exclusive,¹⁵ and does not prevent the determination of such questions on distribution in the administration proceedings, when the special proceeding has not been resorted to.¹⁶ Nor is resort to such a proceeding a condition precedent to an order of distribution.¹⁷ Even the pendency of such special proceeding, where there has been no determination of the questions involved, will not prevent the court from hearing an application for distribution of the estate and determining all questions of heirship thereon.¹⁸

B. NATURE AND PURPOSE.—The proceeding is a special proceeding¹⁹ in rem,²⁰ and is not a civil action, though in some states it par-

[b] The statute applies to a case where the decedent died less than five years before its enactment. *Fitzpatrick v. Simonson Bros. Mfg. Co.*, 86 Minn. 140, 90 N. W. 378.

14. Miss. Code, 1906, §2790.

15. Cal.—*In re Jessup*, 81 Cal. 408, 21 Pac. 976, 22 Pac. 742, 1028, 6 L. R. A. 594. Ill.—*Hurd's Rev. St.*, 1909, ch. 3, §140. Mont.—*In re Davis' Estate*, 27 Mont. 490, 499, 71 Pac. 757.

16. Cal.—*In re Jessup*, 81 Cal. 408, 21 Pac. 976, 22 Pac. 742, 1028, 6 L. R. A. 594. Idaho.—*Rev. Codes*, §5846. Mont.—*Rev. Codes*, 1907, §7672. Wyo. Comp. St., 1910, §5707; *Weidenhoff v. Primm*, 16 Wyo. 340, 353, 94 Pac. 453.

[a] California.—“Nothing in this section contained shall be construed to exclude the right upon final distribution of any estate to contest the question of heirship, title, or interest in the estate so distributed, where the same shall not have been determined under the provisions of this section.” Code Civ. Proc., §1664; *Estate of Sheid*, 129 Cal. 172, 61 Pac. 920; *In re Oxarart*, 78 Cal. 109, 20 Pac. 367; *Hitchcock v. Superior Court*, 73 Cal. 295, 14 Pac. 872.

[b] Questions not determined in such proceeding may be determined on final distribution. *Blythe v. Ayres*, 102 Cal. 254, 36 Pac. 522.

17. *In re Jessup*, 81 Cal. 408, 21 Pac. 976, 22 Pac. 742, 1028, 6 L. R. A. 594 (partial distribution); *In re Davis' Estate*, 27 Mont. 490, 499, 71 Pac. 757.

[a] There is no necessity for such a proceeding where the rights of the

parties have been otherwise ascertained, as by a compromise agreement and an order made in pursuance thereof. *In re Davis' Estate*, 27 Mont. 490, 499, 71 Pac. 757.

[b] In Pennsylvania, by the express provisions of that statute, no person is compelled to resort to the mode of proving inheritance provided by 2 Purdon's Dig., 2004, §51, unless he petitions for the same.

18. *Estate of Sheid*, 122 Cal. 528, 55 Pac. 328.

[a] The pendency of the special proceeding (1) is not ground for abatement of the proceeding for distribution. *Estate of Sheid*, 129 Cal. 172, 61 Pac. 920. (2) In such case the statutory proceeding may then be dismissed. *In re Oxarart*, 78 Cal. 109, 20 Pac. 367.

[b] Whether the hearing on the application will be continued until the questions involved in the special proceeding have been determined is discretionary with the trial court, and its ruling will not be disturbed on appeal unless an abuse of discretion is shown. *In re Oxarart*, 78 Cal. 109, 20 Pac. 367.

19. Cal.—*Estate of Joseph*, 118 Cal. 660, 50 Pac. 768; *In re Blythe*, 110 Cal. 226, 42 Pac. 641; *In re Burton*, 93 Cal. 459, 29 Pac. 36; *Smith v. Westerfield*, 88 Cal. 374, 26 Pac. 206. S. D.—*Carter v. Frahm*, 141 N. W. 370. Utah.—*Garr v. Davidson*, 25 Utah 335, 71 Pac. 481.

20. *In re Blythe*, 110 Cal. 231, 42 Pac. 643; *Fitzpatrick v. Simonson Bros. Mfg. Co.*, 86 Minn. 140, 90 N. W. 378.

takes in form of the nature of one.²¹ It is sometimes regarded as a probate proceeding,²² and as a step in the distribution of the estate,²³ and as subsidiary to the proceeding for distribution.²⁴

When authorized pending administration, the purpose of the proceeding is to provide an additional, and a more adequate and complete method of determining heirship and the rights of all persons claiming to be heirs or entitled to any interest in the estate,²⁵ and to enable such persons to have their rights determined before distribution, so that final distribution may be made directly to the persons respectively entitled thereto.²⁶

A Statutory Proceeding. — Such proceedings are purely statutory,²⁷ and can be entertained only when authorized by the statute, and subject to the terms and conditions thereby imposed.²⁸

C. PROCEDURE. — 1. Time for Instituting Proceedings. — The time within which proceedings to determine heirship may be instituted is fixed by the statute, and varies in the different jurisdictions.²⁹

21. Estate of Joseph, 118 Cal. 660, 50 Pac. 768; *In re Blythe*, 110 Cal. 226, 42 Pac. 641.

[a] It is not, strictly speaking, a civil action. *Carter v. Frahm* (S. D.), 141 N. W. 370.

22. It is embraced within the scope of the term "matters of probate" as used in the constitutional provision conferring jurisdiction on the superior courts. *In re Blythe*, 110 Cal. 226, 42 Pac. 641; *In re Burton*, 93 Cal. 459, 29 Pac. 36. See also *Carter v. Frahm* (S. D.), 141 N. W. 370.

23. *McDonald v. McCoy*, 121 Cal. 55, 72, 53 Pac. 421.

24. *More v. More*, 133 Cal. 489, 65 Pac. 1044, 66 Pac. 76.

[a] The jurisdiction of the court in the two proceedings is co-extensive. *More v. More*, 133 Cal. 489, 65 Pac. 1044, 66 Pac. 76.

25. *Weidenhoft v. Primm*, 16 Wyo. 340, 352, 94 Pac. 453.

[a] "To provide the means by which, where there are hostile claimants to an estate, all the conflicting rights thereto may be summarily determined in one proceeding." *Blythe v. Ayres*, 102 Cal. 254, 36 Pac. 522.

[b] "It was intended to construct a wider, better, and more just and effective method of determining heirship to one dying intestate, where there are many conflicting claimants of such heirship. It gives a longer time, and affords ampler opportunities to contestants to present and litigate their claims, than they formerly had

when the ordinary decree of distribution was conclusive." *In re Blythe*, 110 Cal. 231, 42 Pac. 643.

26. *In re Burton*, 93 Cal. 459, 29 Pac. 36; *Weidenhoft v. Primm*, 16 Wyo. 340, 352, 94 Pac. 453.

[a] Its purpose is to determine the parties to whom the estate is to be distributed. *More v. More*, 133 Cal. 489, 65 Pac. 1044, 66 Pac. 76.

[b] The object of the statute "was to expedite such distribution by enabling persons claiming interests in estates to have their claim determined in advance of the application for distribution," so that the court will not be required to try such questions on such application, but may at once decree distribution to the persons ascertained to be entitled of the portions of the estate adjudged to them. *In re Oxarart*, 78 Cal. 109, 20 Pac. 367.

27. *Smith v. Westerfield*, 88 Cal. 374, 26 Pac. 206; *Garr v. Davidson*, 25 Utah 335, 71 Pac. 481.

28. Cal.—*Burris v. Kennedy*, 108 Cal. 331, 41 Pac. 458; *Smith v. Westerfield*, 88 Cal. 374, 26 Pac. 206. La. Succession of Barber, 52 La. Ann. 960, 27 So. 363; Succession of Allen, 44 La. Ann. 801, 11 So. 42. Md.—*Shriver v. State*, 65 Md. 278, 4 Atl. 679. Utah. *Garr v. Davidson*, 25 Utah 335, 71 Pac. 481.

[a] The jurisdictional requirements of the statute must be strictly complied with. *Carter v. Frahm* (S. D.), 141 N. W. 370.

29. Cal.—Code Civ. Proc., §1664.

2. Jurisdiction and Venue.—Usually jurisdiction of proceedings to determine heirship is given to the court having jurisdiction of probate proceedings.³⁰ Whether its jurisdiction is exclusive depends upon the statutes of the various states.³¹ If administration is in progress, the proceeding must generally be brought in the court where the administration proceedings are pending,³² or, if brought after administration, in the court where the administration was had.³³

The county in which proceedings to determine heirship must be brought depends on the terms of the statute.³⁴ It is sometimes required to be brought in the probate court of the county where the land is situated,³⁵ especially where there has been no administration.³⁶

3. Parties.—Who may institute such a proceeding depends entirely on the statutes, which generally provide that the proceedings may be instituted by any one claiming as or through an heir or who is otherwise interested in the estate or entitled to have it distributed.³⁷

Colo.—Ann. St., §§7050, 7063. **Idaho.** Rev. Codes, §5840. **Minn.**—Rev. Laws, 1905, §3654; *Fitzpatrick v. Simonson Bros. Mfg. Co.*, 86 Minn. 140, 90 N. W. 378. **Mont.**—Rev. Codes, 1907, §7670. **N. D.**—Rev. Codes, 1905, §8040. **Utah.**—Comp. Laws, 1907, §3980; *Garr v. Davidson*, 25 Utah 335, 71 Pac. 481. **Wis.**—St., 1898, §3873b. **Wyo.**—Comp. St., 1910, §5704; *Weidenhoft v. Primm*, 16 Wyo. 340, 94 Pac. 453 (though the estate is not in condition for distribution at that time).

[a] **California.**—The court has no jurisdiction to entertain such a proceeding, or to make any binding order therein, where the petition is filed within a year after the death of the deceased. *Smith v. Westerfield*, 88 Cal. 374, 26 Pac. 206.

30. Colo.—Ann. St., §7062. **Ill.** *Hurd's Rev. St.*, 1909, ch. 3, §139. **Pa.**—2 *Purdon's Dig.*, 2004, §51. **Utah.**—Comp. Laws, 1907, §3980.

[a] **California.**—The proceeding is a matter of probate within the meaning of the constitutional provision defining the jurisdiction of the superior courts, and this is true though it involves the determination of the rights of alleged assignees of the heirs. *In re Burton*, 93 Cal. 459, 29 Pac. 36.

[b] **Minnesota.**—The decree of heirship is within the authority delegated to probate courts by the state constitution, which limits their jurisdiction to the "estates of deceased persons, and persons under guardianship." *Fitzpatrick v. Simonson Bros. Mfg. Co.*, 86 Minn. 140, 90 N. W. 378.

31. The jurisdiction of the probate

court is not exclusive, but a court of equity has concurrent jurisdiction in a proper case. *Burns v. Smith*, 21 Mont. 251, 264, 53 Pac. 742, 69 Am. St. Rep. 653.

32. Cal.—Code Civ. Proc., §1664. **Colo.**—Ann. St., §7050. **Idaho.**—Rev. Codes, §5840. **Mont.**—Rev. Codes, 1907, §7670. **Wyo.**—Comp. St., 1910, §5704.

[a] **New York.**—The surrogate's court which has acquired jurisdiction of the estate, or, if no surrogate's court has acquired such jurisdiction, the surrogate's court of the county where the real property, or any part of it, is situated. Code Civ. Proc., §2654.

33. *Idaho Rev. Codes*, §5840.

34. See *Miss. Code*, 1906, §2790.

35. *Mich. Comp. Laws*, 1897, §9469; *Minn. Rev. Laws*, 1905, §§3654, 3658; *Chadbourne v. Alden*, 98 Minn. 118, 107 N. W. 148.

[a] The probate court in which the petition is first filed has jurisdiction of the whole of the real property belonging to the estate, though a part of it lies in another county. *Chadbourne v. Alden*, 98 Minn. 118, 107 N. W. 148.

36. *Idaho Rev. Codes*, §5840. See also: **N. Y.**—Code Civ. Proc., §2654. **N. D.**—Rev. Codes, 1905, §8040. **Wis.** St., 1898, §3873b.

37. Cal.—Code Civ. Proc., §1664. **Colo.**—Ann. St., §§7050, 7062. **Idaho.** Rev. Codes, §5840. **Mich.**—Comp. Laws, 1907, §9469. **Minn.**—Rev. Laws, 1905, §3654. **Mont.**—Rev. Codes, 1907, §7670; *Kirk v. Baker*, 26 Mont. 190, 66 Pac. 942. **N. Y.**—Code Civ. Proc.,

In states where a complaint is required in addition to the petition,³⁸ it is sometimes provided that the party filing the original petition on which the proceeding is based, if he files a complaint, and if not, the party first filing such complaint, is to be treated as the plaintiff in all subsequent proceedings, and that all other parties who appear shall be treated as defendants.³⁹ This designation is merely for convenience, however,⁴⁰ and does not fix the status of the parties in the proceeding.⁴¹

Each party is an independent actor,⁴² and is a plaintiff as against all other parties whose claims are adverse.⁴³ Each has a separate and independent right to conduct his own case according to his own judgment,⁴⁴ including the right to cross-examine the witnesses of a hostile party.⁴⁵

Which parties are hostile to each other is to be determined from the averments of the pleadings, regardless of whether such parties are called plaintiffs or defendants.⁴⁶ All parties who might be entitled to share in the estate are necessary parties.⁴⁷

4. Petition.—The proceeding is generally instituted by filing a petition⁴⁸ praying for a judicial determination of the heirs of the

§2654. **N. D.**—Rev. Codes, 1905, §8040. **Pa.**—2 Purdon's Dig., 2004, §51. **Utah.** Comp. Laws, 1907, §3980. **Wis.**—St., 1898, §3873b. **Wyo.**—Comp. St., 1910, §5704; Weidenhott v. Primm, 16 Wyo. 340, 94 Pac. 453.

[a] All the parties entitled to share in the distribution are necessary parties to a bill against an administrator seeking to have the plaintiff declared to be the sole heir of the decedent, if such a bill can be maintained under any circumstances. Smith v. Smith, 13 Colo. App. 295, 57 Pac. 747.

38. See *infra*, I, C, 6.

39. **Cal.**—Code Civ. Proc., §1664; Estate of Kasson, 141 Cal. 33, 74 Pac. 436, s. c., 127 Cal. 496, 59 Pac. 950; Blythe v. Ayres, 102 Cal. 254, 36 Pac. 522. **Idaho.**—Rev. Codes, §5844. **Mont.** Rev. Codes, 1907, §7672.

40. Blythe v. Ayres, 102 Cal. 254, 36 Pac. 522.

[a] The one who first files a complaint is called, for convenience, the plaintiff, and the others are called defendants, and their pleadings are called answers, but the requirement as to each pleading is substantially the same. Estate of Kasson, 127 Cal. 496, 59 Pac. 950.

41. Estate of Kasson, 141 Cal. 33, 74 Pac. 436.

42. Estate of Kasson, 141 Cal. 33, 74 Pac. 436.

[a] Each person who appears, and, either by complaint or answer, sets up a claim peculiar to himself. Estate of Kasson, 127 Cal. 496, 59 Pac. 950.

43. Estate of Kasson, 141 Cal. 33, 74 Pac. 436.

44. Estate of Kasson, 127 Cal. 496, 59 Pac. 950.

45. A defendant is not precluded from cross-examining a witness of another defendant hostile to him because such witness has previously been cross-examined by the plaintiff as to the same matter. Estate of Kasson, 127 Cal. 496, 59 Pac. 950.

[a] When there are numerous parties, the court may, in its discretion, prevent frequent and apparently useless repetitions of the same questions by different parties. Estate of Kasson, 127 Cal. 496, 59 Pac. 950.

46. Estate of Kasson, 127 Cal. 496, 59 Pac. 950.

47. Smith v. Smith, 13 Colo. App. 295, 57 Pac. 747, wherein suit was brought against administrator alone.

48. **Cal.**—Code Civ. Proc., §1664. **Colo.**—Ann. St., §§7050, 7062, 7063. **Idaho.**—Rev. Codes, §5840. **Mich.**—Comp. Laws, 1907, §9470. **Minn.**—Rev. Laws, 1905, §3655. **Mont.**—Rev. Codes, 1907, §7670. **N. Y.**—Code Civ. Proc., §2654. **N. D.**—Rev. Codes, 1905, §8040. **Pa.** 2 Purdon's Dig., 2004, §51. **Utah.**

decedent,⁴⁹ or for an ascertainment of the rights of all persons to said estate and all interests therein, and to whom distribution thereof should be made,⁵⁰ as the case may be. The requirements as to what must be set up in the pleadings of each of the parties, whether plaintiff or defendant, are substantially the same.⁵¹

The petition must allege the facts upon which the jurisdiction of the court depends.⁵² The particular facts which must be averred are frequently specified in the statute, and depend somewhat on the nature of the proceeding and the particular questions involved. It is variously required to set forth the name of the deceased,⁵³ the time and place of his death,⁵⁴ his last place of residence,⁵⁵ the fact that he died intestate,⁵⁶ that no will has been probated nor any administration granted in the state, or if administration was had, that real property was omitted in the administration or final decree,⁵⁷ the contents of his will, if he left one,⁵⁸ that the necessary time has elapsed since his death,⁵⁹ the relationship of the petitioner to the deceased,⁶⁰ the names and addresses of all other persons who are or claim to be heirs,⁶¹ a description of the deceased's property,⁶² the interest of the decedent,⁶³ the petitioner,⁶⁴ and each of the other heirs⁶⁵ therein, and a prayer that all the other heirs be cited to attend the probate of their rights.⁶⁶

A bill against an administrator to have the plaintiff declared the heir of the decedent, if it can be maintained at all, must show that personal property of the decedent has come into the possession of the administrator, that the plaintiff is entitled thereto, that the estate is

Comp. Laws, 1907, §3980. **Wis.**—St., 1898, §3873b. **Wyo.**—Comp. St., 1910, §5704.

[a] This petition is not a complaint. *Blythe v. Ayres*, 102 Cal. 254, 36 Pac. 522.

49. **Colo.**—Ann. St., §7050. **Mich.** Comp. Laws, 1897, §§9470, 9469. **N. Y.** Code Civ. Proc., §2654. **N. D.**—Rev. Codes, 1905, §8040. **Utah.**—Comp. Laws, 1907, §3980.

50. **Cal.**—Code Civ. Proc., §1664. **Idaho.**—Rev. Codes, §5840. **Mont.**—Rev. Codes, 1907, §7670. **Wyo.**—Comp. St., 1910, §5704.

51. *Estate of Kasson*, 127 Cal. 496, 59 Pac. 950; *Blythe v. Ayres*, 102 Cal. 254, 36 Pac. 522.

52. **N. Y.**—Code Civ. Proc., §2654. **N. D.**—Rev. Codes, 1905, §8040. **Pa.** See 2 Purdon's Dig., 2004, §51. **Wis.** St., 1898, §3873b.

53. **Mich.**—Comp. Laws, 1897, §9470. **Minn.**—Rev. Laws, 1905, §3655. **Utah.** His name and residence. Comp. Laws, 1907, §3980.

54. **Colo.**—Ann. St., §7062. **Minn.** Rev. Laws, 1905, §3655. **Utah.**—The

date of his death. Comp. Laws, 1907, §3980. **Wis.**—St., 1898, §3873b.

55. **Colo.** Ann. St., §7062; **Wis.** St., 1898, §3873b.

56. **Utah** Comp. Laws, 1907, §3980.

57. **Minn.** Rev. Laws, 1905, §3655.

58. **Minn.** Rev. Laws, 1905, §3655.

59. That more than five years have passed since his death. **Minn.** Rev. Laws, 1905, §3655.

60. **Colo.** Ann. St., §7050.

61. **Colo.**—Ann. St., §§7050, 7062. **Mich.**—Comp. Laws, 1897, §9470. **Minn.** Rev. Laws, 1905, §3655. **Utah.**—Comp. Laws, 1907, §3980. **Wis.**—St., 1898, §3873b.

62. **Colo.**—Ann. St., §7062. **Minn.** Rev. Laws, 1905, §3655. **N. Y.**—Code Civ. Proc., §2654. **N. D.**—Rev. Codes, 1905, §8040. **Utah.**—Comp. Laws, 1907, §3980. **Wis.**—St., 1898, §3873b.

63. **Minn.** Rev. Laws, 1905, §3655.

64. **Minn.**—Rev. Laws, 1905, §3655. **N. Y.**—Code Civ. Proc., §2654. **N. D.** Rev. Codes, 1905, §8040.

65. **N. Y.** Code Civ. Proc., §2654; **N. D.** Rev. Codes, 1905, §8040.

66. **N. Y.** Code Civ. Proc., §2654.

in condition for distribution, and that a demand therefor has been made.⁶⁷

5. Notice.—Upon the filing of the petition notice of the time and place of the hearing thereon is generally required to be given to all persons interested.⁶⁸

The form and contents of the notice is prescribed by the statute. It is variously required to set forth the name of the deceased,⁶⁹ the name of the petitioner,⁷⁰ and the interest or share which he claims,⁷¹ the name of the executor or administrator of the estate,⁷² the names of all persons interested in the estate,⁷³ and a description of the real estate of which the decedent died seized or possessed,⁷⁴ and to require all persons claiming any interest in the estate to appear and exhibit their claims.⁷⁵

Service and Return.—The manner in which the notice must be served, and in which proof of service must be made, is fixed by the statute, and varies in the different states.⁷⁶ In some states the court is required to enter an order or decree establishing proof of such service,⁷⁷ and it is specifically provided that the court shall acquire jurisdiction on proof of service.⁷⁸

67. *Smith v. Smith*, 13 Colo. App. 295, 57 Pac. 747.

68. *Cal.*—Code Civ. Proc., §1664; *Blythe v. Ayers*, 102 Cal. 254, 36 Pac. 522. *Colo.*—Ann. St., §7063. *Idaho.*—Rev. Codes, §5840. *Mich.*—Comp. Laws, 1897, §9470. *Miss.* Code, 1906, §2791, chancery proceedings. *Mont.*—Rev. Codes, 1907, §7670. *N. Y.*—Code Civ. Proc., §2654. *N. D.* Rev. Codes, 1905, §8040. *Pa.*—2 Purdon's Dig., 2004, §51. *Utah.*—Comp. Laws, 1907, §3980. *Wis.*—St., 1898, §3873c. *Wyo.*—Comp. St., 1910, §5705.

[a] Provision is made for bringing in all parties, whether they have appeared or not. *Weidenhoft v. Primm*, 16 Wyo. 340, 94 Pac. 453.

[b] Where proceedings for the administration of the estate are pending, no notice is necessary. *Hurd's Rev. St.* (Ill.), 1909, ch. 3, §139. See also *Colo. Ann. St.*, §7050.

69. *Cal.*—Code Civ. Proc., §1664. *Colo.*—Ann. St., §7063. *Idaho.*—Rev. Codes, §5840. *Mont.*—Rev. Codes, 1907, §7670. *N. Y.*—Code Civ. Proc., §2655. *Wyo.*—Comp. St., 1910, §5705.

70. *N. Y. Code Civ. Proc.*, §2655.

71. *N. Y. Code Civ. Proc.*, §2655.

72. *Cal.*—Code Civ. Proc., §1664. *Idaho.*—Rev. Codes, §5840. *Mont.* Rev. Codes, 1907, §7670. *Wyo.*—Comp. St., 1910, §5705.

73. *Cal.*—Code Civ. Proc., §1664.

Colo.—Ann. St., §7063. *Idaho.*—Rev. Codes, §5840. *Mont.*—Rev. Codes, 1907, §7670. *Wyo.*—Comp. St., 1910, §5705.

74. *Cal.*—Code Civ. Proc., §1664. *Colo.*—Ann. St., §7063. *Idaho.*—Rev. Codes, §5840. *Mont.*—Rev. Codes, 1907, §7670.

75. *Cal.*—Code Civ. Proc., §1664. *Idaho.*—Rev. Codes, §5840. *Mont.* Rev. Codes, 1907, §7670. *Wyo.*—Comp. St., 1910, §5705; *Weidenhoft v. Primm*, 16 Wyo. 340, 94 Pac. 453.

76. *Cal.*—Code Civ. Proc., §1664. *Colo.*—Ann. St., §§7050, 7063. *Idaho.* Rev. Codes, §5840. *Mich.*—Comp. Laws, 1897, §9471. *Minn.*—Rev. Laws, 1905, §3656. *Miss.*—Code, 1906, §2791.

Mont.—Rev. Codes, 1907, §7670. *Pa.* 2 Purdon's Dig., 2004, §51. *Utah.* Comp. Laws, 1907, §3980. *Wis.*—St., 1898, §3873c. *Wyo.*—Comp. St., 1910, §5705.

77. *Cal.*—Code Civ. Proc., §1664. *Idaho.*—Rev. Codes, §5841. *Mont.* Rev. Codes, 1907, §7670. *Wyo.*—Comp. St., 1910, §5705.

78. *Cal.*—Code Civ. Proc., §1664. *Idaho.*—Rev. Codes, §5840. *Mont.* Rev. Codes, 1907, §7670. *Wyo.*—Comp. St., 1910, §5705.

[a] "Jurisdiction having thus attached, the provisions as to the time of future steps in the proceeding are merely directory, are not to be considered as conditions precedent, and

6. Appearance and Pleading by Parties Summoned. — In some jurisdictions the party filing the petition or any of the parties appearing in response to the notice may file a complaint⁷⁹ within the time prescribed⁸⁰ setting forth the facts constituting his claim of heirship, ownership, or interest in the estate with such reasonable particularity as the court may require.⁸¹

Interested parties are entitled to answer such complaint,⁸² or petition, where there is no complaint⁸³ setting up the facts constituting their respective claims of heirship, ownership, or interest in the estate, with such particularity as the court may require,⁸⁴ which answer is sometimes required to be served on the plaintiff.⁸⁵

No party has a standing in the proceeding unless he has averred his claim and has set forth the facts constituting it,⁸⁶ and no party will be heard to contest the right of another claimant without averring any right in himself.⁸⁷

In some states those cited and not appearing⁸⁸ are to be deemed in

are not of the essence of the proceeding." *Estate of Sutro*, 143 Cal. 487, 77 Pac. 402.

79. Cal.—*Estate of Sutro*, 143 Cal. 487, 77 Pac. 402; *Blythe v. Ayres*, 102 Cal. 254, 36 Pac. 522. **Idaho.**—Rev. Codes, §5842. **Mont.**—Rev. Codes, 1907, §7671.

[a] Any one of the persons named in the petition may file a complaint, though the statute does not contemplate that there shall be numerous complaints. *Estate of Sutro*, 143 Cal. 487, 77 Pac. 402.

[b] In *Blythe v. Ayres*, 102 Cal. 254, 262, 36 Pac. 522, it is said to be doubtful whether the strict rules of pleading are applicable.

80. Cal.—Code Civ. Proc., §1664. **Idaho.**—Rev. Codes, §5842. **Mont.**—Rev. Codes, 1907, §7671.

[a] This provision as to time is directory merely, and the fact that the complaint is not filed until after the time prescribed does not deprive the court of jurisdiction. *Estate of Sutro*, 143 Cal. 487, 77 Pac. 402.

[b] The court might perhaps dismiss the proceeding for want of prosecution if no complaint was filed by anyone during the twenty days or for a reasonable time thereafter. A comparatively short delay should perhaps be considered unreasonable. *Estate of Sutro*, 143 Cal. 487, 77 Pac. 402.

81. Cal.—Code Civ. Proc., §1664; *Blythe v. Ayres*, 102 Cal. 254, 36 Pac. 522. **Idaho.**—Rev. Codes, §5842. **Mont.**—Rev. Codes, 1907, §7671.

82. Cal.—Code Civ. Proc., §1664; *Blythe v. Ayres*, 102 Cal. 254, 36 Pac. 522. **Idaho.**—Rev. Codes, §5843. **Minn.**—Rev. Laws, 1905, §3656. **Mont.**—Rev. Codes, 1907, §7671. **Wis.**—St., 1898, §3873d.

83. Colo.—Ann. St., §7064. **N. D.**—Rev. Codes, 1905, §8041. **Wis.**—St., 1898, §3873d.

84. Cal.—Code Civ. Proc., §1664; *Blythe v. Ayres*, 102 Cal. 254, 36 Pac. 522. **Idaho.**—Rev. Codes, §5844. **Mont.**—Rev. Codes, 1907, §7672.

85. Cal.—Code Civ. Proc., §1664. **Idaho.**—Rev. Codes, §5844. **Mont.**—Rev. Codes, 1907, §7672.

86. Blythe v. Ayres, 102 Cal. 254, 36 Pac. 522.

87. Blythe v. Ayres, 102 Cal. 254, 36 Pac. 522.

88. Cal.—*Hitchcock v. Superior Court*, 73 Cal. 295, 14 Pac. 872. **Idaho.**—Rev. Codes, §5841. **Mont.**—Rev. Codes, 1907, §7671. **Wyo.**—Comp. St., 1910, §5706; *Weidenhoff v. Primm*, 16 Wyo. 340, 94 Pac. 453.

[a] The addition to an otherwise valid decree establishing defaults of a proviso that it shall be without prejudice to the rights of such persons as had previously filed petitions for distribution does not render it invalid. *Estate of Sutro*, 143 Cal. 487, 77 Pac. 402.

[b] An order denying a motion to open a default and to permit an heir to appear and answer is not reviewable on certiorari. *Hitchcock v. Superior Court*, 73 Cal. 295, 14 Pac. 872.

default. Generally the court may appoint an attorney⁸⁹ or a guardian ad litem⁹⁰ for infant parties who have no guardian.

7. Hearing or Trial.—On the filing of the petition the court is generally required to fix a time and place for a hearing thereof.⁹¹

The procedure is regulated entirely by the statute and varies in the different jurisdictions. In some states it is provided that the proceedings shall be the same as those in an ordinary civil action.⁹² In others provision is merely made for a hearing on the day fixed.⁹³

In a proceeding in chancery to determine heirship, the procedure is the same as that in other chancery suits.⁹⁴

Continuance.—The hearing may generally be continued,⁹⁵ especially for the purpose of notifying interested persons who have not been duly notified and have not appeared.⁹⁶

Questions Open to Consideration.—The scope of the inquiry and the questions which may be determined depend upon the terms of the statute, and vary in the different jurisdictions.⁹⁷ Generally the court may determine the rights of persons claiming as assignees of the heirs and

89. Cal.—Code Civ. Proc., §1664. Idaho.—Rev. Codes, §5846. Mont. Rev. Codes, 1907, §7672. Wyo.—Comp. St., 1910, §5706.

90. Colo. Ann. St., §§7051, 7064; Wis. St., 1898, §3873d.

91. Cal.—Code Civ. Proc., §1664. Colo.—Ann. St., §7063. Idaho.—Rev. Codes, §5840. Mich.—Comp. Laws, 1897, §9470. Minn.—Rev. Laws, 1905, §3656; Chadbourne v. Alden, 98 Minn. 118, 107 N. W. 148. Mont.—Rev. Codes, 1907, §7670. Pa.—2 Purdon's Dig., 2004, §51. Wis.—St., 1898, §3873c. Wyo.—Comp. St., 1910, §5705.

[a] "The statute does not prescribe the form or substance of the order; but the fair inference is that it must state the time and place of the hearing and substantially conform to orders made for hearings on petitions for final decrees pursuant to the probate code." Chadbourne v. Alden, 98 Minn. 118, 107 N. W. 148.

[b] "The essential thing to be stated in the order (1) is that the petition has been filed to secure a decree of descent and distribution of the estate of the deceased and the time and place of hearing it." The order need not describe the land belonging to the estate. Chadbourne v. Alden, 98 Minn. 118, 107 N. W. 148.

92. Cal.—Code Civ. Proc., §1664; Estate of Kasson, 141 Cal. 33, 74 Pac. 436. Idaho.—Rev. Codes, §5844. Mont. Rev. Codes, 1907, §7671.

[a] As to the right to a jury trial. see Estate of Sheid, 122 Cal. 528, 55 Pac. 328.

93. Colo.—Ann. St., §§7051, 7065. Mich.—Comp. Laws, 1897, §9471. Minn. Rev. Laws, 1905, §§3656, 3657. N. Y. Code Civ. Proc., §2656. N. D.—Rev. Codes, 1905, §8041. Pa.—2 Purdon's Dig., 2004, §51. Utah.—Comp. Laws, 1907, §3981. Wis.—St., 1898, §3873d, 3873c.

94. Miss. Code, 1906, §2791.

95. Colo. Ann. St., §7051; Mich. Comp. Laws, 1897, §9471.

[a] A motion for a continuance is addressed to the discretion of the court, and a denial thereof will not be disturbed unless an abuse of discretion is shown. Estate of Kasson, 141 Cal. 33, 74 Pac. 436.

96. Colo. Ann. St., §7064; Wis. St., 1898, §3873d.

97. Where there is a contest respecting the heirship of a party or the share to which a party is entitled as an heir, the proceeding must be dismissed. N. Y. Code Civ. Proc., §2656.

[a] Any questions as to advancements in real estate alleged to have been made to any heir may be considered and determined, as upon the assignment of the residue of a settled estate. Wis. St., 1898, §3873c.

[b] Presentation and Allowance of Creditor's Claims.—Utah Comp. Laws, 1907, §3982.

distributees.⁹⁸ As a rule only rights claimed in privity with the estate may be considered and determined, and not rights or titles claimed adversely thereto,⁹⁹ nor may the proceeding be resorted to to determine what property belongs to the estate.¹ It has been held that equitable claims against the heirs or their assignees are not proper subjects of consideration in such a proceeding,² and that the jurisdiction of the court does not extend to the determination of the rights of one claiming under a contract with the decedent to give him his property on his death,³ or to the determination or administration of trusts other than those created by the will of the decedent and which are necessarily involved in the question of distribution.⁴

The will of the decedent cannot be admitted to probate in such a proceeding,⁵ except where the statute provides to the contrary,⁶ nor can any rights be asserted which are based solely on an unprobated will.⁷

Filing and Recording Evidence.—It is sometimes provided that the evidence on which the findings are based shall be reduced to writing and filed or recorded.⁸

8. Judgment or Decree.—The court is generally required to enter a judgment or decree determining who are the heirs of the deceased, or the heirship, ownership and interest of each of the parties to the proceeding.⁹

98. *More v. More*, 133 Cal. 489, 65 Pac. 1044, 66 Pac. 76; *In re Burton*, 93 Cal. 459, 29 Pac. 36. See *supra*, I. C. 3.

99. *In re Burton*, 93 Cal. 459, 29 Pac. 36; *Burns v. Smith*, 21 Mont. 251, 263, 53 Pac. 742, 69 Am. St. Rep. 653.

[a] The proceeding provides no means of determining adverse claims. *McDonald v. McCoy*, 121 Cal. 55, 72, 53 Pac. 421.

1. *McDonald v. McCoy*, 121 Cal. 55, 72, 53 Pac. 421.

2. *More v. More*, 133 Cal. 489, 65 Pac. 1044, 66 Pac. 76.

3. *Wright v. Wright*, 99 Mich. 170, 58 N. W. 54, 23 L. R. A. 196.

4. *More v. More*, 133 Cal. 489, 65 Pac. 1044, 66 Pac. 76.

5. *Estate of Christensen*, 135 Cal. 674, 68 Pac. 112.

6. Minn. Rev. Laws, 1905, §3657.

7. *Estate of Christensen*, 135 Cal. 674, 68 Pac. 112.

8. *Hurd's Rev. St. (Ill.)*, 1909, ch. 3, §139; 2 *Purdon's Dig. (Pa.)*, 2004, §51.

9. Cal.—Code Civ. Proc., §1664. Colo.—Ann. St., §§7051, 7065. Idaho. Rev. Codes, §5845. Ill.—*Hurd's Rev. St.*, 1909, c. 3, §139. Mich.—Comp.

Laws, 1897, §9471; *Lorimer v. Wayne* Circuit Judge, 116 Mich. 682, 75 N. W. 133. Minn.—*Fitzpatrick v. Simonson Bros. Mfg. Co.*, 86 Minn. 140, 90 N. W. 378. Miss.—Code, 1906, §2791. Mont. Rev. Codes, 1907, §7672. N. Y.—Code Civ. Proc., §2656. N. D.—Rev. Codes, 1905, §8042. Utah.—Comp. Laws, 1907, §3981. Wis.—St., 1898, §3873c. Wyo. Comp. St., 1910, §5705.

[a] Including parties claiming as assignees of heirs or devisees. *In re Burton*, 93 Cal. 459, 29 Pac. 36.

[b] "The court acquires jurisdiction to determine, and it is made its duty to determine, not alone the heirship to said deceased, but the interest of each respective claimant to his estate. . . . This may and should be done by a decree establishing the degrees of kinship or relation in which the separate claimants stood to the deceased. . . .; and, where a claimant is found to bear no kinship whatever to the deceased, a finding and judgment to that effect is properly within the jurisdiction of the court and within the issues to be determined." *In re Blythe*, 112 Cal. 689, 45 Pac. 6.

[c] It is the duty of the court to determine the alleged claim of each party to the proceeding, regardless of

The decree is sometimes required to describe the property,¹⁰ to name the persons entitled to interests in the property and the part to which each is entitled,¹¹ and to recite the facts found.¹²

Conclusiveness.—In some states the final judgment or decree has the same effect as that of any other judgment or decree of the court rendering it,¹³ and is as conclusive as other judgments and decrees of like character,¹⁴ except as to the rights or interests of persons not cited and who do not become parties to the proceeding by voluntary appearance.¹⁵

Where the proceeding is had pending administration, it is sometimes specifically provided that the finding or decree shall be conclusive on final distribution of the estate.¹⁶ And in some, orders or

whether he is nominally a plaintiff or a defendant. *Estate of Kasson*, 141 Cal. 33, 74 Pac. 436; *Blythe v. Ayres*, 102 Cal. 254, 36 Pac. 522.

[d] **The final determination is not a judgment** in a civil action, though having features in common with such a judgment. *In re Blythe*, 110 Cal. 226, 42 Pac. 641.

[e] **Judgment Book Entry.**—It is not necessary that such determination be entered in a judgment book, but it is sufficient if it is spread at length upon the probate minute book. *In re Blythe*, 110 Cal. 229, 42 Pac. 642; *In re Blythe*, 110 Cal. 226, 42 Pac. 641.

[f] **Journal Entry.**—The finding and adjudication is required to be entered on the journal of the court under some statutes. *Lorimer v. Wayne Circuit Judge*, 116 Mich. 682, 75 N. W. 133.

[g] **The decree must fully protect the rights of all persons** shown by the proofs to be heirs, whether they appear at the hearing or not. *Colo. Ann. St.*, §§7052, 7066.

[h] **In Pennsylvania** no decree is provided for, but the court merely approves the proofs, and the same are then filed and recorded. 2 *Purdon's Dig.*, 2004, §51.

10. N. Y. Code Civ. Proc., §2656.

11. *Colo. Ann. St.*, §7065; *Wis. St.*, 1898, §3873c.

12. N. Y. Code Civ. Proc., §2656.

13. *Minn. Rev. Laws*, 1905, §3657; *Fitzpatrick v. Simonson Bros. Mfg. Co.*, 86 Minn. 140, 90 N. W. 378.

14. *Cal.*—Code Civ. Proc., §1664; *More v. More*, 133 Cal. 489, 65 Pac. 1044, 66 Pac. 76; *McDonald v. McCoy*, 121 Cal. 55, 53 Pac. 421; *In re Blythe*, 112 Cal. 689, 45 Pac. 6. *Colo.*—Ann.

St., §§7052, 7067. *Idaho.*—Rev. Codes, §§5840, 5845. *Minn.*—*Fitzpatrick v. Simonson Bros. Mfg. Co.*, 86 Minn. 140, 90 N. W. 378. *Miss.*—Code, 1906, §2792. *Mont.*—Rev. Codes, 1907, §§7670, 7672. *N. D.*—Rev. Codes, 1905, §8043. *Utah.*—Comp. Laws, 1907, §3981. *Wis.*—*St.*, 1898, §3873f. *Wyo.* Comp. St., 1910, §5705.

[a] **This provision does not prevent an appeal** from the judgment of the district court. "It is the determination in such a proceeding of the rights of all persons claiming an interest in the estate that the statute makes final and conclusive, and not the judgment of the district court." *Weidenhoft v. Primm*, 16 Wyo. 340, 353, 94 Pac. 453.

[b] **It is conclusive only as to the succession** or testamentary rights, and only as to matters actually litigated. *More v. More*, 133 Cal. 489, 65 Pac. 1044, 66 Pac. 76.

15. N. Y.—Code Civ. Proc., §2655. N. D.—Rev. Codes, 1905, §8041. Pa. 2 *Purdon's Dig.*, 2004, §51. *Utah.* Comp. Laws, 1907, §3981.

16. *Cal.*—Code Civ. Proc., §1664; *More v. More*, 133 Cal. 489, 65 Pac. 1044, 66 Pac. 76; *McDonald v. McCoy*, 121 Cal. 55, 72, 53 Pac. 421; *In re Blythe*, 112 Cal. 689, 45 Pac. 6; *Blythe v. Ayres*, 102 Cal. 254, 36 Pac. 522. *Idaho.*—Rev. Codes, §§5845, 5846, 5840. *Mont.*—Rev. Codes, §§7670, 7672. *Wyo.*—Comp. St., 1910, §§5705, 5707; *Weidenhoft v. Primm*, 16 Wyo. 340, 94 Pac. 453.

[a] **Where it is determined that a party to the proceedings is not of kin** to the deceased, and such finding is affirmed on appeal, he is concluded thereby in subsequent proceedings for

decrees declaring heirship are made prima facie evidence of heirship.¹⁷

Opening Decree.—In some states claimants not personally served and who do not appear may move to open the decree within a specified time,¹⁸ or for a rehearing.¹⁹

9. Costs.—The allowance and apportionment of costs is regulated by the statute, and varies in the different jurisdictions. It is variously provided that they must be paid by the petitioner,²⁰ or that the matter is discretionary with the court.²¹

10. Appeal and Review.—Unless a statute authorizes an appeal from the court's orders or decrees, as they do in some states,²² no

distribution. *In re Blythe*, 112 Cal. 689, 45 Pac. 6.

[b] **It binds all parties**, and is final and conclusive as to the persons entitled to distribution and their respective rights, and those questions cannot be re-litigated upon final distribution or in any other proceeding. *Weidenhoft v. Primm*, 16 Wyo. 340, 353, 94 Pac. 453.

17. Ill.—Hurd's Rev. St., 1909, c. 3, §140; *Ford v. Ford*, 117 Ill. App. 502. **Mich.**—Comp. Laws, 1897, §9471; *Lorimer v. Wayne Circuit Judge*, 116 Mich. 682, 75 N. W. 133; *Wright v. Wright*, 99 Mich. 170, 58 N. W. 54, 23 L. R. A. 196. **N. Y.**—Code Civ. Proc., §2656. **Pa.**—2 Purdon's Dig., 2004, §51.

[a] **When an appeal is pending** it is not prima facie evidence in another proceeding. *Thomas v. Olenick*, 140 Ill. App. 385.

[b] **The proceeding simply makes evidence**, and any common-law jury could overturn it in any other proceeding. *Lorimer v. Wayne Circuit Judge*, 116 Mich. 682, 75 N. W. 133. See also *Miller v. Davis*, 106 Mich. 300, 64 N. W. 338.

[c] **The proceedings are not conclusive** upon anyone, and are not binding even upon the petitioner. He, or other person interested, if not satisfied with the findings, may, in any judicial proceeding, resort to original evidence, and wholly ignore the action of the probate court. *Lorimer v. Wayne Circuit Judge*, 116 Mich. 682, 75 N. W. 133.

[d] **"The facts which the decree may establish** presumptively are, 'the fact of the decedent's death; the place of his residence at the time of his death; his intestacy, either generally, or as to the real property in question; the number of heirs entitled to inherit the property in question; the name,

age, residence, and relationship to the decedent of each; and the interest or share of each in the property.' Code Civ. Proc., §2656." *Aubuchon v. New York, etc. R. Co.*, 137 App. Div. 834, 122 N. Y. Supp. 581.

[e] **The court does not pretend to adjudicate upon the question of title** to real property, and the decree is not presumptive evidence on that question. *Aubuchon v. New York, etc. R. Co.*, 137 App. Div. 834, 122 N. Y. Supp. 581.

[f] **In Wisconsin the judgment or the record thereof is presumptive evidence** of the facts found and determined therein in all courts and places, and conclusive evidence against persons notified, or consenting, or appearing, and those claiming under them. St., 1898, §3873f.

18. Colo. Ann. St., §§7052, 7067; **N. Y. Code Civ. Proc.**, §§2658, 2659.

19. 2 Purdon's Dig. (Pa.), 2004, §51.

20. N. D. Rev. Codes, 1905, §8045; **2 Purdon's Dig. (Pa.)**, 2004, §51.

21. Cal.—Code Civ. Proc., §1664; *Lindy v. McChesney*, 141 Cal. 351, 74 Pac. 1034. **Idaho.**—Rev. Codes, §5846. **Mont.**—Rev. Codes, 1907, §7672.

[a] **Against Unsuccessful Claimant.** Where the contest is between one claiming the whole estate as sole heir on the one side and between devisees and legatees on the other, it is proper to tax costs against the former if he is unsuccessful. *Lindy v. McChesney*, 141 Cal. 351, 74 Pac. 1034.

22. Cal.—Code Civ. Proc., §1664. **Idaho.**—Rev. Codes, §5843. **Minn.**—Rev. Laws, 1905, §2657. **Mont.**—Rev. Codes, 1907, §7671; *In re Klein's Estate*, 35 Mont. 185, 88 Pac. 798. **Wyo.**—*Weidenhoft v. Primm*, 16 Wyo. 340, 94 Pac. 453.

[a] **A party who does not except to or attack findings that only certain**

appeal will lie from the court's adjudication.²³ Such appeal, where authorized, must be taken within the time provided by the statute.²⁴ Orders which the court had jurisdiction to make are not reviewable on certiorari.²⁵

II. ADVANCEMENTS.—A. DUTY TO ACCOUNT FOR ADVANCEMENTS.—The only liability of an heir arising from the fact that he has been advanced is that of receiving a correspondingly less portion of the estate of his ancestor on distribution thereof.²⁶ His co-heirs are not entitled to a partition of land given to him as an advancement,²⁷ nor can they recover the excess from one who has received more than his share of the estate by way of advancements.²⁸ No assignment by an heir will defeat an account of advancements.²⁹

An heir has a right to have a judicial determination of the question whether money or property received by him from his ancestor shall be regarded as a gift or an advancement, and is not barred from participation in the estate by seeking such a determination before bringing the same into hotchpot.³⁰

A refusal to bring advancements into hotchpot on the first distribution of the property of a decedent does not always deprive an heir of a right to share in a subsequent distribution of other property.³¹ It has been held that if advancements are not collated in the distribution of the proceeds of the sale of land in a partition suit the heir has a right to have them collated before the distribution of the

other parties are related to the deceased or entitled to share in the estate is not entitled to appeal, since he is not aggrieved. *Blythe v. Ayres*, 102 Cal. 254, 36 Pac. 522.

[b] **Illinois.**—An appeal from an order directing payment to one previously declared an heir does not bring up the order declaring such heirship. *Ford v. Ford*, 117 Ill. App. 502.

23. In **Michigan** no appeal lies from the finding and adjudication of the court. "The legislature evidently intended that the proceeding under this statute should be summary," and hence provided no appeal. *Lorimer v. Wayne* Circuit Judge, 116 Mich. 682, 75 N. W. 133.

24. If taken after the expiration of the sixty days, the supreme court has no jurisdiction, and the appeal will be dismissed. *Smith v. Westerveld*, 88 Cal. 374, 26 Pac. 206; *In re Grider*, 81 Cal. 571, 22 Pac. 908.

25. Certiorari will not lie to review an order refusing to open a default and to permit an heir to appear and answer. *Hitchcock v. Superior Court*, 73 Cal. 295, 14 Pac. 872.

26. *Dow v. Dow*, 3 Ohio N. P. (N. S.) 125.

27. *Ford v. Ellingwood*, 3 Mete. (Ky.) 359.

28. *Dow v. Dow*, 3 Ohio N. P. (N. S.) 125.

[a] Where the matter of advancements is not inquired into in a suit to partition lands, and land is decreed to an heir without reserving any lien to secure the repayment of advances made to him, and no claim is made against him in such suit on account of such advances, the excess of advances received by him cannot be considered as a debt due by him to the other distributees or the representative. *Eckler v. Galbraith & Lail*, 12 Bush (Ky.) 71.

29. Whether the assignment is made before or after the interest vests in him. *Steele v. Frierson*, 85 Tenn. 430, 3 S. W. 649.

30. *Ladd v. Stephens*, 147 Mo. 319, 48 S. W. 915.

31. Such refusal does not deprive a child of the right to share in a subsequent distribution of slaves assigned to the widow as dower. In such case it may be shown that such

rents in such suit.³² So, too, where the advancement to an heir exceeds his share on the first distribution, the balance may be charged against him on a subsequent distribution of other property.³³ Heirs may waive their right to have advancements charged against the share of a co-heir.³⁴

Rights of Creditors of Heirs. — In a suit by a creditor of an heir to subject an alleged undivided interest of the latter in the lands of his ancestor to the payment of the plaintiff's debt, it is a good defense that the heir received advancements in excess of the value of his share of the estate.³⁵

A creditor of the heir who levies upon or attaches his interest in the estate acquires a lien only on such an interest as he possesses after the other heirs have been equalized.³⁶ If the heir has received advancements equal to his full share in the estate his creditor acquires nothing by levying on his interest.³⁷

B. METHODS OF BRINGING ADVANCEMENTS INTO HOTCHPOT. — **1. In General.** — The whole matter of advancements, and the accounting for them on the final distribution, is statutory.³⁸

It has been held that where one receives money and property from his wife's father for her benefit, on the death of the father the wife may compel her husband to account for and pay the same to her, or she may compel her father's administrator to pay her her full share of the estate without regard to such advancements.³⁹ In the latter case the administrator is subrogated to the wife's rights against her husband, and by a suit in equity, may collect the amount of such advancements from him.⁴⁰

An heir may maintain a suit against the administrator on the ground that, in making distribution, he has failed to require heirs

advancements were greater than such child's share on the first division. *Knight v. Oliver*, 12 Gratt. (Va.) 33.

32. *Evans v. Evans*, 1 Heisk. (Tenn.) 577.

33. The balance may be charged against his share on a subsequent partition and distribution of the dower land after the death of the widow. *French v. French's Estate*, 46 Vt. 357.

[a] **A statement of the commissioners** as to the excess of the advancement to an heir above his share in the distribution of the estate is not conclusive on the probate court on a subsequent distribution of lands decreed to the widow as dower. *French v. French's Estate*, 46 Vt. 357.

34. In *Hoerle v. Hoerle*, 94 App. Div. 615, 87 N. Y. Supp. 1007, an agreement by the heirs was held to constitute such a waiver.

35. *Keever v. Hunter*, 62 Ohio St. 616, 57 N. E. 454.

36. *Dow v. Dow*, 3 Ohio N. P. (N. S.) 125.

[a] No attachment or levy by a creditor of the heir will defeat an account of advancements. *Steele v. Friereson*, 85 Tenn. 430, 3 S. W. 649; *Johnson v. Hoyle*, 3 Head (Tenn.) 56.

37. *Liginger v. Field*, 78 Wis. 367, 47 N. W. 613.

[a] **Injunction.**—He will be enjoined from selling any part of the land under such execution. *Liginger v. Field*, 78 Wis. 367, 47 N. W. 613.

[b] A sale under an execution levied upon an alleged undivided interest of an heir in land of the decedent, where such heir has received an advancement in excess of his share in the estate, may be enjoined. *Dyer v. Armstrong*, 5 Ind. 437.

38. *Malone v. Malone*, 106 Ala. 567, 17 So. 676.

39. *Stayner v. Bower*, 42 Ohio St. 314.

40. *Stayner v. Bower*, 42 Ohio St. 314.

who have received advancements to account therefor in hotchpot.⁴¹

2. **On Settlement and Distribution of the Estate.**—Generally questions in regard to advancements may be determined by the probate court on final settlement and distribution of the estate,⁴² or in proceedings in that court for the partition of realty,⁴³ and under express statute in some states in proceedings in the probate court to determine heirship.⁴⁴ Where courts of equity have jurisdiction to make distribution they may determine and equalize advancements in making such distribution.⁴⁵

3. **Special Proceedings.**—Statutes in some states provide for special proceedings in the probate court for the determination of questions and controversies as to advancements, by an application to the court pending administration setting up the advancements⁴⁶ to which the heir alleged to have received such advancement must answer.⁴⁷ Objections are filed to such report or answer and a hearing is had

41. *Tison v. Tison*, 12 Ga. 208.

42. **Ala.**—*Malone v. Malone*, 106 Ala. 567, 17 So. 676; *Cousins v. Jackson*, 49 Ala. 236. **Cal.**—Code Civ. Proc., §1686. **Conn.**—*Porter v. Collins*, 7 Conn. 1. **Ga.**—Code, 1911, §4055. **Idaho.**—Rev. Codes, §5642. **Ind.**—*Burns' Ann. St.*, 1908, §§2929, 3010; *Shaw v. Kent*, 11 Ind. 80; *Kepler v. Kepler*, 2 Ind. 363. **Ky.**—*Crain v. Malone*, 130 Ky. 125, 113 S. W. 67, 132 Am. St. Rep. 355, 22 L. R. A. (N. S.) 1165. **Md.**—*Cecil v. Cecil*, 19 Md. 72, 81 Am. Dec. 626. **Mass.**—Rev. Laws, 1902, ch. 140, §9; *Bemis v. Stearns*, 16 Mass. 200; *Stearns v. Stearns*, 16 Mass. 167. **Mich.**—Comp. Laws, 1897, §9457. **Minn.**—Rev. Laws, 1905, §3800. **Mo.**—*In re Estate of St. Vrain*, 1 Mo. App. 294, form of order of distribution taking account of advancements. **Mont.**—Rev. Codes, 1907, §7689. **Nev.**—Rev. Laws, 1912, §6089. **N. H.**—Pub. St., ch. 196, §10; *Dixon v. Marston*, 64 N. H. 433, 14 Atl. 728; *Titus v. Ash*, 24 N. H. 319. **N. Y.**—Code Civ. Proc., §2733. **N. D.**—Rev. Codes, 1905, §8212. **Pa.**—*Springer's Appeal*, 29 Pa. 208. **R. I.**—Gen. Laws, 1909, ch. 316, §§12, 22; *Mowry v. Smith*, 5 R. I. 255; *Law v. Smith*, 2 R. I. 244. **S. D.**—Prob. Code, §323, Comp. Laws, 1910, p. 516. **Utah.**—Comp. Laws, 1907, §3955. **Vt.**—Pub. St., 1906, §2956; *Estate of Robinson*, 1 D. Chip. 357. **Wis.**—St., 1898, §3961; *Liginger v. Field*, 78 Wis. 367, 47 N. W. 613.

[a] The commissioners are not required to compute the excess of the advancements over the distributive

shares of the heirs. *French v. French's Estate*, 46 Vt. 357.

[b] "It is not an original proceeding for which notice is to be given, in addition to that for the final settlement and distribution." The general published notice is sufficient to all interested persons, including judgment creditors of an heir. *Liginger v. Field*, 78 Wis. 367, 47 N. W. 613.

43. See *infra*, II, B, 5.

44. Wis. St., 1898, §3873c.

45. **Ala.**—*Marshall v. Marshall*, 86 Ala. 383, 5 So. 475; *Key v. Jones*, 52 Ala. 238. **Ill.**—*Grattan v. Grattan*, 18 Ill. 167, 65 Am. Dec. 726. **Ky.**—*Eckler v. Galbraith & Lail*, 12 Bush 71; *Powell's Heirs v. Powell's Heirs*, 5 Dana 168; *Haden v. Haden's Heirs*, "J. J. Marsh. 168. **Mass.**—*Torrey v. Pond*, 102 Mass. 355. **Tenn.**—*Daniels v. Pickett*, 59 S. W. 148. **Va.**—*Watkins v. Young*, 31 Gratt. 84; *Knight v. Oliver*, 12 Gratt. 33.

46. Ala. Code, 1907, §3773.

[a] If the allegations are not sworn to, the proper remedy is by demurrer. *Gaillard v. Duke*, 57 Ala. 619.

[b] A demurrer to the original allegations because not sworn to will not reach amended declarations subsequently filed, though they are subject to the same objection. *Gaillard v. Duke*, 57 Ala. 619.

[c] This provision establishes a mode in which the heir or distributee may judicially manifest an election to retain the advancement and abandon all claim to a further distribution. *Key v. Jones*, 52 Ala. 238.

47. Ala. Code, 1907, §3774; *Key v. Jones*, 52 Ala. 238.

thereon after notice.⁴⁸ This is the exclusive method of ascertaining the fact and value of advancements under such statutes.⁴⁹ Under some statutes heirs must upon request of the administrator file an inventory of their advancements or will be considered as having received their share of the estate.⁵⁰

4. Suits in Equity. — A court of equity will take cognizance of a suit by heirs against another heir to have the shares of such heir subjected to the payment of advancements and have the lien of a creditor acquired by attachment declared subordinate to their equity,⁵¹ or of a suit by an heir who has received advancements for the purpose of bringing advancements into hotchpot.⁵² In at least one state the administrator may, by bill in equity, require the heirs to interplead for the purpose of procuring a determination of the advancements for which they shall be required to account.⁵³ If he does so, he is not entitled to take any further part in the proceedings or to be heard in argument, where he seeks no further relief.⁵⁴

Equity will interpose to restrain the enforcement of a claim by an heir to any further portion of the estate where he has received by way of advancement property equal to, or in excess of, the share to which he would otherwise have been entitled.⁵⁵ On the other hand, it has been held that equity will not enjoin heirs from claiming any part of the estate for failure to bring advancements into hotchpot, since a decree excluding them from the division of the estate would be a perpetual bar.⁵⁶ Equity will set aside a contract of family settle-

48. Ala. Code, 1907, §3776; *Key v. Jones*, 52 Ala. 238.

[a] Such proceedings should generally be conducted in the name of the representative as plaintiff and the party contesting the advancement as defendant. "If it appears from the record, that the question at issue was fairly presented, and correctly decided, without objection in the court below, the defendant, if the decision is against him, cannot complain that the other distributees were the plaintiffs, instead of the administrators." *Smith v. Smith*, 21 Ala. 761.

[b] Judgment may then be rendered declaring the amount and value of the advancements. *Key v. Jones*, 52 Ala. 238.

49. A charge of advancements on final settlement is unauthorized. *Malone v. Malone*, 106 Ala. 567, 17 So. 676.

50. N. C. Code Rev., 1905, §§134, 135.

51. *Comer v. Shehee*, 129 Ala. 588, 30 So. 95, 87 Am. St. Rep. 78.

[a] In such a suit the bill may be amended so as to demand a sale of the

land for partition and an equitable distribution of the proceeds. *Comer v. Shehee*, 129 Ala. 588, 594, 30 So. 95, 87 Am. St. Rep. 78.

52. *Meyer v. Meyer*, 60 W. Va. 473, 56 S. E. 209.

[a] Equity will take cognizance of a suit against the other heirs and the administrator for discovery and relief, declaring that such heirs have received advancements and requiring them to be brought into hotchpot. *Tison v. Tison*, 14 Ga. 167.

53. *Andrews v. Halliday*, 63 Ga. 263. See *Langford v. Nabers*, 86 Ga. 449, 12 S. E. 648.

54. As in other cases the representative is not entitled to take any further part in the proceedings or to be heard in argument, where he seeks no further relief. *Andrews v. Halliday*, 63 Ga. 263.

55. *Parker v. McCluer*, 5 Abb. Pr. N. S. (N. Y.) 97.

56. The granting of such an injunction is not ground for reversal, where a cross-bill asserting their claim is dismissed. *Powell's Heirs v. Powell's Heirs*, 5 Dana (Ky.) 168.

ment whereby a child receives from his father by way of advancement a portion of the estates in full of his claims if the same was the result of fraud and undue influence.⁵⁷

5. **Partition Proceedings.**—Unless exclusive jurisdiction has been conferred upon another court,⁵⁸ a court of equity as an incident to a partition suit between the heirs may adjust and equalize advancements,⁵⁹ the heirs being required to bring in their advancements and

57. *Brown v. Brown*, 139 Ind. 653, 39 N. E. 152.

58. In *New Hampshire* the question of advancements cannot be tried in partition proceedings, but the jurisdiction of the probate court is exclusive. *Locke v. Hancock*, 59 N. H. 85.

[a] A code provision authorizing probate courts to take cognizance of controversies as to advancements does not take away the jurisdiction of a court of equity to adjust such equities in partition suits. *Bozone v. Daniel* (Ala.), 39 So. 774.

[b] A statute authorizing the charging of advancements in partition and on distribution of the estate, does not necessarily compel parties to resort to partition or distribution for the purpose of settling questions as to advancements, or deprive equity of jurisdiction in a proper case. *Dyer v. Armstrong*, 5 Ind. 437.

59. *Ala.*—*Bozone v. Daniel*, 39 So. 774; *Comer v. Shehee*, 129 Ala. 588, 30 So. 95, 87 Am. St. Rep. 78; *Booth v. Foster*, 111 Ala. 312, 20 So. 356, 56 Am. St. Rep. 52; *Marshall v. Marshall*, 86 Ala. 383, 5 So. 475. *Ill.*—*Cline v. Jones*, 111 Ill. 563; *Pigg v. Carroll*, 89 Ill. 205; *Barnes v. Hazleton*, 50 Ill. 429. *Ind.*—*Burns' Ann. St.*, 1914, §1246; *Green v. Brown*, 146 Ind. 1, 44 N. E. 805; *Purner v. Koontz*, 138 Ind. 252, 36 N. E. 1094; *New v. New*, 127 Ind. 576, 27 N. E. 154; *Duncan v. Henry*, 125 Ind. 10, 24 N. E. 506; *Nicholson v. Caress*, 59 Ind. 39. *Ia.*—*West v. Beck*, 95 Iowa 520, 64 N. W. 599; *Ramsay v. Abrams*, 58 Iowa 512, 12 N. W. 555. *Ky.*—*Eckler v. Galbraith & Lail*, 12 Bush 71; *Tye v. Tye*, 24 Ky. L. Rep. 637, 69 S. W. 718. *La.*—See *King v. King*, 107 La. 437, 31 So. 894. *Md.*—*Warfield v. Warfield*, 5 Harr. & J. 459. *Mass.*—*Torrey v. Pond*, 102 Mass. 355; *Bemis v. Stearns*, 16 Mass. 200; *Stearns v. Stearns*, 16 Mass. 167. *Miss.*—*Gowan v. Gowan*, 12 So. 29. *Mo.*—*Gunn v. Thurston*, 130 Mo. 339, 32 S. W. 654; *In re Estate of Elliott*,

98 Mo. 379, 11 S. W. 739, reversing 27 Mo. App. 218. See *Dobbins v. Humphreys*, 171 Mo. 198, 70 S. W. 815; *Green v. Walker*, 99 Mo. 68, 12 S. W. 353; *McDonald v. McDonald*, 86 Mo. App. 122, which were actions for partition in which such questions were determined. *Neb.*—*Boden v. Mier*, 71 Neb. 191, 98 N. W. 701; *Schick v. Whitcomb*, 68 Neb. 784, 94 N. W. 1023. *N. Y.*—See *Hicks v. Gildersleeve*, 4 Abb. Pr. 1. *N. C.*—*Ex parte Collins*, 71 N. C. 236. *Ohio.*—See *Parsons v. Parsons*, 52 Ohio St. 470, 40 N. E. 165; *Tobias v. Richardson*, 16 Ohio Cir. Dec. 81; *Fels v. Fels*, 1 Ohio C. C. 420. *Pa.*—*Summerville's Estate*, 129 Pa. 631, 18 Atl. 554; *Dutch's Appeal*, 57 Pa. 461. *R. I.*—*Beakhust v. Crumby*, 18 R. I. 689, 30 Atl. 453, 31 Atl. 753; *Law v. Smith*, 2 R. I. 244. See also *Sayles v. Baker*, 5 R. I. 457. *S. D.*—*Kyes v. Wilcox*, 13 S. D. 228, 83 N. W. 93. *Tenn.*—*Evans v. Evans*, 1 Heisk. 577.

[a] An alienation by one of the joint owners cannot affect this right. *Booth v. Foster*, 111 Ala. 312, 20 So. 356, 56 Am. St. Rep. 52; *Duncan v. Henry*, 125 Ind. 10, 24 N. E. 506.

[b] Equity will not entertain a suit to establish and foreclose an equitable lien for advancements on undistributed realty consisting of lands assigned to the widow as dower and which has reverted to the heirs on her death, and land conveyed by one heir to the others as tenants in common, but the only remedy in such case is by partition. *Belle v. Brown*, 37 Ore. 588, 61 Pac. 1024.

[c] If the estate consists of both realty and personalty, the court in a proceeding to partition the realty may charge advancements against the shares of the parties in the proceeds of the sale of the lands without waiting until the collection of the personalty and the arrival of the proper time for distributing the same. *Hicks v. Gildersleeve*, 4 Abb. Pr. (N. Y.) 1.

to take them as portions of their shares.⁶⁰ In some states if questions as to advancements arise in partition the proceedings may be suspended until such questions are decided in the probate court in which the estate of the deceased is settled,⁶¹ particularly where the probate court has exclusive jurisdiction to determine such questions.⁶²

6. Advancements as a Defense to Actions. — While no question as to advancements can be determined in an action of ejectment brought by one heir against another,⁶³ unless a statute precludes an heir receiving an advancement equal to or superior to the amount such heir would ordinarily be entitled to receive from taking any portion thereof,⁶⁴ such defense may be set up in a suit for partition if the heir has received his share of the estate by way of advancement,⁶⁵ or it may be set up in an action at law by a distributee to recover a distributive share of the estate.⁶⁶

In some states the fact that the money received upon a note was paid and received as an advancement may be set up as a defense in an action thereon by the administrator of the payee,⁶⁷ or even where that fact has not been set up as a defense in the action at law, equity will enjoin the enforcement of a judgment at law upon such a note.⁶⁸

C. PROCEDURE. — 1. Jurisdiction. — Generally the probate court has jurisdiction to determine controversies in regard to advancements which arise in the course of the administration of the estate of a decedent.⁶⁹ The jurisdiction of the probate court in regard to ad-

60. *Marshall v. Marshall*, 86 Ala. 383, 5 So. 475.

[a] The court should ascertain their value and require them to be brought into hotchpot with the whole estate. *Pigg v. Carroll*, 89 Ill. 205; *Belle v. Brown*, 37 Ore. 588, 61 Pac. 1024.

61. Mass. Rev. Laws, 1902, ch. 140, §89; *Torrey v. Pond*, 102 Mass. 355; *Bemis v. Stearns*, 16 Mass. 200; *Stearns v. Stearns*, 16 Mass. 167.

62. *Locke v. Hancock*, 59 N. H. 85.

63. *Holliday v. Ward*, 19 Pa. 485, 57 Am. Dec. 671.

64. *Parker v. McCluer*, 5 Abb. Pr. N. S. (N. Y.) 97; *Bell v. Champlain*, 64 Barb. (N. Y.) 396 (the amount received must be equal to or superior to what the heir would ordinarily take).

65. *Purner v. Koontz*, 138 Ind. 252, 36 N. E. 1094.

66. See *Hayden v. Burch*, 9 Gill (Md.) 79; *State v. Jameson*, 3 Gill & J. (Md.) 442; *In re Estate of Young*, 3 Md. Ch. 461.

[a] Where more than one child has been advanced, the remedy at law by a suit to recover on the administration bond is not an adequate one. More perfect relief may be had in equity where all the parties in interest

may be brought before the court and their respective rights adjusted. *State v. Jameson*, 3 Gill & J. (Md.) 442.

[b] In Pennsylvania advancements may not be set off in an action to recover a distributive share. The orphans' court has exclusive jurisdiction. *Holliday v. Ward*, 19 Pa. 485, 491, 57 Am. Dec. 671, *overruling* *Earnest v. Earnest*, 5 Rawle (Pa.) 213.

67. *Hicks v. Hicks*, 19 Ohio Cir. Dec. 628, *affirmed*, 76 Ohio St. 575, 81 N. E. 1187.

[a] In *Lodge v. Fitch*, 72 Neb. 652, 101 N. W. 338, the evidence was held to be insufficient to sustain such a defense. The right to interpose it was not questioned.

68. *Meyer v. Meyer*, 60 W. Va. 473, 56 S. E. 209, in a suit by a maker of the note for an injunction and to have the estate brought into hotchpot. In this case it was held error to dissolve an injunction in view of the evidence and the fact that its continuance until the hearing could result in no great hardship to the administrator, while its dissolution would work great hardship to the plaintiff in the event of his final success.

69. Ala.—Code, 1907, §§3773, 3774;

vancements is exclusive, in some states,⁷⁰ while in others it is concurrent with that of other courts.⁷¹

A statute conferring jurisdiction on the probate court does not deprive courts of equity of jurisdiction to equalize advancements when necessary to complete relief and justice in cases in which they have taken jurisdiction under some recognized head of original equitable jurisdiction.⁷²

2. Parties.—An administrator cannot be said to be an interested party in proceedings to establish an advancement so as to make a judgment or decree in such proceedings conclusive on an heir or distributee not a party thereto by a constructive representation.⁷³ He

Bozone v. Daniel, 39 So. 774; Marshall v. Marshall, 86 Ala. 383, 5 So. 475; Key v. Jones, 52 Ala. 238. **Cal.**—Code Civ. Proc., §1686. **Colo.**—Ann. St., §7043. **Idaho.**—Rev. Codes, §5642. **Ind.** Burns' Ann. St., 1908, §§2929, 3010; Shaw v. Kent, 11 Ind. 80; Kepler v. Kepler, 2 Ind. 363. **Md.**—Cecil v. Cecil, 19 Md. 72, 81 Am. Dec. 626. **Mass.** Rev. Laws, 1902, c. 140, §9; Bemis v. Stearns, 16 Mass. 200; Stearns v. Stearns, 16 Mass. 167. **Mich.**—Comp. Laws, 1897, §9457; *In re Simon's Estate*, 158 Mich. 256, 122 N. W. 544; McClintock's Appeal, 58 Mich. 152, 24 N. W. 549. **Minn.**—Rev. Laws, 1905, §3800. **Mont.**—Rev. Codes, 1907, §7689. **Neb.**—Boden v. Mier, 71 Neb. 191, 98 N. W. 701; Schick v. Whitcomb, 68 Neb. 784, 94 N. W. 1023. **Nev.**—Rev. Laws, 1912, §6089. **N. H.**—Pub. St., ch. 196, §10; Dixon v. Marston, 64 N. H. 433, 14 Atl. 728; Locke v. Hancock, 59 N. H. 85; Titus v. Ash, 24 N. H. 319. **N. D.**—Rev. Codes, 1905, §8212. **Pa.**—Hughes's Appeal, 57 Pa. 179; Holliday v. Ward, 19 Pa. 485, 57 Am. Dec. 671; Blanchard v. Commonwealth, 6 Watts 309; Earnest v. Earnest, 5 Rawle 213. **R. I.**—Gen. Laws, 1909, ch. 316, §§12, 22; Sayles v. Baker, 5 R. I. 457; Law v. Smith, 2 R. I. 244. **S. D.** Prob. Code, §323, Comp. Laws, 1910, p. 516. **Utah.**—Comp. Laws, 1907, §3955. **Vt.**—Pub. St., 1906, §2956; French v. French's Estate, 46 Vt. 357; Heirs of Adams v. Adams, 22 Vt. 50; Robinson v. Swift, 3 Vt. 283; Estate of Robinson, 1 D. Chip. 357. **Wis.**—St., 1898, §3961; Liger v. Field, 78 Wis. 367, 47 N. W. 613.

[a] **New York.**—Where there is a surplus of personal property to be distributed, and the advancement consisted of personal property, or where a deficiency in the adjustment of an

advancement of real property is chargeable on personal property. Code Civ. Proc., §2733.

70. Locke v. Hancock, 59 N. H. 85. See Titus v. Ash, 24 N. H. 319; Hughes's Appeal, 57 Pa. 179; Holliday v. Ward, 19 Pa. 485, 57 Am. Dec. 671.

[a] "When a statute gives jurisdiction of any subject to the orphan's court it impliedly prohibits the other courts from taking cognizance of it." Holliday v. Ward, 19 Pa. 485, 492, 57 Am. Dec. 671.

71. Mass.—Bemis v. Stearns, 16 Mass. 200; Stearns v. Stearns, 16 Mass. 167. **Neb.**—Schick v. Whitcomb, 68 Neb. 784, 94 N. W. 1023. **Tenn.**—Parkes v. Gilbert, 1 Baxt. 97.

[a] Advancements may be taken into consideration in the partition of realty in the court of common pleas, though they could be more conveniently adjusted in the probate court. Considerations of convenience will not oust the common-law courts of their jurisdiction. Stearns v. Stearns, 16 Mass. 167.

[b] The chancery court will not take jurisdiction to collate advancements where a bill for that purpose shows that the complainants had information of the pendency of proceedings in the county court for the sale of realty and the distribution of the proceeds in time to have obtained relief there, and fails to show any reason for not doing so. Parkes v. Gilbert, 1 Baxt. (Tenn.) 97. See *supra*, II, B, 1.

72. Marshall v. Marshall, 86 Ala. 383, 5 So. 475; Belle v. Brown, 37 Ore. 588, 61 Pac. 1024.

73. Cecil v. Cecil, 19 Md. 72, 81 Am. Dec. 626.

is not a necessary party to a suit for partition in which an adjustment of advances is sought where there are no debts.⁷⁴

Persons to whom advancements are alleged to have been made in fraud of creditors are proper parties defendant to a suit by creditors for the settlement of the estate,⁷⁵ as are distributees receiving advancements proper parties to suits by an heir against an administrator for failure to require advancements to be brought into hotchpot.⁷⁶ The widow is not a necessary party, however, to proceedings to determine whether a conveyance of land to a child was or was not an advancement.⁷⁷

3. Pleading.—An heir seeking to avoid a release of liability to account for advances executed by him, must plead his election to avoid it and the grounds upon which such election is based.⁷⁸

Under a statute precluding a child receiving an advancement equal to or in excess of the amount it would ordinarily take from taking any portion of the estate, an answer setting up an advancement must show that such advancement was equal to or superior to the interest such child would ordinarily take.⁷⁹

An admission in an answer of the receipt of money and property from the ancestor, is not so neutralized by further allegations that the money was received for services rendered and the property was purchased, as to render such admission inoperative to support the presumption of an advancement until proof to the contrary is offered.⁸⁰

In a suit by heirs against the administrator and other heirs to require advancements alleged to have been made to the latter to be accounted for, it is not necessary for the bill to aver notice to the administrator that the complainant would call the other distributees into hotchpot,⁸¹ nor is it necessary to allege that the complainants have not been advanced,⁸² but if the bill shows that they have been, then they must allege readiness to bring such advancements into hotchpot.⁸³

In a suit by a husband to enforce a resulting trust in his favor in lands purchased by him in the name of his wife, the bill must allege facts sufficient to overcome the presumption that the purchase was an advancement to her.⁸⁴

74. *Marshall v. Marshall*, 86 Ala. 383, 5 So. 475.

75. *Handley v. Heflin*, 84 Ala. 600, 4 So. 725.

76. Though perhaps they are not necessary parties. *Tison v. Tison*, 12 Ga. 208.

77. *Watkins v. Brant*, 46 Wis. 419, 1 N. W. 82.

78. *Andrews v. Halliday*, 63 Ga. 263.

79. *Bell v. Champlain*, 64 Barb. (N. Y.) 396.

80. *Cecil v. Cecil*, 19 Md. 72, 81 Am. Dec. 626.

81. Since the administrator is bound to administer the estate according to law, and is presumed to have notice of the complainant's rights under the law. *Tison v. Tison*, 12 Ga. 208.

82. *Tison v. Tison*, 12 Ga. 208.

83. *Tison v. Tison*, 12 Ga. 208.

[a] If the bill does not show that they have been advanced, it is not demurrable for failure to aver a readiness to bring the amount received into hotchpot. *Tison v. Tison*, 14 Ga. 167; *Tison v. Tison*, 12 Ga. 208.

84. *Maxwell v. Maxwell*, 109 Ill. 588.

4. **Trial.**—In partition questions as to advancements to the different tenants in common are separate issues to be tried independently of the general questions involved.⁸⁵ Such issues are not for the recovery of the money or property advanced.⁸⁶

Jury Trial.—The fact and amount of an advancement may be tried by a jury under statutes providing for jury trials in the settlement of estates upon request of either party,⁸⁷ or in special proceedings for determining controversies as to advancements.⁸⁸ A party is not entitled to a jury trial, however, as a matter of right in the determination and adjustment of advancements in a partition suit unless authorized by a statute.⁸⁹

Instructions relating to the subject of advancements are properly refused where there is no evidence in the case tending to establish that an advancement has been made.⁹⁰

Questions of Law and Fact.—Where there is a jury trial, it is for the jury to determine what sums have been advanced,⁹¹ and to whom,⁹² and whether a note executed by a child in favor of a parent evidenced an advancement or a loan⁹³ or a gift.⁹⁴ Whether advancements shall be accounted for is a question of law.⁹⁵

Verdict.—A verdict is sufficient if upon reasonable intendment it can be seen that it covers the issues, and in such case defects of form will be disregarded.⁹⁶ In a suit to determine and settle the amount of the advancements made to each of the distributees, the verdict should specify the amounts advanced to each, if any.⁹⁷

Reference.—An issue in a suit in equity for distribution of person-

85. *Gunn v. Thurston*, 130 Mo. 339, 32 S. W. 654.

86. *Gunn v. Thurston*, 130 Mo. 339, 32 S. W. 654.

87. Where the question is raised on a contest of the administrator's final account, the administrator is entitled to a jury trial unless he waives it. *Shaw v. Kent*, 11 Ind. 80.

88. Ala. Code, 1907, §3773.

[a] The issue is properly tried by the court where neither party demands a jury trial. *Gaillard v. Duke*, 57 Ala. 619.

89. Issues of that character are not for the recovery of the money or property advanced. *Gunn v. Thurston*, 130 Mo. 339, 32 S. W. 654.

90. *Selleck v. Selleck*, 107 Ill. 389.

91. *Andrews v. Halliday*, 63 Ga. 263; *State v. Jameson*, 3 Gill & J. (Md.) 442.

92. *Andrews v. Halliday*, 63 Ga. 263.

93. *Hicks v. Hicks*, 19 Ohio Cir. Dec. 628, *affirmed*, 76 Ohio St. 575, 81 N. E. 1187.

94. Ark.—*Robinson v. Robinson*, 45

Ark. 481. Ind.—*Shaw v. Kent*, 11 Ind. 80. Md.—*Stewart v. State*, 2 Har. & G. 114. N. Y.—*Palmer v. Culbertson*, 65 Hun 625, 20 N. Y. Supp. 391, *affirmed*, 143 N. Y. 213, 38 N. E. 199.

95. *Andrews v. Halliday*, 63 Ga. 263.

96. A verdict in an action for partition as follows: "We, the jury, find that advancements were made to John Purner by his father, Amos Purner, amounting in value to five thousand and six hundred twenty-five dollars (\$5,625), and we find that the real estate described in the complaint is of the value of thirty-eight hundred dollars (\$3800)," though informal for a failure to include a finding for either party on the issue of partition, was sufficient as against a motion for a venire de novo, where the only issue was as to the advancements made to the plaintiff, and the judgment was "that the plaintiff take nothing by his suit." *Purner v. Koontz*, 138 Ind. 252, 36 N. E. 1094.

97. *Andrews v. Halliday*, 63 Ga. 263.

alty and to require advancements to be brought into hotchpot, as to whether a certain transaction was an absolute gift or an advancement, is properly decided by the court without reference to a commissioner for inquiry and accounting.⁹⁸ Findings of a referee on the issue as to whether money or property received is to be deemed an advancement are conclusive when not excepted to.⁹⁹

Distribution by Commissioners.—Generally where the practice is to appoint commissioners to make distribution or partition, the court or a jury determines the amount to be charged against the various parties, and the commissioners make the distribution, deducting from the shares of each of the parties the amounts advanced to them respectively.¹ The warrant to the commissioners is sometimes required to specify the advancements found by the court to have been made.²

5. Judgment or Decree.—In some states the decree assigning and distributing the estate is required to specify the advancements found to have been made.³

An adjudication of the question of advancements to an heir dates back, by relation, to the death of the ancestor, at which time the heir's interest, if any, becomes vested.⁴ Such an adjudication and finding that an heir has received advancements equal in value to his share of the estate does not divest him of any interest in the estate, but merely determines that he had no interest in it at the death of his ancestor because he had already received it.⁵

Conclusiveness.—As in other cases, an adjudication by a court of competent jurisdiction on questions regarding advancements is conclusive on all parties to the proceeding,⁶ and those claiming under

98. *Watkins v. Young*, 31 Gratt. (Va.) 84.

99. *Ladd v. Stephens*, 147 Mo. 319, 48 S. W. 915.

1. *Scott v. Harris*, 127 Ind. 520, 27 N. E. 150.

[a] "The act of making the computations and deductions is not a judicial act, but a mere computation, based upon the judgment of the court defining the share in the estate to which each tenant is entitled, and to be charged against any tenant as an advancement." *Scott v. Harris*, 127 Ind. 520, 27 N. E. 150.

[b] The value of the property brought into hotchpot must be ascertained by the judge or by a jury under his direction. Commissioners appointed to make distribution have no power to ascertain it. *Taylor v. Reese*, 4 Ala. 121; *Teat v. Lee*, 8 Port. (Ala.) 507.

2. *Mich.*—Comp. Laws, 1897, §9457. *Nev.*—Rev. Laws, 1912, §6089. *Vt.*—Pub. St., 1906, §2956. *Wis.*—St., 1898, §3961.

3. *Cal.*—Code Civ. Proc., §1686.

Idaho.—Rev. Codes, §5642. *Mich.*—Comp. Laws, 1897, §9457; *McClintock's Appeal*, 58 Mich. 152, 24 N. W. 549. *Minn.*—Rev. Laws, 1905, §3800. *Mont.*—Rev. Codes, 1909, §7689. *Nev.*—Rev. Laws, 1912, §6089. *N. D.*—Rev. Codes, 1905, §8212. *S. D.*—Prob. Code, §323, Comp. Laws, 1910, p. 516. *Utah.*—Comp. Laws, 1907, §3955. *Vt.*—Pub. St., 1906, §2956. *Wis.*—St., 1898, §3961.

4. *Liginger v. Field*, 78 Wis. 367, 47 N. W. 613.

5. *Liginger v. Field*, 78 Wis. 367, 47 N. W. 613.

6. *Ala.*—*Comer v. Shehee*, 129 Ala. 588, 595, 30 So. 95, 87 Am. St. Rep. 78. *Mass.*—*Torrey v. Pond*, 102 Mass. 355. *Vt.*—*Robinson v. Swift*, 3 Vt. 283.

[a] Advancements are involved in the issues upon which a decree of distribution is rendered, and such decree is conclusive as to the amount due the distributee at its date, in an action on the administrator's bond to recover the amount of a judgment for his dis-

them,⁷ and cannot be varied or altered by evidence aliunde.⁸ An heir or distributee who is not a party to the proceedings is not bound by the adjudication.⁹ He is not constructively represented by the administrator in such proceedings.¹⁰

Statutes in some states specifically provide that the final decree of the probate court, or of the appellate court on appeal, shall be binding on all persons interested in the estate.¹¹ In the absence of fraud,¹² an order of distribution¹³ or a decree in a partition suit¹⁴ is conclusive as to advancements where the questions in relation thereto might have been litigated in the proceeding leading up to such order or decree, but were not. In such case equity will not impress a lien for advancements on the lands apportioned to the advanced heirs in the partition suit.¹⁵

A decree for complainants in a suit to collate advancements and for distribution of the estate is not a bar to a subsequent suit for collation

tributive share. *Cousins v. Jackson*, 49 Ala. 236.

[b] The decision of the orphans' court charging an advancement against the share of an heir or distributee is as conclusive as any other judgment. *Springer's Appeal*, 29 Pa. 208; *Blanchard v. Com.*, 6 Watts (Pa.) 309.

[c] **Equity will not disturb a decree of distribution** because of the infancy of a party in interest, where his guardian was made a party. *Robinson v. Swift*, 3 Vt. 283.

7. *Torrey v. Pond*, 102 Mass. 355.

[a] **Attaching Creditors.**—On a creditor attaching the heir's interest in the estate, though he was not a party to the proceeding. *Comer v. Shehee*, 129 Ala. 588, 595, 30 So. 95, 87 Am. St. Rep. 78.

[b] In a suit by heirs to have the share of another heir subjected to the payment of advancements, and to have the lien acquired by an attachment of the latter's interest declared subordinate to their equity, no further proof of the advancement or the amount thereof is necessary. *Comer v. Shehee*, 129 Ala. 588, 30 So. 95, 87 Am. St. Rep. 78.

[c] **Judgment Creditors.**—A judgment or order of the county court on final settlement is binding on judgment creditors of the heir, though they have no notice of the proceedings in which the judgment or order was made, further than the general published notice to all persons interested. *Liginger v. Field*, 78 Wis. 367, 47 N. W. 613.

8. *Comer v. Shehee*, 129 Ala. 588, 30 So. 95, 87 Am. St. Rep. 78.

[a] In an action by a distributee on the administrator's bond to recover the amount of a judgment for his distributive share, the decree of distribution cannot be impeached by parol evidence of advancements for the purpose of reducing the amount recoverable. *Cousins v. Jackson*, 49 Ala. 236.

9. *Cecil v. Cecil*, 19 Md. 72, 81 Am. Dec. 626.

10. The administrator has no interest in establishing the fact of an advancement. *Cecil v. Cecil*, 19 Md. 72, 81 Am. Dec. 626.

11. **Cal.**—Code Civ. Proc., §1686. **Mich.**—Comp. Laws, 1907, §9457. **Mont.** Rev. Codes, 1907, §7689. **N. D.**—Rev. Codes, 1905, §8212. **S. D.**—Prob. Code, §323, Comp. Laws, 1910, p. 516. **Utah.** Comp. Laws, 1907, §3955. **Vt.**—Pub. St., 1906, §2956. **Wis.**—St., 1898, §3961; *Liginger v. Field*, 78 Wis. 367, 47 N. W. 613; *Watkins v. Brant*, 46 Wis. 419, 1 N. W. 82.

12. Actual, as distinguished from constructive, fraud. *Belle v. Brown*, 37 Ore. 588, 61 Pac. 1024.

13. *Belle v. Brown*, 37 Ore. 588, 61 Pac. 1024. See *Cousins v. Jackson*, 49 Ala. 236, where it is held that advancements are involved in the issues upon which a decree of distribution is rendered.

14. *Belle v. Brown*, 37 Ore. 588, 61 Pac. 1024.

15. *Belle v. Brown*, 37 Ore. 588, 61 Pac. 1024.

in respect to funds subsequently becoming assets of the estate,¹⁶ nor does a decree of partition preclude an heir from requiring his co-heirs to account for advancements in a subsequent proceeding to partition other lands,¹⁷ or prevent the subsequent settlement of advancements in the distribution of the valuation money among those entitled thereto.¹⁸

6. Costs.—Where proceedings to ascertain the amount of advancements are for the benefit of all the heirs and distributees, the costs are a joint charge upon the estate.¹⁹

7. Appeal.—Under some statutes an appeal will lie from the decision of the probate court in statutory proceedings to determine whether an advancement was made and the amount thereof.²⁰ As in other cases, if a review is sought on the facts, all the evidence must be set out in the record.²¹ Findings of the court as to the amount of advancements based on conflicting evidence will not be disturbed on appeal.²²

III. RETENTION OR SET-OFF OF DEBTS AND LIABILITIES OF BENEFICIARY TO ESTATE.—**A. NATURE OF RIGHT.**—The right of the representative to deduct any indebtedness of a legatee or distributee to the decedent or to the estate from his legacy or distributive share, though often called a right of set-off, has been said to be rather an equitable right of retainer,²³ or a right to pay out of the fund in hand.²⁴ Some courts regard it as neither a right of set-off nor of retainer, but as being merely a question of the right of the legatee or distributee to receive payment, having regard to the amount of his indebtedness to the estate.²⁵

16. *Daniels v. Pickett* (Tenn.) 59 S. W. 148.

17. *Gowan v. Gowan* (Miss.), 12 So. 29.

18. *Summerville's Estate*, 129 Pa. 631, 18 Atl. 554; *Dutch's Appeal*, 57 Pa. 461.

19. They should not be charged against those distributees who are most active in contesting the facts. *Distributees of Mitchell v. Mitchell's Admr.*, 8 Ala. 414.

20. *Gaillard v. Duke*, 57 Ala. 619.

21. *Gaillard v. Duke*, 57 Ala. 619.

22. *Dobbins v. Humphreys*, 171 Mo. 198, 70 S. W. 815.

23. *Ala.*—*Streety v. McCurdy*, 104 Ala. 493, 16 So. 686; *Nelson v. Murfree*, 69 Ala. 598. *Ind.*—*Holmes v. McPheeters*, 149 Ind. 587, 49 N. E. 452. *Me.*—*Webb v. Fuller*, 85 Me. 443, 27 Atl. 346, 22 L. R. A. 177. *N. Y.* *Smith v. Kearney*, 2 Barb. Ch. 533. *S. C.*—*Ex parte Wilson*, 84 S. C. 444, 66 S. E. 675; *Small v. Usher*, 77 S. C. 112, 57 S. E. 623; *Sartor v. Beaty*, 25

S. C. 293; *Wilson v. Kelly*, 16 S. C. 216.

[a] In England the right of deduction is based on the common-law doctrine of retainer. "The American doctrine places it upon the ground that the debt is already in the hands of the executor as assets collected by being deducted from the legacy, thereby practically enforcing the common-law doctrine of retainer." *Lietman's Est. v. Lietman*, 149 Mo. 112, 50 S. W. 307, 73 Am. St. Rep. 374.

24. *Fiscus v. Moore*, 121 Ind. 547, 23 N. E. 362, 7 L. R. A. 235. To the same effect: *Ind.*—*Fiscus v. Fiscus*, 127 Ind. 283, 26 N. E. 831. *N. J.*—*La Foy v. La Foy*, 43 N. J. Eq. 206, 10 Atl. 266, 3 Am. St. Rep. 302. *R. I.*—*Armour v. Kendall*, 15 R. I. 193, 2 Atl. 311. *S. C.*—*Stokes v. Stokes*, 62 S. C. 346, 40 S. E. 662; *Sartor v. Beaty*, 25 S. C. 293.

25. *Dickinson's Estate*, 148 Pa. 142, 23 Atl. 1053; *Thompson's Appeal*, 42 Pa. 345, 357; *Smith v. Smith*, 5 L. T. N. S. (Eng.) 302. See also *In re*

It is an equitable doctrine,²⁶ resting upon the equitable principle that the legatee or distributee is not entitled to his legacy or distributive share while he retains a part of the assets out of which it ought to be paid.²⁷ The retention is, in fact, the collection of a debt due the estate.²⁸

B. GENERAL STATEMENT OF THE RULE.—As a general rule the representative may retain or deduct²⁹ from a legacy or distributive

Akerman, L. R. (1891), 3 Ch. Div. 212.

[a] In *Oxsheer v. Nave*, 90 Tex. 568, 40 S. W. 7, 37 L. R. A. 98, the right is said to rest, "not so much upon any rule of set-off or of retainer as upon the broad principles of equity."

26. **S. C.**—*Ex parte Wilson*, 84 S. C. 444, 66 S. E. 675. **Tenn.**—*Irvine v. Palmer*, 91 Tenn. 463, 19 S. W. 326, 30 Am. St. Rep. 893. **Tex.**—*Oxsheer v. Nave*, 90 Tex. 568, 40 S. W. 7, 37 L. R. A. 98.

27. **Fla.**—*Merritt v. Jenkins*, 17 Fla. 593. **Ind.**—*Fiscus v. Moore*, 121 Ind. 547, 23 N. E. 362, 7 L. R. A. 235, *quoted* in *Fiscus v. Fiscus*, 127 Ind. 283, 26 N. E. 831. **Mo.**—*Duffy v. Duffy*, 155 Mo. 144, 55 S. W. 1002. **N. Y.**—*Smith v. Kearney*, 2 Barb. Ch. 533; *Rogers v. Murdock*, 45 Hun 30. **N. C.**—*Ramsour v. Thompson*, 65 N. C. 628. **Pa.**—*Dickinson's Estate*, 148 Pa. 142, 23 Atl. 1073. **R. I.**—*Armour v. Kendall*, 15 R. I. 193, 2 Atl. 311. **S. C.**—*Small v. Usher*, 77 S. C. 112, 57 S. E. 623; *Stokes v. Stokes*, 62 S. C. 346, 40 S. E. 662; *Sartor v. Beaty*, 25 S. C. 293; *Wilson v. Kelly*, 16 S. C. 216. **Tenn.**—*Irvine v. Palmer*, 91 Tenn. 463, 19 S. W. 326, 30 Am. St. Rep. 893. **Eng.**—*Courtenay v. Williams*, 3 Hare 539, 67 Eng. Reprint 494; *Jeffs v. Wood*, 2 P. Wms. 128, 24 Eng. Reprint 668.

[a] "The theory of retainer is that it is the executor's duty to collect all debts due the estate, and that such debts are assets due the estate, which it is the executor's right to retain and offset against a legacy." *In re Bogert's Estate*, 41 Misc. 598, 85 N. Y. Supp. 291.

28. *Marvin v. Bowlby*, 142 Mich. 245, 105 N. W. 751, 113 Am. St. Rep. 574, 4 L. R. A. (N. S.) 189.

29. **Ala.**—*Noble v. Tait*, 140 Ala. 469, 37 So. 278; *Streety v. McCurdy*, 104 Ala. 493, 16 So. 686; *Nelson v. Murfee*, 69 Ala. 598. **Colo.**—*See Haines v. Christie*, 28 Colo. 502, 66

Pac. 883. **Conn.**—*Cone's Appeal*, 68 Conn. 84, 35 Atl. 781. **Fla.**—*Merritt v. Jenkins*, 17 Fla. 593. **Ga.**—*Rawlins v. Rawlins*, 75 Ga. 632. **Ill.**—*Jeffers v. Jeffers*, 139 Ill. 368, 28 N. E. 913; *Esmond v. Esmond*, 154 Ill. App. 357; *Egan v. Clark*, 87 Ill. App. 246. **Ind.**—*Holmes v. McPheeters*, 149 Ind. 587, 49 N. E. 452; *Fiscus v. Fiscus*, 127 Ind. 283, 26 N. E. 831; *Koons v. Mellett*, 121 Ind. 585, 23 N. E. 95, 7 L. R. A. 231; *Fiscus v. Moore*, 121 Ind. 547, 23 N. E. 362, 7 L. R. A. 235; *Barnett v. Thomas*, 36 Ind. App. 441, 75 N. E. 868, 114 Am. St. Rep. 385. **Ia.**—*In re Fussell's Estate*, 129 Iowa 498, 105 N. W. 503; *Wick v. Hickey*, 103 N. W. 469; *Bowen v. Evans*, 70 Iowa 368, 30 N. W. 638. **Kan.**—*Head v. Spier*, 66 Kan. 386, 71 Pac. 833; *Holden v. Spier*, 65 Kan. 412, 70 Pac. 348. **Ky.**—*Thompson v. Myers*, 95 Ky. 597, 26 S. W. 1014; *Brown's Admr. v. Mattingly*, 91 Ky. 275, 15 S. W. 353. **Me.**—*Weston Co. v. Colby*, 107 Me. 104, 77 Atl. 637; *Holt v. Libby*, 80 Me. 329, 14 Atl. 201. **Md.**—*Hoffman v. Armstrong*, 90 Md. 123, 44 Atl. 1012; *Hoffman v. Hoffman*, 88 Md. 60, 40 Atl. 712; *Gosnell v. Flack*, 76 Md. 423, 25 Atl. 411, 18 L. R. A. 158; *Manning v. Thruston*, 59 Md. 218; *Smith v. Donnell*, 9 Gill 84. **Mass.**—*Rev. Laws*, 1902, ch. 141, §23; *Tilton v. Tilton*, 196 Mass. 562, 82 N. E. 704; *Jones v. Treadwell*, 169 Mass. 430, 48 N. E. 339; *Allen v. Edwards*, 136 Mass. 138. **Mich.**—*Marvin v. Bowlby*, 142 Mich. 245, 105 N. W. 751, 113 Am. St. Rep. 574, 4 L. R. A. (N. S.) 189. **Minn.**—*Christians v. Christians*, 108 Minn. 157, 121 N. W. 633. **Mo.**—*Duffy v. Duffy*, 155 Mo. 144, 55 S. W. 1002; *Yates v. Burt*, 161 Mo. App. 267, 143 S. W. 73; *Hopkins v. Thompson*, 73 Mo. App. 401; *Ford v. O'Donnell*, 40 Mo. App. 51; *Ford v. Talmage*, 36 Mo. App. 65. **Neb.**—*Boden v. Mier*, 71 Neb. 191, 98 N. W. 701. **N. J.**—*La Foy v. La Foy*, 43 N. J. Eq. 206, 10 Atl. 266, 3 Am. St. Rep. 302; *Denise v. Denise*, 37 N. J. Eq. 163;

share of personalty any debts owed by the legatee or distributee to the decedent, and it is his duty to do so.³⁰

In Louisiana heirs are required to collate debts owed by them to their ancestor.³¹

C. PERSONS AND PROPERTY AS AGAINST WHOM RIGHT IS AVAILABLE.

1. Interests in Personalty.—The foregoing rule does not apply in the case of legacies, however, where the will shows that it was the

Snyder v. Warbasse, 11 N. J. Eq. 463. **N. Y.**—Adair v. Brimmer, 74 N. Y. 539; Clarke v. Bogardus, 12 Wend. 67; Wright v. Austin, 56 Barb. 13; Smith v. Kearney, 2 Barb. Ch. 533; *In re* Knibbs' Estate, 45 Misc. 83, 91 N. Y. Supp. 697; *In re* Bogert's Estate, 41 Misc. 598, 85 N. Y. Supp. 291; *In re* Foster's Estate, 38 Misc. 347, 77 N. Y. Supp. 922; Rogers v. Murdock, 45 Hun 30; Matter of Bogart, 28 Hun 466. **Ohio.**—Lambright v. Lambright, 74 Ohio St. 198, 78 N. E. 265. **Ore.**—Dray v. Bloch, 29 Ore. 347, 45 Pac. 772. **Pa.**—Dull's Estate, 137 Pa. 116, 20 Atl. 419; Springer's Appeal, 29 Pa. 208; Keim v. Muhlenberg, 7 Watts 79. **R. I.**—Chafee v. Maker, 17 R. I. 739, 24 Atl. 773; Henry v. Fiske, 11 R. I. 318. **S. C.**—*Ex parte* Wilson, 84 S. C. 444, 66 S. E. 675; Small v. Usher, 77 S. C. 112, 57 S. E. 623; Sartor v. Beaty, 25 S. C. 293; *In re* Covin's Estate, 20 S. C. 471; Godbold v. Godbold, 13 S. C. 601. **Tenn.**—Smith v. Gooch, 6 Lea 536. **Tex.**—Oxsheer v. Nave, 90 Tex. 568, 40 S. W. 7, 37 L. R. A. 98; Powers v. Morrison, 88 Tex. 133, 30 S. W. 851, 53 Am. St. Rep. 738, 28 L. R. A. 521, *reversing* (Tex. Civ. App.), 30 S. W. 849. **Va.**—Lingle v. Cook's Admr., 32 Gratt. 262. **Eng.** *In re* Cordwell's Estate, L. R. 20 Eq. 644; Courtenay v. Williams, 3 Hare 539, 67 Eng. Reprint 494; Ranking v. Barnard, 5 Madd. 32, 56 Eng. Reprint 806; Coates v. Coates, 33 Beav. 249, 55 Eng. Reprint 363; Rose v. Gould, 15 Beav. 189, 51 Eng. Reprint 509; Jeffs v. Wood, 2 P. Wms. 128, 24 Eng. Reprint 668.

[a] The right of retainer exists independent of statute. Webb v. Fuller, 85 Me. 443, 27 Atl. 346, 22 L. R. A. 177.

[b] The right and duty to retain the amount of the debt is in no manner controlled or affected by the solvency or insolvency of the heir or

legatee. Lambright v. Lambright, 74 Ohio St. 198, 78 N. E. 265.

[c] **An administrator who is also an heir** and a debtor to the estate must apply the amount of his distributive share to the payment of his debt, and must charge himself with and account for such amount as assets in his hands. Lambright v. Lambright, 74 Ohio St. 198, 78 N. E. 265.

[d] **Mississippi.**—The indebtedness of distributees to the estate may be set-off against their distributive shares, if so agreed with the administrator, but in so doing such indebtedness must be treated as part of the assets of the estate. Anderson v. Gregg, 44 Miss. 170.

[e] **"If a surety gives a legacy to his principal** the latter cannot recover it from the estate of the former until he has satisfied or furnished indemnity against the demand for which the testator was his surety." Baily's Estate, 156 Pa. 634, 27 Atl. 560, 22 L. R. A. 444.

[f] **Legal incapacity of the legatee** to contract the obligation does not affect right of estate to deduct debt due estate. Starr's Appeal, 136 Pa. 23, 19 Atl. 1069.

30. Ill.—Esmond v. Esmond, 154 Ill. App. 357. **Md.**—Hoffman v. Armstrong, 90 Md. 123, 44 Atl. 1012; Hoffman v. Hoffman, 88 Md. 60, 40 Atl. 712; Manning v. Thruston, 59 Md. 218; Smith v. Donnell, 9 Gill 84. **Ohio.**—Lambright v. Lambright, 74 Ohio St. 198, 78 N. E. 265.

31. Succession of Burns, 52 La. Ann. 1377, 27 So. 883; Succession of Skipwith, 15 La. Ann. 209.

[a] **"The title of the heirs is in no manner affected by the amount of their indebtedness to the succession, however large it may be; and the balance for or against them can only be ascertained by a partition made in due form."** Turner v. Turner, 7 La. Ann. 216.

intention of the testator that the debt should not be deducted,³² but the mere gift of a legacy does not necessarily evidence such an intention.³³

It has been held that the right of retainer or set-off does not apply to specific legacies,³⁴ nor to specific articles of personalty ordered by the court to be distributed to the heir.³⁵ It has also been held that a legatee entitled to an equal share of the estate cannot be compelled to submit to a deduction until the other debts due the estate are collected or it is shown that they cannot be collected.³⁶

2. Interests in Realty.—In some states the indebtedness of an heir or devisee may be set off against or deducted from his share of the realty,³⁷ or his share of the surplus proceeds of realty sold for

32. The statute requiring debts to be set off does not apply in such case. *Bigelow v. Pierce*, 179 Mass. 331, 60 N. E. 611.

See further the title "Wills."

33. *Brokaw v. Hudson's Exrs.*, 27 N. J. Eq. 135; *Snyder v. Warbasse*, 11 N. J. Eq. 463, 473; *In re Foster's Estate*, 15 Misc. 175, 37 N. Y. Supp. 36; *Smith v. Murray*, 1 Dem. Sur. (N. Y.) 34.

[a] "When a creditor bequeaths a legacy to his debtor, and either does not notice the debt, or mentions it in such a manner as to leave his intention doubtful, and after his death the security for the debt is found, uncanceled, among the testator's property, the courts of equity do not consider the legacy to the debtor as necessarily, or even *prima facie*, a release or extinguishment of the debt, but require evidence clearly expressive of the intention to release, and if such intention does not appear clearly expressed or implied on the face of the will, evidence from other sources will be proper." *In re Foster's Estate*, 15 Misc. 175, 37 N. Y. Supp. 36.

34. *Clarke v. Cotton*, 17 N. C. 51.

35. *Rose v. O'Brien*, 50 Me. 188.

36. Since, until all the assets have been collected, the amount of the legacy cannot be known. *Jeffers v. Jeffers*, 139 Ill. 368, 28 N. E. 153.

37. **Ala.**—*Streety v. McCurdy*, 104 Ala. 493, 16 So. 686. See *Nelson v. Murfee*, 69 Ala. 598. **Ind.**—*New v. New*, 127 Ind. 576, 27 N. E. 154. **Ia.** *Wick v. Hickey*, 103 N. W. 469. **Mo.** *Wright v. Green*, 239 Mo. 449, 144 S. W. 437; *Ayres v. King*, 168 Mo. 244, 249, 67 S. W. 553, 90 Am. St. Rep. 452; *Duffy v. Duffy*, 155 Mo. 144,

55 S. W. 1002; *Yates v. Burt*, 161 Mo. App. 267, 143 S. W. 73; *Hopkins v. Thompson*, 73 Mo. App. 401. **Pa.**—*Dickinson's Estate*, 148 Pa. 142, 23 Atl. 1053. See *Donaldson's Estate*, 158 Pa. 292, 27 Atl. 959. **Tex.**—*Oxsheer v. Nave*, 90 Tex. 568, 40 S. W. 7, 37 L. R. A. 98; *Ruiz v. Campbell*, 6 Tex. Civ. App. 714, 26 S. W. 295. **Vt.**—*Tinkham v. Smith*, 56 Vt. 187.

[a] Where there is no personal estate for distribution. *Keever v. Hunter*, 62 Ohio St. 616, 59 N. E. 454; *Tobias v. Richardson*, 5 Ohio C. C. (N. S.) 74.

[b] If the heir is indebted to the estate in a sum which cannot otherwise be made, the administrator may, by proper proceedings, subject his interest in the realty to its payment. *Mann v. Mann*, 12 Heisk. (Tenn.) 245; *Towles v. Towles*, 1 Head (Tenn.) 601.

[c] Since under the statute the real property is subject to the payment of simple contract debts. *Boyer v. Robinson*, 26 Wash. 117, 66 Pac. 119.

[d] "The debt due by an heir to the estate is a part of the estate and like other assets is subject to partition and distribution. The heir owing the debt must either pay it or take his share in the debt or the debt as a part of his share, as the case may be." *Oxsheer v. Nave*, 90 Tex. 568, 40 S. W. 7, 37 L. R. A. 98.

[e] The other heirs have an equitable lien on his share of the land for the debt which he owes the estate, which lien is superior in equity to such heir's right in the land. *Streety v. McCurdy*, 104 Ala. 493, 16 So. 686.

[f] "If one of the heirs of an estate is indebted to it, he may be treated in its distribution as having an advancement to the amount of his

the payment of debts,³⁸ or under foreclosure of a trust deed given by the decedent,³⁹ or his share of the proceeds of realty sold pursuant to the terms of the will,⁴⁰ or for purposes of partition.⁴¹ In other states debts due from an heir or devisee cannot be set off against his share of the realty,⁴² or of the proceeds of the sale of realty in the hands of the representative.⁴³

3. Trust Funds.—As a general rule, an executor has no right of retainer from the principal of a trust fund to pay the debt of a life beneficiary,⁴⁴ nor has he a right of retainer from the interest pay-

debt." *Dickinson's Estate*, 148 Pa. 142, 23 Atl. 1053; *Springer's Appeal*, 29 Pa. 208.

[g] **Effect on Title of Heir.**—The indebtedness of the heir to the estate does not of itself divest him of all title. *Wright v. Green*, 239 Mo. 449, 144 S. W. 437.

38. Ala.—*Streety v. McCurdy*, 104 Ala. 493, 16 So. 686. **Ind.**—*Fiscus v. Moore*, 121 Ind. 547, 23 N. E. 362, 7 L. R. A. 235; *Barnett v. Thomas*, 36 Ind. App. 441, 75 N. E. 868, 114 Am. St. Rep. 385. **Pa.**—*Manifold's Estate*, 5 Watts & S. 340.

[a] May apply the share of the heir toward the payment of a judgment recovered against him by the decedent in his lifetime. *Nelson v. Murfee*, 69 Ala. 598.

39. Hopkins v. Thompson, 73 Mo. App. 401.

40. Koons v. Mellett, 121 Ind. 585, 23 N. E. 95, 7 L. R. A. 231.

41. Duffy v. Duffy, 155 Mo. 144, 55 S. W. 1002; *Dickinson's Estate*, 148 Pa. 142, 23 Atl. 1053.

42. Mass.—*Jones v. Treadwell*, 169 Mass. 430, 48 N. E. 339; *Dearborn v. Preston*, 7 Allen 192. **Mich.**—*Broas v. Broas*, 153 Mich. 310, 116 N. W. 1077; *Marvin v. Bowlby*, 142 Mich. 245, 105 N. W. 751, 113 Am. St. Rep. 574, 4 L. R. A. (N. S.) 189. **N. J.** *La Foy v. La Foy*, 43 N. J. Eq. 206, 10 Atl. 266, 3 Am. St. Rep. 302. **S. C.** *Sartor v. Beaty*, 25 S. C. 293; *In re Covin's Estate*, 20 S. C. 471.

[a] **Reason.**—"The title to the real estate vests in the heir at the date of the death of the ancestor. Real estate is not assets in the hands of a personal representative, and, unless otherwise charged by the terms of a will, is subject only to the contingency of a sale of so much thereof as may be necessary to pay the debts of the estate in case there is not sufficient per-

sonal estate for that purpose." *Marvin v. Bowlby*, 142 Mich. 245, 255, 105 N. W. 751, 113 Am. St. Rep. 574, 4 L. R. A. (N. S.) 189.

[b] "Indebtedness of an heir to the estate which may be held as an advancement may be considered in the division of real estate among heirs." *Marvin v. Bowlby*, 142 Mich. 245, 256, 105 N. W. 751, 113 Am. St. Rep. 574, 4 L. R. A. (N. S.) 189.

[c] **Judgments.**—But a judgment recovered by the intestate against the heir is a lien on the real estate which descends to the latter, and the administrator has a right to have that interest subjected to its payment. *Sartor v. Beaty*, 20 S. C. 293.

43. Marvin v. Bowlby, 142 Mich. 245, 105 N. W. 751, 113 Am. St. Rep. 574, 4 L. R. A. (N. S.) 189.

[a] Where the conversion of realty into personality (1) is merely accidental, as where a sale is necessary to carry the provisions of the will into effect. In such case the fund is to be regarded in equity as realty. *Smith v. Kearney*, 2 Barb. Ch. (N. Y.) 533. See *Marvin v. Bowlby*, 142 Mich. 245, 256, 105 N. W. 751, 113 Am. St. Rep. 574, 4 L. R. A. (N. S.) 189. (2) In *Ex parte Wilson*, 81 S. C. 441, 66 S. E. 675, the interest of a distributee in the proceeds of realty was applied to the payment of debts due by her to the estate. It does not appear in this case for what purpose the realty was sold, nor whether the proceeds were considered realty or personality.

44. Where a will directs that a fund shall be invested and the interest paid to one during his life and at his death the fund shall be paid to his children, debts owing by the father to the children cannot be set off against the principal of the trust fund. *Voorhees v. Voorhees' Exr.*, 18 N. J. Eq. 223.

[a] "The trustee, whether he be

able to such beneficiary,⁴⁵ though it has been held that a court of equity will allow such indebtedness to be used in payment of such interest.⁴⁶

4. Persons Claiming Under Distributees, Legatees, Devisees, or Heirs.—Generally the representative has the same right of retention against a transferee or assignee,⁴⁷ or a judgment⁴⁸ or attaching⁴⁹

the executor or some other person, is not vested with the title to the debt, and has no duty devolving upon him to collect a debt due the testator, and therefore no right of retention or equitable lien to satisfy a debt with which he has no concern, or to which he has no title." *In re Knibb's Estate*, 45 Misc. 83, 91 N. Y. Supp. 697.

45. *Rudd v. Rudd*, 4 Dem. Sur. (N. Y.) 335. See *In re Knibb's Estate*, 45 Misc. 83, 91 N. Y. Supp. 697; *In re Widmayer*, 28 Misc. 362, 59 N. Y. Supp. 980.

[a] On settlement of their accounts, executors have no right to have judgments for costs recovered by them against one entitled to the income of a trust fund for life satisfied out of such income. The surrogate has no jurisdiction. *In re Knibb's Estate*, 45 Misc. 83, 91 N. Y. Supp. 697.

[b] Though the executor and the trustee are the same person. The trustee's duties "are confined exclusively to investing and caring for the trust funds, and applying the same as directed by the trust." *In re Bogert's Estate*, 41 Misc. 598, 85 N. Y. Supp. 291. *Contra, In re Foster's Estate*, 38 Misc. 341, 77 N. Y. Supp. 922.

46. *Voorhees v. Voorhees' Exr.*, 18 N. J. Eq. 223.

47. **Ala.**—*Streety v. McCurdy*, 104 Ala. 493, 16 So. 686; *Nelson v. Murfee*, 69 Ala. 598. **Ind.**—*Fiscus v. Moore*, 121 Ind. 547, 23 N. E. 362, 7 L. R. A. 235. **Mo.**—*Hopkins v. Thompson*, 73 Mo. App. 401; *Ford v. O'Donnell*, 40 Mo. App. 51. See *Leitman's Est. v. Leitman*, 149 Mo. 112, 50 S. W. 307, 73 Am. St. Rep. 374. **N. Y.**—*Smith v. Kearney*, 2 Barb. Ch. 533; *Ferris v. Burrows*, 34 Hun 104; *Matter of Colwell*, 15 N. Y. St. 742. **N. C.**—*Allen v. Smitherman*, 41 N. C. 341. **Pa.** *Baily's Estate*, 156 Pa. 634, 27 Atl. 560, 22 L. R. A. 444; *Dull's Estate*, 137 Pa. 116, 20 Atl. 419; *Keim v. Muhlenberg*, 7 Watts 79. **S. C.**—*Sartor*

v. Beaty, 25 S. C. 293. **Tenn.**—*Irvine v. Palmer*, 91 Tenn. 463, 19 S. W. 326, 30 Am. St. Rep. 893. But see *Towles v. Towles*, 1 Head 601. **Eng.**—*Ranking v. Barnard*, 5 Madd. 32, 56 Eng. Reprint 806.

48. **Mo.**—*Ayres v. King*, 168 Mo. 244, 249, 67 S. W. 558, 90 Am. St. Rep. 452; *Duffy v. Duffy*, 155 Mo. 144, 55 S. W. 1002. **N. Y.**—*Smith v. Kearney*, 2 Barb. Ch. 533. **Pa.**—*Dickinson's Estate*, 148 Pa. 142, 23 Atl. 1053. **R. I.** *Armour v. Kendall*, 15 R. I. 193, 2 Atl. 311. **Tenn.**—*Irvine v. Palmer*, 91 Tenn. 463, 19 S. W. 326, 30 Am. St. Rep. 893. **Wash.**—*Boyer v. Robinson*, 26 Wash. 117, 66 Pac. 119.

[a] The right is superior to the lien of a judgment creditor of the heir, (1) though such judgment was recovered against the heir before the death of the decedent (*Streety v. McCurdy*, 104 Ala. 493, 16 So. 686), (2) or of a judgment creditor who has sued out execution and garnished money belonging to the estate in the hands of a third person. *Hopkins v. Thompson*, 73 Mo. App. 401.

49. *Brown's Admr. v. Mattingly*, 91 Ky. 275, 15 S. W. 353; *Me. Rev. St.*, 1903, ch. 77, §7; *Weston Co. v. Colby*, 107 Me. 104, 77 Atl. 637.

[a] An executor has a right to retain a legacy to reimburse himself for security debts paid by him for such legatee as against a creditor of the legatee seeking to reach the legacy by a bill filed after the qualification of the executor without fixing a valid prior lien thereon by attachment or otherwise. *Fay v. Reager*, 2 Sneed (Tenn.) 200.

[b] An attaching creditor is charged with notice of the statutory lien, and that suit may be brought and attachment made by the administrator to enforce it. The creditor's attachment does not destroy nor in any way affect the right of the administrator, even though such creditor's attachment is prior in order of time. *Weston*

creditor, or a mortgagee, with notice,⁵⁰ or a trustee in bankruptcy,⁵¹ or insolvency,⁵² of a legatee or distributee, or a purchaser of the latter's interest at a judicial sale,⁵³ or against the heirs, creditors, or personal representatives of a deceased legatee, or distributee,⁵⁴ as he would have against such heir or legatee himself.

In some states, in so far as the realty is concerned, the estate is in the position of any other creditor, and the indebtedness of an heir or devisee cannot be set off against one who in good faith has purchased the interest of the heir or devisee before the institution of proceedings to enforce the indebtedness of the latter to the estate,⁵⁵ or as against a prior attaching creditor.⁵⁶ The interests of other heirs purchased by an heir cannot be subjected to the payment of a debt of the latter.⁵⁷

Persons Taking by Right of Representation.—In some states debts may be retained or deducted as against persons taking the share of a deceased distributee or legatee by right of representation.⁵⁸ In others it is held that, where property descends directly to the children of a

Co. v. Colby, 107 Me. 104, 77 Atl. 637.

[c] To defeat the attachment of the heir's creditor the lien must be enforced by legal proceedings commenced within two years after administration granted. Rev. St., 1903, ch. 77, §7; Leonard v. Motley, 75 Me. 418.

[d] A levy by attaching creditors is not defeated by an attachment and levy by the administrator, where the judgment in the latter proceeding is void for want of notice to the heir. Leonard v. Motley, 75 Me. 418.

50. Fiscus v. Moore, 121 Ind. 547, 23 N. E. 362, 7 L. R. A. 235.

51. Wick v. Hickey (Iowa), 103 N. W. 469. See Sartor v. Beaty, 25 S. C. 293; Cherry v. Boulton, 4 Myl. & Cr. 442, 41 Eng. Reprint 171; Richards v. Richards, 4 Eng. Con. Exch. Rep. 219, 9 Price 230.

52. Hoffman v. Armstrong, 90 Md. 123, 44 Atl. 1012; Smith v. Donnell, 9 Gill (Md.) 84.

53. Ala.—Nelson v. Murfee, 69 Ala. 598. Mo.—Ayres v. King, 168 Mo. 244, 249, 67 S. W. 558, 90 Am. St. Rep. 452. Tex.—Oxsheer v. Nave, 90 Tex. 568, 40 S. W. 7, 37 L. R. A. 98.

[a] Where at the time when the interest of an heir is sold under execution notice is given that the sale is subject to the right of the estate, if any, to have the indebtedness of the heir to the estate charged against the property, it may be so charged against

the share allotted to the purchaser in subsequent partition proceedings. Donaldson's Estate, 158 Pa. 292, 27 Atl. 959.

[b] **Secured Debt.**—That the indebtedness of the heir, who is insolvent, is partially secured by a lien on other property does not in any way affect the rights of the parties. Oxsheer v. Nave, 90 Tex. 568, 40 S. W. 7, 37 L. R. A. 98.

54. Webb v. Fuller, 85 Me. 443, 27 Atl. 346, 22 L. R. A. 177.

55. Thompson v. Myers, 95 Ky. 597, 26 S. W. 1014; Scobee v. Bridges, 87 Ky. 427, 9 S. W. 299. See Brown's Admr. v. Mattingly, 91 Ky. 275, 15 S. W. 353, which is distinguished in Thompson v. Myers, *supra*.

56. The debt of the heir to the ancestor is not a lien on the heir's share in the ancestor's realty. Mann v. Mann, 12 Heisk. (Tenn.) 245.

57. Ruiz v. Campbell, 6 Tex. Civ. App. 714, 26 S. W. 295.

58. Mass.—Tilton v. Tilton, 196 Mass. 562, 82 N. E. 704. Neb.—Boden v. Mier, 71 Neb. 191, 98 N. W. 701. N. J.—Denise v. Denise, 37 N. J. Eq. 163; Snyder v. Warbasse, 11 N. J. Eq. 463; Batton v. Allen, 5 N. J. Eq. 99, 43 Am. Dec. 630. Ohio.—Martin v. Martin, 56 Ohio St. 333, 46 N. E. 981. Pa.—Girard Life Ins., etc. Co. v. Wilson, 57 Pa. 182; Hughes' Appeal, 57 Pa. 179; McConkey v. McConkey, 9 Watts 352; Earnest v. Earnest, 5 Rawle. 213.

deceased child of an intestate,⁵⁹ or descends to him as heir of a devisee of the testator,⁶⁰ or where a legacy goes under the statute to the issue of a legatee who dies before the testator,⁶¹ debts due by the parent cannot be deducted.

In Louisiana collateral relatives claiming by representation are not bound to collate debts owed by their ancestor to the deceased, or gifts made by the deceased to him.⁶²

D. CHARACTER OF INDEBTEDNESS. — 1. General Principles. — To warrant retention, the debt must be a valid, subsisting one,⁶³ and be due and payable.⁶⁴ The representative cannot set off a fraudulent indebtedness where the rights of third persons are concerned.⁶⁵

Money borrowed by a married woman from the decedent may be set off against her distributive share, though, by reason of her coverture, she was incapacitated from borrowing.⁶⁶ Generally debts due by a husband cannot be set off against the distributive share of his wife.⁶⁷ Nor can debts due an administrator from a guardian in the latter's personal capacity be set off against the share of the ward.⁶⁸ The indebtedness of a legatee draws interest until such legacy becomes due and payable.⁶⁹

Examples. — Among the classes of debts which may be set off or retained are debts due from a legatee as surviving partner of a firm,⁷⁰ the amount due the estate from the surviving wife,⁷¹ debts for which the decedent was surety, though they were paid by the representative after the decedent's death,⁷² debts assumed by the

59. **Ky.**—*Wells v. Wells*, 6 Ky. L. Rep. 216. **Md.**—*Kendall v. Mondell*, 67 Md. 444, 10 Atl. 240. **S. C.**—*Stokes v. Stokes*, 62 S. C. 346, 40 S. E. 662. **Tex.**—*Powers v. Morrison*, 88 Tex. 133, 30 S. W. 851, 53 Am. St. Rep. 738, 28 L. R. A. 521, *reversing* (Tex. Civ. App.), 30 S. W. 849.

60. *Smith v. Kearney*, 2 Barb. Ch. (N. Y.) 533.

61. *Carson v. Carson's Exr.*, 1 Mete. (Ky.) 300.

62. Succession of Bougere, 28 La. Ann. 743.

[a] Where there are no heirs in the direct line, and the succession falls exclusively to collateral heirs. Succession of Morgan, 23 La. Ann. 290.

63. Succession of Tautzin, 21 La. 536; *Hughes' Appeal*, 57 Pa. 179.

64. A debt not yet due cannot be set off against a legacy in equity, and equity will not enjoin the legatee from prosecuting an action at law to collect his legacy. *Hayes v. Hayes*, 2 Del. Ch. 191, 73 Am. Dec. 709.

65. *Rawlins v. Rawlins*, 75 Ga. 632.

66. *Bucknor's Estate*, 136 Pa. 23, 19 Atl. 1069, 20 Am. St. Rep. 891.

67. **La.**—Succession of Thibodaux, 10 La. Ann. 653. **Miss.**—*Anderson v. Gregg*, 44 Miss. 170. **S. C.**—*Kennedy v. Badgett*, 19 S. C. 591; *Roberts v. Adams*, 2 S. C. 337.

68. *Shriver v. Garrison*, 30 W. Va. 456, 4 S. E. 660.

69. *Bowen v. Evans*, 70 Iowa 368, 30 N. W. 638; *Adair v. Brimmer*, 74 N. Y. 539; *In re Griffing*, 39 Misc. 621, 80 N. Y. Supp. 659.

70. *Noble v. Tait*, 140 Ala. 469, 37 So. 278; *Ferris v. Burrows*, 34 Hun (N. Y.) 104.

[a] Even though it is not within the terms of a statute providing for the setting off of debts contracted with the decedent in his lifetime or with the representative. *Noble v. Tait*, 140 Ala. 469, 37 So. 278.

71. *Estate of Angle*, 148 Cal. 102, 82 Pac. 668.

72. **Ind.**—*Koons v. Mellett*, 121 Ind. 585, 23 N. E. 95, 7 L. R. A. 231. **N. C.**—*Ramsour v. Thompson*, 65 N. C. 628. **Ohio.**—*Lambright v. Lambright*, 74 Ohio St. 198, 78 N. E. 265. **Pa.**—*Baily's Estate*, 156 Pa. 634, 27 Atl. 560, 22 L. R. A. 444; *Appeal of Sproul*,

decendent,⁷³ and debts arising from the right of a surety to enforce contribution against his co-surety.⁷⁴

2. Joint Debts.—In some states the right of retainer is not affected by the fact that the debt is owing by a legatee or distributee and another jointly.⁷⁵ The several shares of two or more distributees may be retained to satisfy a judgment recovered against them jointly.⁷⁶

3. Debts or Liabilities in Favor of Representative or Estate. As a general rule, debts due to the representative personally from a legatee or distributee cannot be deducted from the latter's share of the estate,⁷⁷ unless the legatee or distributee consents to such deduction,⁷⁸ though the contrary has been held to be true where the demand of the distributee has been converted into a personal one against the representative by a decree of distribution.⁷⁹ While such a debt cannot be allowed as a credit in the administration account on the balance due by the representative,⁸⁰ it may, in equity, be allowed as a payment on the indebted legatee's or distributee's share of the estate.⁸¹

Debts or liabilities of a distributee in favor of the estate or the represen-

105 Pa. 442; *Manifold's Estate*, 5 Watts & S. 340.

[a] **A legacy may be withheld until the estate is exonerated** from a contingent liability arising from the fact that the testator was surety for the legatee, who has made default. *Appeal of Sproul*, 105 Pa. 442.

73. *Succession of Tournillon*, 15 La. Ann. 263.

74. *Baily's Estate*, 156 Pa. 634, 27 Atl. 560, 22 L. R. A. 444.

75. *Armour v. Kendall*, 15 R. I. 193, 2 Atl. 311.

[a] The right of retainer is not affected by the fact that the distributee's liability to the estate is as a member of a partnership, and is joint with that of the other partner. *Ex parte Wilson*, 84 S. C. 444, 66 S. E. 675.

[b] Notes may be set off though signed by persons other than the distributee as his sureties. *Ball v. Townsend*, Litt. Sel. Cas. (Ky.) 325.

76. *Webb v. Fuller*, 85 Me. 443, 27 Atl. 346, 22 L. R. A. 177.

[a] Where an administrator has a joint judgment against three distributees, he cannot set off more than two-thirds of it to an action brought for the use of two of them without showing that there is nothing due from the estate to the third. If, after such judgment was obtained, the administrator voluntarily paid the third out of the assets of the estate without re-

taining his pro rata share of the judgment, the amount so paid should be treated as a credit on one-third of the judgment, or as a discharge of one-third thereof if the payment was in excess of such third. *Rudolph v. Underwood*, 88 Ga. 664, 16 S. E. 55.

77. *Ala.*—*Kidd v. Porter*, 13 Ala. 91. *Ore.*—*Dray v. Bloch*, 29 Ore. 347, 45 Pac. 772. *Pa.*—*Bradshaw's Appeal*, 3 Grant 109.

[a] A claim for services rendered by the administrator prior to his appointment. *McLaughlin v. Barnes*, 12 Wash. 373, 41 Pac. 62.

[b] **Effect of Assignment.**—This is true notwithstanding a colorable assignment of the claim by the representative to a third party. *McLaughlin v. Barnes*, 12 Wash. 373, 41 Pac. 62.

78. *Kidd v. Porter*, 13 Ala. 91.

79. A decree of a surrogate directing an executor to pay a legacy to the legatee renders the executor personally liable, and hence in an action of debt on such a decree the executor may set off a debt due him personally from the legatee. *Dubois v. Dubois*, 6 Cow. (N. Y.) 494.

80. *Preston v. Davis*, 102 Va. 178, 45 S. E. 865.

81. In a suit to recover legacies or distributive shares. *Preston v. Davis*, 102 Va. 178, 45 S. E. 865; *Hooper v. Hooper*, 32 W. Va. 526, 9 S. E. 937.

tative in his official capacity, contracted after the death of the decedent may generally be deducted.⁸²

4. Debts Barred by the Statute of Limitations.—In some states debts due by an heir or legatee or distributee may be set off against or deducted from his share of the estate, even though they are barred by the statute of limitations,⁸³ though the contrary has been

82. Ala.—Code, 1907, §2722; Noble v. Tait, 140 Ala. 469, 37 So. 278. **Ind.** New v. New, 127 Ind. 576, 27 N. E. 154. **Me.**—Rose v. O'Brien, 50 Me. 188. **Mass.**—Henshaw v. Whitney, 11 Gray 223. **Miss.**—McGee v. Ford, 5 Smed. & M. 769; Mahon v. Bower's Admr., 1 How. 275. **Mo.**—Lietman's Est. v. Lietman, 149 Mo. 112, 50 S. W. 307, 73 Am. St. Rep. 374; Hopkins v. Thompson, 73 Mo. App. 401. **N. H.** Wilson v. Edmonds, 24 N. H. 517. **N. C.** Allen v. Smitherman, 41 N. C. 341. **Ohio.**—Lambright v. Lambright, 74 Ohio St. 198, 78 N. E. 265. **Ore.**—Dray v. Bloch, 29 Ore. 347, 45 Pac. 772. **R. I.** In re Fisher, 19 R. I. 53, 31 Atl. 579. **Tenn.**—Fulton v. Davidson, 3 Heisk. 614; Stewart v. Glenn, 3 Heisk. 581. **Va.**—Kent v. Kent, 34 S. E. 32.

[a] Notes given to the administrator for the purchase price of personal estate sold by him, though they are signed by persons other than the distributee as his sureties. Ball v. Townsend, Litt. Sel. Cas. (Ky.) 325.

[b] **Liability of a distributee for property of the estate converted** by him to his own use after the death of the decedent may be set off. Small v. Usher, 77 S. C. 112, 57 S. E. 623.

[c] **Liability Incurred by Representative.**—(1) A debt incurred to the estate itself by the distributee as administrator (Gosnell v. Flack, 76 Md. 423, 25 Atl. 411, 18 L. R. A. 158), (2) or money owed by an executor to the estate as a result of misapplication of the assets, or otherwise, should be deducted from the amount of a legacy to him, may be set off. Grant v. Edwards, 92 N. C. 447. (3) The sureties of an administrator are chargeable for his debt to the estate to the extent of his interest in the estate. Sanchez v. Forster, 133 Cal. 614, 65 Pac. 1077.

83. Ga.—See Rawlins v. Rawlins, 75 Ga. 632. **Ind.**—Holmes v. McPheeters, 149 Ind. 587, 49 N. E. 452. **Ia.**—See Garrett v. Pierson, 29 Iowa 304. **Kan.** Holden v. Spier, 65 Kan. 412, 70 Pac. 348. **Mo.**—Lietman's Est. v. Lietman,

149 Mo. 112, 50 S. W. 307, 73 Am. St. Rep. 374. **N. Y.**—In re Foster's Estate, 15 Misc. 175, 37 N. Y. Supp. 36; In re Smith's Estate, 14 Misc. 169, 35 N. Y. Supp. 701; Rogers v. Murdock, 45 Hun 30; Matter of Bogart, 28 Hun 466. **R. I.**—See Armour v. Kendall, 15 R. I. 193, 2 Atl. 311. **S. C.**—Ex parte Wilson, 84 S. C. 444, 66 S. E. 675; Stokes v. Stokes, 62 S. C. 346, 40 S. E. 662; Sartor v. Beaty, 25 S. C. 293; White v. Moore, 23 S. C. 456; Wilson v. Kelly, 16 S. C. 216. **Vt.**—Tinkham v. Smith, 56 Vt. 187. **Eng.**—In re Cordwell's Estate, L. R. 20 Eq. 644; Courtenay v. Withians, 3 Hare 539, 67 Eng. Reprint 494; Coates v. Coates, 33 Beav. 249, 55 Eng. Reprint 363; Rose v. Gould, 15 Beav. 189, 51 Eng. Reprint 509.

[a] **Louisiana.**—(1) An heir cannot plead against collation that the debt which he owes is prescribed (Succession of Bougere, 28 La. Ann. 743), (2) especially where the debt is not barred until after the opening of the succession. Succession of Skipwith, 15 La. Ann. 209.

[b] Mere efflux of time from the death of the testator does not prevent the retention from the share of a legatee of such sum as may be due from him as surviving partner of the testator. Noble v. Tait, 140 Ala. 469, 37 So. 278.

[c] Where a note is inventoried as an asset and charged as such to the executor in his final account which is approved and accepted, neither the probate court on distribution nor the superior court on appeal from the order of distribution can determine the question whether it is barred by limitations. Cone's Appeal, 68 Conn. 84, 35 Atl. 781.

[d] **Obligation of Surety.**—In White v. Moore, 23 S. C. 456, it was doubted whether this would be true as to the obligation of a surety, the court saying that they were not aware that it had ever been held that there was a moral obligation on the part of the

held to be true where the debt is presumed paid by the lapse of time.⁸⁴

Other courts do not permit the deduction or set off of debts so barred,⁸⁵ except in the case of legacies, where the will shows that such was the testator's intention.⁸⁶

Persons claiming under a legatee or distributee may set up the bar of limitations where the legatee or distributee could do so.⁸⁷

5. Effect of Discharge in Bankruptcy.—The right of retention exists though the legatee or distributee has been discharged in bankruptcy.⁸⁸

6. Exemptions.—Statutory exemptions cannot be claimed as against the right of retainer.⁸⁹

E. MANNER OF ENFORCING RIGHT.—PROCEEDINGS IN PROBATE COURT.—Generally the deduction may be made by the probate court on distribution,⁹⁰ though the contrary is true in some states.⁹¹

In New York it has been held that the surrogate's court has no jurisdiction to pass on the validity of the debt.⁹²

surety to pay after his legal obligation had been barred.

84. *Sartor v. Beaty*, 25 S. C. 293; *White v. Moore*, 23 S. C. 456.

85. Ill.—*Hesley v. Shaw*, 120 Ill. App. 92. But see *Jeffers v. Jeffers*, 139 Ill. 368, 28 N. E. 913; *Esmond v. Esmond*, 154 Ill. App. 357. **Me.**—*Holt v. Libby*, 80 Me. 329, 14 Atl. 201; *Wadleigh v. Jordan*, 74 Me. 483. **Mass.** *Allen v. Edwards*, 136 Mass. 138. **Neb.** *Boden v. Mier*, 71 Neb. 191, 98 N. W. 701. **Ohio.**—*Harrod v. Carder's Admr.*, 3 Ohio C. C. 479. **Pa.**—*Light's Estate*, 136 Pa. 211, 20 Atl. 536; *Milne's Appeal*, 99 Pa. 483; *Reed v. Marshall*, 90 Pa. 345.

[a] Even though the debt is not barred at the death of the testator. *Light's Estate*, 136 Pa. 211, 20 Atl. 536.

86. *Holt v. Libby*, 80 Me. 329, 14 Atl. 201; *Allen v. Edwards*, 136 Mass. 138.

For the construction of wills in this regard see the title "Wills."

87. One who attaches a legacy by trustee process may set up the statute as a bar to an offset claimed by the executor against the legatee. *Holt v. Libby*, 80 Me. 329, 14 Atl. 201.

88. Ia.—*In re Estate of Fussell*, 129 Iowa 498, 105 N. W. 503. **La.**—See *Succession of Cucullu*, 9 La. Ann. 96. **S. C.**—*Sartor v. Beaty*, 25 S. C. 293; *Wilson v. Kelly*, 16 S. C. 216.

89. *Fiscus v. Fiscus*, 127 Ind. 283, 26 N. E. 831; *Duffy v. Duffy*, 155 Mo. 144, 55 S. W. 1002.

90. Ill.—*Esmond v. Esmond*, 154 Ill. App. 357. **Kan.**—*Holden v. Spier*, 65 Kan. 412, 70 Pac. 348. **Mass.**—*Tilton v. Tilton*, 196 Mass. 562, 82 N. E. 704; *Allen v. Edwards*, 136 Mass. 138. **Mo.** *Lietman's Est. v. Lietman*, 149 Mo. 112, 50 S. W. 307, 73 Am. St. Rep. 374, overruling *Ford v. Talmage*, 36 Mo. App. 65.

[a] "As a preliminary to a distribution, the Orphans' Court may settle all questions of advancement or of debts that are to stand for advancements; but it cannot go farther and decide that a distributee is in debt beyond his share of the estate, and such a decision can furnish no foundation for any process to compel payment of a debt or any part of it." The surplus "is not different from a claim against any other debtor, and must be collected by the administrator or accounted for by him in the same way." *Springer's Appeal*, 29 Pa. 208.

91. *In re Smith*, 108 Cal. 115, 40 Pac. 1037.

[a] Where a deceased legatee was also executor the court cannot deduct from his distributive share a balance due from him to the estate as such executor. *In re Smith*, 108 Cal. 115, 40 Pac. 1037.

[b] On distribution a distributee cannot be charged with property of the decedent received by such distributee in another state. *In re Cook*, 77 Cal. 220, 17 Pac. 923, 19 Pac. 431, 11 Am. St. Rep. 267, 1 L. R. A. 567.

92. It must accept the assertion of

In Illinois the legatee must claim credit for the indebtedness at the time when he renders his final account, and, if he fails to do so, he cannot set it off in a subsequent action on his bond to recover the amount adjudged to be due the legatee or distributee by the decree of distribution.⁹³

Equity has jurisdiction to subject the interest of the heir in the lands of the ancestor to the payment of the heir's debt to the estate as against third persons claiming as judgment debtors of the heirs.⁹⁴ The existence of a debt from the heir to the estate must be alleged.⁹⁵

A judgment obtained by the ancestor in his lifetime against the heir cannot be collaterally attacked by the heir in a proceeding to subject his share of the estate to the payment of the same,⁹⁶ except in case of fraud or collusion by third persons claiming under the heir.⁹⁷

Partition.—Generally an heir or devisee cannot be required to account for debts owing by him to the estate in a suit to partition realty among heirs or devisees,⁹⁸ though there is authority to the contrary.⁹⁹

Attachment.—In Maine the debt of an heir or distributee of a solvent intestate estate to the decedent may be enforced by suit and attachment of his share.¹

F. RECOVERY OF EXCESS OF DEBT.—The debt of the distributee is extinguished only to the amount of his distributive share.² If the

the executor that it is a valid existing indebtedness. *Matter of Colwell*, 15 N. Y. St. 742; *Smith v. Murray*, 1 Dem. Sur. (N. Y.) 34.

93. *People v. Lease*, 71 Ill. App. 380.
94. *Streety v. McCurdy*, 104 Ala. 493, 16 So. 686.

95. *Streety v. McCurdy*, 104 Ala. 493, 16 So. 686.

96. *Streety v. McCurdy*, 104 Ala. 493, 16 So. 686.

[a] The debtor must proceed by an original bill or a cross-bill to have the same set aside. *Streety v. McCurdy*, 104 Ala. 493, 16 So. 686.

97. *Streety v. McCurdy*, 104 Ala. 493, 16 So. 686.

98. *Jeffers v. Jeffers*, 139 Ill. 368, 28 N. E. 913. See *Fiscus v. Moore*, 121 Ind. 547, 23 N. E. 362, 7 L. R. A. 235.

99. *Ruiz v. Campbell*, 6 Tex. Civ. App. 714, 26 S. W. 295.

[a] Where the realty is distributed in kind, or is sold under order of court and the proceeds distributed. *Barnett v. Thomas*, 36 Ind. App. 441, 75 N. E. 868, 114 Am. St. Rep. 385.

1. The statutory lien on the share of one entitled to a share of a solvent intestate estate, for a debt owed by him to the intestate, may be enforced by suit and attachment of the share within two years after administration is granted,

and by levy within thirty days after judgment. Me. Rev. St., 1903, ch. 77, §7; *Weston v. Colby*, 107 Me. 104, 77 Atl. 637.

[a] The suit must be commenced within two years after administration granted. *Leonard v. Motley*, 75 Me. 418; *Fenderson v. Belcher*, 68 Me. 59.

[b] Where the lien is sought to be enforced by suit and attachment, neither the writ nor the declaration need designate any part of the share as that part on which the lien is claimed. It is sufficient if it appears in the writ and declaration that the suit and attachment is to enforce the lien given by this section. *Weston Co. v. Colby*, 107 Me. 104, 77 Atl. 637.

[c] The suit is not based upon the statute, but upon the indebtedness of the heir to the intestate. Hence the rule that in actions based on a statute all the facts stated in the statute as constituting the right of action should be stated in the declaration does not apply. *Weston Co. v. Colby*, 107 Me. 104, 77 Atl. 637.

[d] To constitute a valid judgment in such a suit the heir must have actual or constructive notice of the suit. *Leonard v. Motley*, 75 Me. 418.

2. *Brunetti v. Barnabe*, 7 Rob. (La.) 117.

debt of the distributee is greater than his distributive share, the representative may recover the balance in an action brought for that purpose,³ but under some statutes no decree can be made by the probate court for the excess.⁴

Where this latter rule obtains a decree of the probate court ascertaining the amount owing by a distributee to the estate is not binding as to the excess in a subsequent suit by the representative to recover such excess.⁵

G. RIGHT OF LEGATEE OR DISTRIBUTEE TO CLAIM SET-OFF.—Generally a legatee or distributee,⁶ or his surety,⁷ or a purchaser from him,⁸ or other person claiming under him,⁹ may set off his legacy or distributive share against a debt owing by him to the estate, unless some special reason exists for the collection of such judgment by the representative.¹⁰

It has been held, however, that the representative will not be enjoined from collecting the debt by an action at law, where it does not appear that he is insolvent or that his bond is insufficient;¹¹ that a set-off will not be allowed where it would necessitate a complete settlement of the representative's accounts¹² in a county other than

3. *Brunetti v. Barnabe*, 7 Rob. (La.) 117.

4. Ala. Code, 1907, §2723; *Caldwell v. Caldwell*, 121 Ala. 598, 25 So. 825.

[a] "The only jurisdiction conferred upon the probate court is to ascertain that the distributee's indebtedness is equal to or exceeds his distributive share." *Caldwell v. Caldwell*, 121 Ala. 598, 25 So. 825.

[b] "It may be that the proper practice under these sections would be for the probate court to simply ascertain that the distributee's indebtedness to the estate exceeds the distributive share of such distributee, and that it is set off in favor of the executor or administrator against his distributive share, and he be not allowed to participate in the distribution of the estate. But when it is apparent that no injury resulted in stating the amount of the indebtedness owing by the distributee in the decree and none could possibly result, the decree will not be disturbed should it appear that the amount of the indebtedness as stated in the decree is too large. Whenever the amount of his indebtedness is confessedly in excess of his distributive share, there is no error of which he can be heard to complain." *Caldwell v. Caldwell*, 121 Ala. 598, 25 So. 825.

5. *Caldwell v. Caldwell*, 121 Ala. 598, 25 So. 825.

6. Ga.—*Dorsey v. Simmons*, 49 Ga.

245; *Moody v. Ellerbie*, 36 Ga. 666; *Carter v. McMichael*, 20 Ga. 96; *Swift v. Swift*, 13 Ga. 140. Ky.—*Ball v. Townsend*, Litt. Sel. Cas. 325. Mass. See *Blackler v. Boott*, 114 Mass. 24. Mo.—*Whaley v. Cape*, 4 Mo. 233.

[a] The heir who owes a debt to the succession is entitled to collate it, and the administrator cannot sue him and compel him to bring the money into court where there is no showing that it is necessary for the payment of debts. *Davis v. Davis*, 5 La. Ann. 561.

[b] **Injunction.**—May enjoin the enforcement of a judgment against him for the purchase money of property of the estate bought by him. *Parker v. Britt*, 4 Heisk. (Tenn.) 243.

7. *Wright v. Austin*, 56 Barb. (N. Y.) 13; *Allen v. Smitherman*, 41 N. C. 341.

8. *Dorsey v. Simmons*, 49 Ga. 245.

9. A widow may set off a share belonging to her by survivorship against a judgment against her deceased husband levied on land which she holds under him. *Dorsey v. Simmons*, 49 Ga. 245.

10. *Dorsey v. Simmons*, 49 Ga. 245; *Davis v. Davis*, 5 La. Ann. 561.

11. *Roberts v. Percival*, 8 Ky. L. Rep. 788.

12. In *Stone v. Stone's Exr.*, 7 Ky. L. Rep. 449, a legatee was not allowed to set off his legacy against a note on

that in which he qualified; and that legacies cannot be set off where they have not been assented to by the executor.¹³

IV. RIGHTS OF ACTION AS BETWEEN BENEFICIARY AND ESTATE.—A. ACTIONS IN REGARD TO REAL PROPERTY.—Except where the rule has been changed by statute,¹⁴ the personal representative of the deceased cannot bring actions relating to the real property of the deceased.¹⁵ Thus the personal representative cannot maintain an action of forcible detainer to recover real property leased by the decedent,¹⁶ except where the statute permits him to do so,¹⁷ and even in the latter case the heir is not necessarily deprived of his right to sue.¹⁸

There is a conflict of authority as to the effect in this regard of a statute giving the representative the right to the possession of the realty.¹⁹

Even where the representative has a right to the possession of the realty and to the rents and profits accruing after the death of the decedent, it is sometimes held that the heir is not deprived of his rights of action in relation thereto unless the representative takes possession, or asserts his right thereto and follows it up by proceedings to obtain such possession.²⁰

The proper party to maintain actions relating to the realty of the deceased, such as actions to quiet title,²¹ or to compel a conveyance

the ground that it would necessitate a complete settlement of the executor's accounts in a county other than that in which he qualified.

13. *Latimer v. Sullivan*, 30 S. C. 111, 8 S. E. 639, followed in *Latimer v. Mahaffey*, 30 S. C. 612, 8 S. E. 642.

14. See the statutes of the various states, including the following:

[a] In California actions to determine any adverse claim to realty may be maintained by or against the representative in all cases where they might have been maintained by or against the decedent. Code Civ. Proc., §1582; *Collins v. O'Laverty*, 136 Cal. 31, 68 Pac. 327; *Pennie v. Hildreth*, 81 Cal. 127, 22 Pac. 398.

[b] In New Hampshire the representative may maintain any action necessary and proper to be brought in relation to realty where the estate is administered as insolvent, until the administration is closed. Pub. St., 1901, ch. 191, §15; *Baker v. Haskell*, 48 N. H. 426.

See also following sections dealing with particular actions in regard to real property.

15. *Le Moyne v. Quimby*, 70 Ill. 399; *Shoemate v. Lockridge*, 53 Ill. 503;

Irwin v. Wollpert, 28 Ill. App. 136; *Brown v. Strickland*, 32 Me. 174 (administrator de bonis non.

16. *Roberts v. Baker*, 65 Ill. App. 111; *Holliday v. Doyon*, 15 Mo. 407.

[a] At common law he could not do so. *Beezley v. Burgett*, 15 Iowa 192.

17. The administrator may maintain the action under a statute giving "the legal representative" the right to do so. *Beezley v. Burgett*, 15 Iowa 192.

18. *Beezley v. Burgett*, 15 Iowa 192.

19. In Michigan it is held that such a statute does not deprive the heirs of the right to recover possession from a tenant holding over after the expiration of the lease. *Streeter v. Paton*, 7 Mich. 341.

[a] In Florida the heirs cannot maintain an action for unlawful detainer against a tenant holding under a lease made by the decedent during his lifetime. *Scott v. Lloyd*, 16 Fla. 151.

20. In the absence of effective action on the part of the representative, the right remains with the heir. *Nashville, C. & St. L. R. Co. v. Karthaus*, 150 Ala. 633, 43 So. 791; *Calhoun v. Fletcher*, 63 Ala. 574.

21. *Le Moyne v. Quimby*, 70 Ill. 399. See *infra*, IV, I, and the title "Quieting Title."

of the legal title thereto,²² or to maintain a writ of entry for the recovery of land is the heir or devisee as the case may be.²³

The heir may sue to enjoin the enforcement of an ordinance prohibiting burials in a cemetery in which his ancestor owned a lot.²⁴

The heirs are indispensable parties in any controversy which will affect the title to land.²⁵

Land Taken Under Power of Eminent Domain. — The representative, rather than the heir, is entitled to recover the damages awarded for land taken under the power of eminent domain during the decedent's lifetime.²⁶ On the other hand, the heir rather than the representative is entitled to recover damages for land so taken after the death of the decedent.²⁷

B. ACTIONS IN REGARD TO PERSONAL PROPERTY. — 1. The General Rule. — As a rule the personal representative of the deceased may maintain all personal actions in relation to the property of the estate.²⁸ He may sue to collect debts or demands due the decedent,²⁹ or to recover personal property belonging to the estate,³⁰ and may maintain actions for the conversion thereof,³¹ or for damages for injuries

22. *Janes v. Throckmorton*, 57 Cal. 368.

23. *Walsh v. Wheelwright*, 96 Me. 174, 52 Atl. 649; *Chadbourn v. Rackliff*, 30 Me. 354.

24. *Hume v. Laurel Hill Cemetery*, 142 Fed. 552, California.

25. *Jones v. Jones*, 107 Ark. 402, 155 S. W. 117; *Chowning v. Stanfield*, 49 Ark. 87, 4 S. E. 276.

26. *Moore v. City of Boston*, 8 Cush. (Mass.) 274; *Upper Appomattox Co. v. Hardings*, 11 Gratt. (Va.) 1. See *Howcott v. Warren*, 29 N. C. 20.

[a] The right to recover such damages is a chose in action. *Indianapolis & V. R. Co. v. Price*, 153 Ind. 31, 53 N. E. 1018; *Church v. Grand Rapids & I. R. Co.*, 70 Ind. 161.

[b] The heirs have no right to petition for increase of damages in such case. *Neal v. Knox & L. R. Co.*, 61 Me. 298.

27. *Neal v. Knox & L. R. Co.*, 61 Me. 298; *Boynton v. Peterborough & S. R. Co.*, 4 Cush. (Mass.) 467.

[a] This is true though the estate has previously been represented insolvent and the administrator afterwards obtains a license to sell the land. *Boynton v. Peterborough & S. R. Co.*, 4 Cush. (Mass.) 467.

28. *Miss. Code*, 1906, §2091; *Vicksburg & M. R. Co. v. Phillips*, 64 Miss. 693, 2 So. 537.

29. *U. S. — Gormley v. Bunyan*, 138 U. S. 623, 11 Sup. Ct. 453, 34 L. ed.

1086. *Conn. — Wooster v. Bishop*, 2 Root 230. *Ind. — Burns' Ann. St.*, 1908, §2808; *Bruning v. Golden*, 159 Ind. 199, 64 N. E. 657. *Me. — Wheeler v. Haskins*, 41 Me. 432. *Minn. — Cooper v. Hayward*, 71 Minn. 374, 74 N. W. 152, 70 Am. St. Rep. 330. *Tex. — Sayles' Civ. St.*, 1897, art. 1197. *Va. — Code*, 1904, §2654. *W. Va. — Code*, 1906, §3273. *Wis. — Sanford v. McCreedy*, 28 Wis. 103.

30. *Fla. — Branch v. Branch*, 6 Fla. 314. *Ill. — McLean County Coal Co. v. Long*, 91 Ill. 617. *Md. — Rockwell v. Young*, 60 Md. 563, 571. *Vt. — Pub. St.*, 1906, §2834. *Wis. — Meyer v. Garthwaite*, 92 Wis. 571, 66 N. W. 704.

31. *Cal. — Horton v. Jack*, 115 Cal. 29, 46 Pac. 920; *s. c.*, 37 Pac. 652. *Conn. — Kirby v. Clark*, 1 Root 389. *Ga. — Liptrot v. Holmes*, 1 Ga. 381. *Ill. — McLean County Coal Co. v. Long*, 91 Ill. 617. *Md. — Rockwell v. Young*, 60 Md. 563, 571. *Mo. — Smith v. Grove*, 12 Mo. 51. *Vt. — Pub. St.*, 1906, §2834.

[a] **Conversion in Decedent's Lifetime.** — *Kirby v. Clark*, 1 Root (Conn.) 389.

[b] **Conversion After Decedent's Death.** — Under the doctrine of relation he may recover for the conversion of personalty occurring after the death of the decedent and before his appointment. *Jahns v. Nolting*, 29 Cal. 507; *Hayden v. Roe*, 66 Wis. 288, 28 N. W. 186; *Knox v. Bigelow*, 15 Wis. 415.

thereto.³² Statutes in some states provide that he may maintain actions for the recovery of personalty,³³ or to determine adverse claims thereto,³⁴ or against any person who has wasted, destroyed, taken, or carried away, or converted to his own use the goods of the decedent during the latter's lifetime.³⁵

Indeed, the only person who is authorized to maintain an action to recover the personal assets of the estate³⁶ is the personal representa-

32. Fla.—Branch v. Branch, 6 Fla. 314. Ia.—Morrison v. Burlington, C. R. & N. R. Co., 84 Iowa 663, 51 N. W. 75. Vt.—Pub. St., 1906, §2834. Wis.—Hayden v. Roe, 66 Wis. 288, 28 N. W. 186.

[a] Trespass de bonis asportatis for taking and carrying away trees during decedent's lifetime they being personalty after they are severed from the freehold. Hill v. Penny, 17 Me. 409; Wilbur v. Gilmore, 21 Pick. (Mass.) 250.

[b] At common law actions for trespasses to personal property did not survive, but this rule was changed by the statutes of 4 Edw. III, and 3 & 4 William IV. Reed v. Peoria & O. R. Co., 18 Ill. 403; Forist v. Androscooggin R. I. Co., 52 N. H. 477.

[c] The statute of 4 Edw. III, ch. 7, "authorized an executor to maintain an action of trespass for chattels taken and carried away in the lifetime of his testator. The principle, by an equitable and somewhat liberal construction of the statute, was extended to all cases of injuries to personal property, whether actually removed or destroyed or not." Wilbur v. Gilmore, 21 Pick. (Mass.) 250. See also Noice v. Brown, 39 N. J. L. 569.

33. Cal.—Code Civ. Proc., §1582. Ind.—Mark v. North, 155 Ind. 575, 57 N. E. 902. Nev.—Rev. Laws, 1912, §6022; Schwartz v. Stock, 26 Nev. 128, 153, 65 Pac. 351. S. D.—Prob. Code, §243, Comp. Laws, 1910, p. 505; Subera v. Jones, 20 S. D. 628, 108 N. W. 26. Tex.—Sayles' Civ. St., 1897, art. 1197. Utah.—Comp. Laws, 1907, §3914. Wash. Rem. & Ball. Ann. Codes & St., §1535. Wyo.—Comp. St., 1910, §5562; First Nat. Bank v. Ludvigsen, 8 Wyo. 230, 56 Pac. 994, 57 Pac. 934, 80 Am. St. Rep. 928.

34. Cal. Code Civ. Proc., §1582; Utah Comp. Laws, 1907, §3914.

35. Cal.—Code Civ. Proc., §1583; Horton v. Jack, 115 Cal. 29, 46 Pac.

920; s. c., 37 Pac. 652; Jahns v. Nolt-ing, 29 Cal. 507. Mont.—Rev. Codes, 1907, §7605. Nev.—Rev. Laws, 1912, §6023. S. D.—Prob. Code, §244, Comp. Laws, 1910, p. 506; Subera v. Jones, 20 S. D. 628, 108 N. W. 26. Utah. Comp. Laws, 1907, §3915. Va.—Code, 1904, §2655. Wash.—Rem. & Ball. Ann. Codes & St., §1536. W. Va.—Code, 1906, §3274. Wyo.—Comp. St., 1910, §5563.

36. U. S.—Newman v. Schwerin, 61 Fed. 865, 10 C. C. A. 129. Ala.—Tillery v. Tillery, 155 Ala. 495, 46 So. 582; Teal v. Chancellor, 117 Ala. 612, 23 So. 651; Davenport v. Brooks, 92 Ala. 627, 9 So. 153; Huddleston v. Huey, 73 Ala. 215; Sullivan v. Lawler, 72 Ala. 72; Sullivan v. Lawler, 72 Ala. 68. Ark.—Whelan v. Edwards, 31 Ark. 723; Lemon's Heirs v. Rector, 15 Ark. 436. Colo.—Hall v. Cowle's Estate, 15 Colo. 343, 25 Pac. 705. Conn.—West v. Howard, 20 Conn. 581. Ga.—Code, 1911, §3933; Morgan v. Woods, 69 Ga. 599; Murphy v. Pound, 12 Ga. 278. Ill. Moore v. Brandenburg, 248 Ill. 232, 93 N. E. 733, 140 Am. St. Rep. 206; Me-Lean County Coal Co. v. Long, 91 Ill. 617. Ind.—Finnegan v. Finnegan, 125 Ind. 262, 25 N. E. 341; Pond v. Sweetser, 85 Ind. 144; Ferguson v. Barnes, 58 Ind. 169. Ky.—Bennett v. Bennett's Admr., 134 Ky. 444, 120 S. W. 372; Williams v. Coffman, 31 Ky. L. Rep. 151, 101 S. W. 919; Nelson v. Nelson, 29 Ky. L. Rep. 885, 96 S. W. 794; Loyd v. Loyd, 20 Ky. L. Rep. 347, 46 S. W. 485; Irons v. Luckey, 1 A. K. Marsh. 74; Woodyard's Heirs v. Threlkeld, 1 A. K. Marsh. 10; Thomas v. White, 3 Litt. 177, 14 Am. Dec. 56. Md.—Lawson v. Burgee, 88 Atl. 121; Smith v. Dennis, 33 Md. 442; Neale v. Hagthorp, 3 Bland 551. See Rockwell v. Young, 60 Md. 563. Mich. Palmer v. Palmer, 55 Mich. 293, 21 N. W. 352; Cullen v. O'Hara, 4 Mich. 132. Miss.—Jones v. Clemmer, 98 Miss. 508,

tive. Thus, as a rule, he alone can maintain replevin,³⁷ or actions

54 So. 4; *Ricks v. Hilliard*, 45 Miss. 359. **Mo.**—*Brown v. Turner*, 113 Mo. 27, 20 S. W. 660; *Smith v. Denny*, 37 Mo. 20; *Salmon's Adms. v. Davis*, 29 Mo. 176; *Griesel v. Jones*, 123 Mo. App. 45, 99 S. W. 769; *McDowell v. Orphan School*, 87 Mo. App. 386; *Hendrix v. Dickson*, 69 Mo. App. 197. **N. H.** *Champollion v. Corbin*, 71 N. H. 78, 51 Atl. 674; *Weeks v. Jewett*, 45 N. H. 540. **N. J.**—*Buchanan v. Buchanan*, 75 N. J. Eq. 274, 71 Atl. 745, 138 Am. St. Rep. 563, 22 L. R. A. (N. S.) 454. **N. Y.**—*Segelken v. Meyer*, 94 N. Y. 473; *Nunnally v. Robinson*, 113 App. Div. 848, 99 N. Y. Supp. 594. **N. C.** *Varner v. Johnston*, 112 N. C. 570, 17 S. E. 483; *Davidson v. Potts*, 42 N. C. 272. **Ohio.**—*McBride v. Vance*, 73 Ohio St. 258, 76 N. E. 938, 112 Am. St. Rep. 723; *Davis v. Corwine*, 25 Ohio St. 668; *Lewis v. Eutsler*, 4 Ohio St. 354; *Reed v. Jordan*, 12 Ohio C. C. 161. **Pa.** *Lee v. Gibbons*, 14 Serg. & R. 105; *Griffin v. Brower*, 21 Pa. Co. Ct. 188. **S. C.**—*Grant v. Poyas*, 62 S. C. 426, 40 S. E. 891. **Tenn.**—*Hurt v. Fisher*, 96 Tenn. 570, 35 S. W. 1085; *Smith v. Gooch*, 6 Lea 536; *Brandon v. Mason*, 1 Lea 615; *Brown v. Bibb*, 2 Coldw. 434; *Thurman v. Shelton*, 10 Yerg. 383; *Trafford v. Wilkinson*, 3 Tenn. Ch. 449. **Tex.**—*Webster v. Willis*, 56 Tex. 468; *Patton v. Gregory*, 21 Tex. 513; *Rylie v. Stammire* (Tex. Civ. App.), 77 S. W. 626. **Vt.**—*Mason v. Mason's Exrs.*, 76 Vt. 287, 56 Atl. 1011. **W. Va.**—*Matheny v. Ferguson*, 55 W. Va. 656, 47 S. E. 886; *Wilson v. Straight*, 46 W. Va. 651, 33 S. E. 758; *Richardson v. Donehoo*, 16 W. Va. 685, 711. **Wis.** *Murphy v. Hanrahan*, 50 Wis. 485, 7 N. W. 436.

[a] "The reason of the rule is that creditors have a prior right to satisfaction out of these assets, and the personal representative is a trustee for them as well as for the beneficiaries." *Hurt v. Fisher*, 96 Tenn. 570, 35 S. W. 1085. To the same effect, *Brandon v. Mason*, 1 Lea (Tenn.) 615.

[b] Heirs cannot sue in law or in equity to recover the unadministered assets of the intestate. *McChord v. Fisher's Heirs*, 13 B. Mon. (Ky.) 193.

[c] One of the next of kin cannot maintain an action to recover his share

of the estate from another of the next of kin who has possession of the whole of the property of the decedent. *Palmer v. Green*, 63 Hun 6, 17 N. Y. Supp. 441.

[d] **Heir Must Show Transfer to Himself.**—(1) The heir cannot recover personalty without pleading and proving that title thereto was duly transferred to him by the legal representative. *McKenney v. Minahan*, 119 Wis. 651, 97 N. W. 489; *Buttles v. De Baum*, 116 Wis. 323, 93 N. W. 5. (2) Failure to so plead is a failure to state a cause of action, and is not to be reached by a demurrer for want of capacity to sue or for defect of parties, and hence is not waived by a failure to interpose such a demurrer. *McKenney v. Minahan*, 119 Wis. 651, 97 N. W. 489.

[e] **The representative of a ward** alone can sue the guardian to recover money collected by him belonging to the estate. *Miller v. Ash*, 156 Cal. 544, 105 Pac. 600.

[f] **An action for breach of a bond** to support the obligee and his wife and daughter must be brought by the administrator of the obligee. It cannot be brought by the daughter. *Sanders v. Filley*, 12 Pick. (Mass.) 554.

[g] **The administrator of a deceased distributee** is a necessary party to a proceeding by heirs to obtain a fund in court on the ground that it is to be treated as realty. *Cox v. Roome*, 36 N. J. Eq. 317.

[h] **Sole Distributee.**—The heir cannot sue "without the intervention of the administrator even though he be the sole distributee of the estate." **Mo.**—*State ex rel. Hounsom v. Moore*, 18 Mo. App. 406. **N. H.**—*Weeks v. Jewett*, 45 N. H. 540. **N. Y.**—*Woodin v. Bagley*, 13 Wend. 453.

[i] **The heirs and distributees cannot properly join with the administrator as complainants.** **Cal.**—*Grattan v. Wiggins*, 23 Cal. 16. **Tenn.**—*Thurman v. Shelton*, 10 Yerg. 383. **Va.**—*Graveley v. Graveley*, 84 Va. 145, 4 S. E. 218, since they have separate and distinct claims.

37. Ill.—*McLean County Coal Co. v. Long*, 91 Ill. 617. **Miss.**—*Jones v. Clemmer*, 98 Miss. 508, 54 So. 4. **Mo.**

for the conversion of personalty,³⁸ or for the taking and detention thereof,³⁹ or actions for damages for injuries thereto,⁴⁰ or actions to recover debts or demands due the estate,⁴¹ or to recover money loaned by the representative,⁴² or actions on promissory notes,⁴³ or open

Adey v. Adey, 58 Mo. App. 408; *McMillan v. Wacker*, 57 Mo. App. 220.

38. **Ark.**—*Graves v. Pinchback*, 47 Ark. 470, 1 S. W. 682; *Pryor v. Ryburn*, 16 Ark. 671. **Ga.**—*Smith v. Turner*, 112 Ga. 533, 37 S. E. 705; *Thompson v. Fenn*, 100 Ga. 234, 28 S. E. 39. **Ind.**—*Humphries v. Davis*, 100 Ind. 369; *Douglass v. McCarer*, 80 Ind. 91. **Mass.**—*Lawrence v. Wright*, 23 Pick. 128. **Mo.**—*Barnes v. Prewitt*, 28 Mo. App. 163. **N. Y.**—*Beecher v. Crouse*, 19 Wend. 306; *McKernan v. Thomas Conville Brew. Co.*, 86 N. Y. Supp. 191. **Tenn.**—*Upchurch v. Anderson*, 62 S. W. 1115.

[a] The heir cannot maintain such an action. **Ill.**—*McLean County Coal Co. v. Long*, 91 Ill. 617. **Ind.**—*Ferguson v. Barnes*, 58 Ind. 169. **Me.**—*Caleb v. Hearn*, 72 Me. 231. **Pa.**—*Roberts v. Messinger*, 134 Pa. 298, 19 Atl. 625.

[b] Devisees cannot sue for slaves tortiously and fraudulently run off and taken out of the state by a third person. *Emerson v. Staton*, 3 T. B. Mon. (Ky.) 116.

39. *Taber v. Packwood*, 1 Day (Conn.) 150.

40. The legatee cannot maintain such actions. *McLean County Coal Co. v. Long*, 91 Ill. 617.

41. **U. S.**—*Briggs v. Walker*, 171 U. S. 466, 19 Sup. Ct. 1, 43 L. ed. 243; *Stanley v. Mather*, 31 Fed. 860. **Ala.**—*Tillery v. Tillery*, 155 Ala. 495, 46 So. 582; *Sullivan v. Lawler*, 72 Ala. 68. **Ark.**—*Crane v. Crane*, 51 Ark. 287, 11 S. W. 1. **Cal.**—*Grattan v. Wiggins*, 23 Cal. 16. **Conn.**—*West v. Howard*, 20 Conn. 581. **Ill.**—*Moore v. Brandenburg*, 248 Ill. 232, 93 N. E. 733, 140 Am. St. Rep. 206. **Ind.**—*Finnegan v. Finnegan*, 125 Ind. 262, 25 N. E. 341; *Westerfield v. Spencer*, 61 Ind. 339; *Hall v. Brownlee*, 28 Ind. App. 178, 62 N. E. 457. **Ky.**—*Bennett v. Bennett's Admr.*, 134 Ky. 444, 120 S. W. 372; *McLemore v. Sebree Coal & M. Co.*, 121 Ky. 53, 88 S. W. 1062; *McChord v. Fisher's Heirs*, 13 B. Mon. 193; *Turner v. Gerald*, 16 Ky. L. Rep. 30; *Hill v. Moore*, 8 Ky. L. Rep. 538. **Mich.**—*Hol-*

lowell v. Cole, 25 Mich. 345. **Miss.**—*Traweck v. Kelly*, 60 Miss. 652. **Mo.**—*Rouggley v. Teichmann*, 10 Mo. App. 257. **Neb.**—*Prusa v. Everett*, 78 Neb. 250, 110 N. W. 568; *Tecumseh Nat. Bank v. McGee*, 61 Neb. 709, 85 N. W. 949; *Cox v. Yeazel*, 49 Neb. 343, 68 N. W. 483. **N. J.**—*Mathis v. Sears*, 3 N. J. L. 594; *Buchanan v. Buchanan*, 75 N. J. Eq. 274, 71 Atl. 745, 138 Am. St. Rep. 563, 22 L. R. A. (N. S.) 454; *Hayes v. Hayes*, 45 N. J. Eq. 461, 17 Atl. 634, *affirmed*, *Hayes v. Berdan*, 47 N. J. Eq. 567, 21 Atl. 339; *Dorscheimer v. Rorback*, 23 N. J. Eq. 46. **N. Y.**—*Woodin v. Bagley*, 13 Wend. 453. **N. C.**—*Fleming v. McKesson*, 56 N. C. 316; *Nance v. Powell*, 39 N. C. 297. **Pa.**—*Griffin v. Brower*, 21 Pa. Co. Ct. 188. **S. C.**—*Kaminer v. Hope*, 9 S. C. 253. **S. D.**—*Trotter v. Mut. Reserve Fund, L. Assn.*, 9 S. D. 596, 70 N. W. 843, 62 Am. St. Rep. 887. **Tenn.**—*Mason v. Spurlock*, 4 Baxt. 554. **Tex.**—*Patton v. Gregory*, 21 Tex. 513; *Cochran's Admr. v. Thompson*, 18 Tex. 652. **Vt.**—*Robinson v. Swift*, 3 Vt. 377. **Va.**—*Graveley v. Graveley*, 84 Va. 145, 4 S. E. 218. **Eng.**—*Alsager v. Rowley*, 6 Ves. Jr. 748, 31 Eng. Reprint 1289; *Doran v. Simpson*, 4 Ves. Jr. 651, 31 Eng. Reprint 336; *Utterson v. Mair*, 2 Ves. Jr. 95, 30 Eng. Reprint 540.

[a] As a general rule, neither legatees nor distributees can maintain a suit in equity to collect debts since "there is no privity between them and the debtors, and it would introduce confusion in the administration of the assets, and displace the power of the personal representative." *Dugger v. Tayloe*, 60 Ala. 504, 517.

42. The distributees cannot sue until distribution has been ordered. *Neubrecht v. Santmeyer*, 50 Ill. 74.

43. **U. S.**—*Stanley v. Mather*, 31 Fed. 860. **Ill.**—*Leamon v. McCubbin*, 82 Ill. 263. **Ind.**—*Begien v. Freeman*, 75 Ind. 398. **Ia.**—*Christie v. Chicago, etc. R. Co.*, 104 Iowa 707, 74 N. W. 697; *Baird v. Brooks*, 65 Iowa 40, 21 N. W. 163; *Haynes v. Harris*, 33 Iowa 516. **Kan.**—*Presbury v. Pickett*, 1 Kan. App. 631, 42 Pac. 405. **Ky.**—*Boughner v.*

accounts,⁴⁴ or other choses in action,⁴⁵ or to recover the purchase money of land⁴⁶ or personal property⁴⁷ sold by the decedent, or to enforce the right of a deceased surety to be reimbursed by his principal,⁴⁸ or actions on appeal bonds,⁴⁹ or certiorari bonds,⁵⁰ or on judgments in favor of the decedent,⁵¹ or actions to recover legacies⁵² belong-

Sharp, 144 Ky. 320, 138 S. W. 375; *Suit v. Crawford*, 100 Ky. 355, 38 S. W. 500; *Rachford v. Rachford*, 13 S. W. 1075; *Burge v. Burge's Admr.*, 25 Ky. L. Rep. 979, 76 S. W. 873. **Miss.** *Kitchens v. Harrall*, 54 Miss. 474. **Mo.** *Todd v. James*, 157 Mo. App. 416, 138 S. W. 929; *Jacobs v. Maloney*, 64 Mo. App. 270. **N. H.**—*Tappan v. Tappan*, 30 N. H. 50. **Ohio.**—*McBride v. Vance*, 73 Ohio St. 258, 76 N. E. 938, 112 Am. St. Rep. 723; *Chappelear v. Martin*, 45 Ohio St. 126, 12 N. E. 448. **S. C.** *Stoddard v. Aiken*, 57 S. C. 134, 35 S. E. 501. **S. D.**—*Mears v. Smith*, 19 S. D. 79, 102 N. W. 295. **Va.**—*Graveley v. Graveley*, 84 Va. 145, 4 S. E. 218. **W. Va.**—*Matheny v. Ferguson*, 55 W. Va. 656, 47 S. E. 886. **Wis.**—*Clark v. Clark*, 76 Wis. 306, 45 N. W. 121; *Murphy v. Hanrahan*, 50 Wis. 485, 7 N. W. 436.

[a] The heir cannot maintain an action for or on notes. *Foss v. Cobler*, 105 Iowa 728, 75 N. W. 516.

[b] An heir cannot sue even though the heirs have paid all the debts and made a distribution of the property, and the plaintiff has received the note sued on as a part of her share. *Rousch v. Hundley*, 4 Ohio Dec. (Reprint) 445.

44. *Richardson v. Vaughan*, 86 Tex. 93, 23 S. W. 640, *affirming* (Tex. Civ. App.), 22 S. W. 1112.

45. **Ark.**—*Whelan v. Edwards*, 31 Ark. 723; *Lemon's Heirs v. Rector*, 15 Ark. 436. **Ga.**—*Juhan v. Juhan*, 104 Ga. 253, 30 S. E. 779; *Hill v. Maffett*, 3 Ga. App. 89, 59 S. E. 325. **Ill.** *McLean County Coal Co. v. Long*, 91 Ill. 617. **Ind.**—*Indianapolis & V. R. Co. v. Price*, 153 Ind. 31, 53 N. E. 1018; *Church v. Grand Rapids & I. R. Co.*, 70 Ind. 161. **Mo.**—*Hendrix v. Dickson*, 69 Mo. App. 197. **N. J.**—*Buchanan v. Buchanan*, 75 N. J. Eq. 274, 71 Atl. 745, 138 Am. St. Rep. 563, 22 L. R. A. (N. S.) 454. **N. Y.**—*Griswold v. Metropolitan Elev. R. Co.*, 122 N. Y. 102, 25 N. E. 331. **Ohio.**—*Lawrence R. Co. v. O'Harra*, 50 Ohio St. 667, 36 N. E. 14. **Vt.**—*Robinson v. Swift*, 3 Vt. 377.

46. See *infra*, IV, G.

47. *Foster v. Cook*, 8 N. C. 509.

48. The statutory right of a surety on a promissory note to be reimbursed. *Harris v. Harris*, 92 Ill. App. 455.

49. *Lovejoy v. Stelle*, 18 Ill. App. 281.

[a] Where the bond runs to the people, the action is properly brought in the name of the people for the use of the administrator of the deceased beneficiary. *People v. Groszglas*, 152 Ill. App. 460.

50. A bond given to procure a review on certiorari of a judgment in a forcible entry and unlawful detainer case. Such a bond is not a covenant running with the land. *Hurt v. Dougherty*, 3 Sneed (Tenn.) 418.

[a] Even if the bond is a covenant running with the land, the representative is the proper party to sue for a breach occurring in the decedent's lifetime. *Hurt v. Dougherty*, 3 Sneed (Tenn.) 418.

51. The heir cannot sue in equity. *Brunk v. Means*, 11 B. Mon. (Ky.) 214.

[a] The heir cannot have a money judgment recovered by the decedent revived in his favor. *Wiggins' Heirs v. Cracraft*, 19 Ky. L. Rep. 477, 40 S. W. 907.

52. **Ala.**—*Sullivan v. Lawler*, 72 Ala. 68. **Ark.**—*Purcell v. Carter*, 45 Ark. 299; *Whelan v. Edwards*, 31 Ark. 723. **Colo.**—*Hall v. Cowles' Estate*, 15 Colo. 343, 25 Pac. 705. **Ga.**—*Murphy v. Pound*, 12 Ga. 278. **Ky.**—*Loyd v. Loyd*, 20 Ky. L. Rep. 347, 46 S. W. 485. **Md.**—*Hanson v. Hanson*, 4 Gill 69. **Mass.**—*Gale v. Nickerson*, 151 Mass. 428, 24 N. E. 400, 9 L. R. A. 200; *Clapp v. Inhabitants of Stoughton*, 10 Pick. 463. **Mo.**—*McDowell v. Orphan School*, 87 Mo. App. 386. **N. H.**—*Weeks v. Jewett*, 45 N. H. 540. **N. J.**—*Cohen v. Moss*, 29 Atl. 194; *Oberly v. Lerch*, 18 N. J. Eq. 346. **N. Y.**—*In re Hodgman's Estate*, 42 N. Y. Supp. 1004, *affirmed*, 161 N. Y. 627, 55 N. E. 1096; *Jenkins v. Freyer*, 4 Paige 47. **Ohio.** *Banning v. Gotshall*, 62 Ohio St. 210, 56 N. E. 1030. **Tenn.**—*Puckett v. James*,

ing to the decedent, or a distributive share in the estate of one dying intestate.⁵³

2. Exceptions.—In many states the heirs, distributees or legatees may sue to recover assets under exceptional circumstances,⁵⁴ as where the personal representative has refused to sue,⁵⁵ or where he cannot

2 Humph. 565; *Trafford v. Wilkinson*, 3 Tenn. Ch. 449.

[a] The next of kin cannot recover it in equity without administration, even though it is alleged that all debts have been paid. *Shaver v. Shaver*, 1 N. J. Eq. 437.

[b] The heirs of a legatee are not proper parties to an action by the administratrix to reach real property bought with funds alleged to have been embezzled by the executor of the will under which said legatee is a beneficiary. *Conley v. Walton*, 49 Misc. 1, 96 N. Y. Supp. 400.

53. **Ga.**—*Blair v. Dickerson*, 73 Ga. 146. **Ind.**—*Turner v. Campbell*, 34 Ind. 317. **Ia.**—*Rhodes v. Stout*, 26 Iowa 313. **Md.**—*Schaub v. Griffin*, 84 Md. 557, 36 Atl. 443. **N. Y.**—*Segelken v. Meyer*, 94 N. Y. 473.

54. **U. S.**—*Newman v. Schwerin*, 61 Fed. 865, 10 C. C. A. 129. **Ala.**—*Costephens v. Dean*, 69 Ala. 385. **Ark.**—*Lemon's Heirs v. Rector*, 15 Ark. 436. **Ga.**—*Morgan v. Woods*, 69 Ga. 599; *Worthy v. Johnson*, 8 Ga. 236, 52 Am. Dec. 399; *Hill v. Maffett*, 3 Ga. App. 89, 59 S. E. 325. **Ind.**—*Indianapolis & V. R. Co. v. Price*, 153 Ind. 31, 53 N. E. 1018; *Church v. Grand Rapids & I. R. Co.*, 70 Ind. 161. **Mo.**—*McDowell v. Orphan School*, 87 Mo. App. 386. **Neb.**—*Tecumseh Nat. Bank v. McGee*, 61 Neb. 709, 85 N. W. 949. **N. Y.**—*Segelken v. Meyer*, 94 N. Y. 473. **N. C.**—*Nance v. Powell*, 39 N. C. 297. **Tex.**—*Patton v. Gregory*, 21 Tex. 513; *Cochran's Adms. v. Thompson*, 18 Tex. 652. **Vt.**—*Marsh v. Marsh*, 78 Vt. 399, 63 Atl. 159; *Mason v. Mason's Exrs.*, 76 Vt. 287, 56 Atl. 1011. **W. Va.**—*Matheny v. Ferguson*, 55 W. Va. 656, 47 S. E. 886; *Wilson v. Straight*, 46 W. Va. 651, 33 S. E. 758; *Richardson v. Donehoo*, 16 W. Va. 685, 711. **Eng.**—*Burrough v. Elton*, 11 Ves. Jr. 29, 32 Eng. Reprint 998; *Alsager v. Rowley*, 6 Ves. Jr. 748, 31 Eng. Reprint 1289; *Utterson v. Mair*, 2 Ves. Jr. 95, 30 Eng. Reprint 540.

[a] Where the circumstances are

such that the reason for the general rule ceases. *Trotter v. Mut. Reserve Fund L. Assn.*, 9 S. D. 596, 70 N. W. 843, 62 Am. St. Rep. 887.

[b] "Where there is some other special case not exactly defined." *Long v. Majestre*, 1 Johns. Ch. (N. Y.) 305, quoted with approval in *Dugger v. Tayloe*, 60 Ala. 504, 517.

[c] "It does not follow because the administrator is the proper party to collect the debts due a decedent and pay creditors, and for that purpose bring suits, that under no circumstances can the heirs at law maintain a suit to collect a debt which has not been collected by the personal representative." *Stanley v. Mather*, 31 Fed. 860.

[d] The heir cannot sue unless some cause is alleged which makes it necessary for the suit to be brought in his name. *Turner v. Gerald*, 16 Ky. L. Rep. 30.

[e] **Where the Defendant Admits Plaintiff's Right.**—In *Segelken v. Meyer*, 94 N. Y. 473, the next of kin were permitted to recover where the decedents were infants, the action was not commenced until more than six years after their death, and the defendant had admitted his liability to the plaintiffs.

[f] In *Hyde v. Stone*, 7 Wend. (N. Y.) 354, 22 Am. Dec. 582, the next of kin was permitted to maintain trover for the value of personalty of which the decedent died possessed, where it was not shown that there had been any administration, and the defendant had admitted the plaintiff's right to the property. See *McKernan v. Thomas Conville Brew. Co.*, 86 N. Y. Supp. 191. *Contra*, *Rousch v. Hundley*, 2 Ohio Dec. (Reprint) 445.

55. **Ala.**—*Tillery v. Tillery*, 155 Ala. 495, 46 So. 582; *Sullivan v. Lawler*, 72 Ala. 68. **Ga.**—*Morgan v. Woods*, 69 Ga. 599; *Worthy v. Johnson*, 8 Ga. 236, 52 Am. Dec. 399; *Hill v. Maffett*, 3 Ga. App. 89, 59 S. E. 325. **Ky.**—*Bennett v. Bennett's Admr.*, 134 Ky. 444, 120 S. W. 372; *McLemore v. Se-*

sue,⁵⁶ or neglects to do so for an unreasonable time,⁵⁷ or colludes with the debtor,⁵⁸ or is insolvent,⁵⁹ or occupies a position antagonistic to his

bree Coal & M. Co., 121 Ky. 53, 88 S. W. 1062; *McChord v. Fisher's Heirs*, 13 B. Mon. 193; *Williams v. Coffman*, 31 Ky. L. Rep. 151, 101 S. W. 919; *Nelson v. Nelson*, 29 Ky. L. Rep. 885, 96 S. W. 794; *Loyd v. Loyd*, 20 Ky. L. Rep. 347, 46 S. W. 485. **Neb.**—*Prusa v. Everett*, 78 Neb. 250, 110 N. W. 568. **N. J.**—*Buchanan v. Buchanan*, 75 N. J. Eq. 274, 71 Atl. 745, 138 Am. St. Rep. 563, 22 L. R. A. (N. S.) 454. **S. D.**—*Trotter v. Mut. Reserve Fund L. Assn.*, 9 S. D. 596, 70 N. W. 843, 62 Am. St. Rep. 887. **Tenn.**—*Mason v. Spurlock*, 4 Baxt. 554. **Tex.**—*Patton v. Gregory*, 21 Tex. 513. **Vt.**—*Marsh v. Marsh*, 78 Vt. 399, 63 Atl. 159. **Va.**—*Tabb v. Cabell*, 17 Gratt. 160. **W. Va.**—*Matheny v. Ferguson*, 55 W. Va. 656, 47 S. E. 886; *Wilson v. Straight*, 46 W. Va. 651, 33 S. E. 758. **Eng.**—*Burroughs v. Elton*, 11 Ves. Jr. 29, 32 Eng. Reprint 998.

[a] The heir may sue in equity if the administrator will not sue or consent to a suit by the heir. He cannot sue at law in such case. *Thomas v. White*, 3 Litt. (Ky.) 177, 14 Am. Dec. 56.

[b] All persons interested in the estate should be made parties. *Trotter v. Mut. Reserve Fund L. Assn.*, 9 S. D. 596, 70 N. W. 843, 62 Am. St. Rep. 887.

56. *Matheny v. Ferguson*, 55 W. Va. 656, 47 S. E. 886; *Burroughs v. Elton*, 11 Ves. Jr. 29, 32 Eng. Reprint 998.

57. **Ark.**—*Graves v. Pinchback*, 47 Ark. 470, 1 S. W. 682; *Stewart v. Smiley*, 46 Ark. 373. **Ky.**—*Emerson v. Staton*, 3 T. B. Mon. 116. **N. J.**—*Buchanan v. Buchanan*, 75 N. J. Eq. 274, 71 Atl. 745, 138 Am. St. Rep. 563, 22 L. R. A. (N. S.) 454. **Tex.**—*Patton v. Gregory*, 21 Tex. 513. **Va.**—*Tabb v. Cabell*, 17 Gratt. 160.

[a] In such case the heirs may sue for conversion though the debts have not all been paid and there has been no final settlement. *Graves v. Pinchback*, 47 Ark. 470, 1 S. W. 682.

58. **Ala.**—*Tillery v. Tillery*, 155 Ala. 495, 46 So. 582; *Sullivan v. Lawler*, 72 Ala. 68; *Dugger v. Tayloe*, 60 Ala. 504, 517. **Ark.**—*Lemon's Heirs v. Rector*, 15 Ark. 436. **Ga.**—*Morgan v. Woods*,

69 Ga. 599; *Hardwick v. Thomas*, 10 Ga. 266; *Worthy v. Johnson*, 8 Ga. 236, 52 Am. Dec. 399; *Hill v. Maffett*, 3 Ga. App. 89, 59 S. E. 325. **Ky.**—*New Bell Jellico Coal Co. v. Stewart's Admx.*, 155 Ky. 415, 159 S. W. 962. **N. J.**—*Dorsheimer v. Rorback*, 23 N. J. Eq. 46. **N. C.**—*Fleming v. McKesson*, 56 N. C. 316; *Nance v. Powell*, 39 N. C. 297. **S. D.**—*Trotter v. Mut. Reserve Fund L. Assn.*, 9 S. D. 596, 70 N. W. 843, 62 Am. St. Rep. 887. **Tenn.**—*Mason v. Spurlock*, 4 Baxt. 554. **Tex.**—*See Patton v. Gregory*, 21 Tex. 513; *Lacy v. Williams*, 8 Tex. 182. **Vt.**—*Marsh v. Marsh*, 78 Vt. 399, 63 Atl. 159; *Robinson v. Swift*, 3 Vt. 377. **W. Va.**—*Matheny v. Ferguson*, 55 W. Va. 656, 47 S. E. 886; *Wilson v. Straight*, 46 W. Va. 651, 33 S. E. 758. **Eng.**—*Alsager v. Rowley*, 6 Ves. Jr. 748, 31 Eng. Reprint 1289; *Doran v. Simpson*, 4 Ves. Jr. 651, 665, 31 Eng. Reprint 336; *Uttersen v. Mair*, 2 Ves. Jr. 95, 30 Eng. Reprint 540.

[a] Where a settlement of a pending suit by the representative is found to be unwise and improvident, and prejudicial to the rights of an heir, or collusive and in fraud of his rights, such heir may be substituted as plaintiff and permitted to prosecute the action in his own behalf. *Tecumseh Nat. Bank v. McGee*, 61 Neb. 709, 85 N. W. 949.

[b] The facts on which the allegation of collusion is made must be proved, since the collusion is a material ingredient of the jurisdiction. *Nance v. Powell*, 39 N. C. 297.

59. **Ga.**—*Morgan v. Woods*, 69 Ga. 599; *Worthy v. Johnson*, 8 Ga. 236, 52 Am. Dec. 399; *Hill v. Maffett*, 3 Ga. App. 89, 59 S. E. 325. **N. J.**—*Dorsheimer v. Rorback*, 23 N. J. Eq. 46. **N. C.**—*Nance v. Powell*, 39 N. C. 297. **S. D.**—*Trotter v. Mut. Reserve Fund L. Assn.*, 9 S. D. 596, 70 N. W. 843, 62 Am. St. Rep. 887. **Tenn.**—*Mason v. Spurlock*, 4 Baxt. 554. **Tex.**—*See Patton v. Gregory*, 21 Tex. 513. **Vt.**—*Robinson v. Swift*, 3 Vt. 377. **W. Va.**—*Matheny v. Ferguson*, 55 W. Va. 656, 47 S. E. 886; *Wilson v. Straight*, 46 W. Va. 651, 33 S. E. 758. **Eng.**—*Alsager v. Rowley*, 6 Ves. Jr. 748, 31 Eng.

official duties,⁶⁰ or where the debtor has been guilty of fraud and misrepresentation in obtaining a settlement with the representative.⁶¹ Even in such cases, however, the representative must be joined as a party defendant.⁶²

In some states the distributees or legatees may sue where the representative assigns the claim to them,⁶³ or consents that they may sue,⁶⁴ or where it is necessary for them to sue in order to preserve the property of the estate.⁶⁵

Legatees or next of kin cannot sue, however, merely because the representative could not,⁶⁶ or because he could not win the case if the suit was brought by himself, but could, as a witness, prove it for other parties.⁶⁷

Statutes sometimes authorize the heirs under certain circumstances to collect, and sue for all demands and property of the deceased which statutes must be strictly complied with in order to enable the heirs to sue.⁶⁸

3. Where There Is No Administration.—In some states the distributees or legatees cannot sue even though there has been no administration.⁶⁹ In others they may sue where there is no representative

Reprint 1289; *Utterson v. Mair*, 2 Ves. Jr. 95, 30 Eng. Reprint 540.

[a] Where he is insolvent, and there is just apprehension of loss if he is permitted to collect debts due the estate. *Dugger v. Tayloe*, 60 Ala. 504, 517.

60. *Tillery v. Tillery*, 155 Ala. 495, 46 So. 582.

61. The distributees may sue in equity where it is alleged that the representative was induced, by fraud and misrepresentation, to part with the evidence of the debt, and to accept confederate money and bonds in payment, and that she and her sureties are insolvent. *Dugger v. Tayloe*, 60 Ala. 504, 517.

62. **Ky.**—*Bennett v. Bennett's Admr.*, 134 Ky. 444, 120 S. W. 372; *McLemore v. Sebree Coal & Min. Co.*, 121 Ky. 53, 88 S. W. 1062; *McChord v. Fisher's Heirs*, 13 B. Mon. 193; *Williams v. Coffman*, 31 Ky. L. Rep. 151, 101 S. W. 919; *Nelson v. Nelson*, 29 Ky. L. Rep. 885, 96 S. W. 794; *Loyd v. Loyd*, 20 Ky. L. Rep. 347, 46 S. W. 485. **Neb.** *Prusa v. Everett*, 78 Neb. 250, 110 N. W. 568. **N. J.**—*Buchanan v. Buchanan*, 75 N. J. Eq. 274, 71 Atl. 745, 138 Am. St. Rep. 563, 22 L. R. A. (N. S.) 454. **Tenn.**—*Mason v. Spurlock*, 4 Baxt. 554. **Vt.**—*Marsh v. Marsh*, 78 Vt. 399, 63 Atl. 159. **W. Va.**—*Wilson v. Straight*, 46 W. Va. 651, 33 S. E. 758.

[a] **In England** the bill may be brought against both the representative and the debtor. *Alsager v. Rowley*, 6 Ves. Jr. 748, 31 Eng. Reprint 1289; *Doran v. Simpson*, 4 Ves. Jr. 651, 665, 31 Eng. Reprint 336; *Utterson v. Mair*, 2 Ves. Jr. 95, 30 Eng. Reprint 540.

63. **Georgia.**—If the administrator for any cause declines to place any claim in suit, he may nevertheless assign the same to any distributee or creditor, who may prosecute the same at his own expense. Code, 1911, §4003; *Juhan v. Juhan*, 104 Ga. 253, 30 S. E. 779; *Thompson v. Fenn*, 100 Ga. 234, 28 S. E. 39.

64. *Emerson v. Staton*, 3 T. B. Mon. (Ky.) 116; *Thomas v. White*, 3 Litt. (Ky.) 177, 14 Am. Dec. 56. See *Roberts v. King*, 10 Gratt. (Va.) 184.

65. Especially where a considerable time has elapsed without administration. *Richardson v. Vaughan*, 86 Tex. 93, 23 S. W. 640, *affirming* 22 S. W. 1112.

66. *Nance v. Powell*, 39 N. C. 297.

67. *Nance v. Powell*, 39 N. C. 297.

68. *Chisholm v. Crye*, 83 Ark. 495, 104 S. W. 167.

[a] The heirs may sue to collect debts only when all the statutory conditions exist. *Chisholm v. Crye*, 83 Ark. 495, 104 S. W. 167.

69. **Ill.**—*Leamon v. McCubbin*, 82 Ill. 263. **Kan.**—*Presbury v. Pickett*, 1

and where there are no debts,⁷⁰ especially where the time limited by

Kan. App. 631, 42 Pac. 405. **Ky.** Bennett v. Bennett's Admr., 134 Ky. 444, 120 S. W. 372; Williams v. Coffman, 31 Ky. L. Rep. 151, 101 S. W. 919; Nelson v. Nelson, 29 Ky. L. Rep. 885, 96 S. W. 794; Wiggins' Heirs v. Cracraft, 19 Ky. L. Rep. 477, 40 S. W. 907.

[a] Heirs or next of kin cannot recover personalty, even though there are no debts and though they are entitled exclusively to the beneficial interest therein. Weeks v. Jewett, 45 N. H. 540; Woodin v. Bagley, 13 Wend. (N. Y.) 453.

[b] **Mere lapse of time without administration** (1) does not authorize the heir to sue, there being no statute limiting the time within which administration may be granted (Murphy v. Hanrahan, 50 Wis. 485, 7 N. W. 436), (2) nor can a distributee sue though from lapse of time it is too late to procure letters of administration. Brown v. Bibb, 2 Coldw. (Tenn.) 434; Trafford v. Wilkinson, 3 Tenn. Ch. 449. See also *supra*, IV, B.

70. **U. S.**—Newman v. Schwerin, 61 Fed. 865, 10 C. C. A. 129. **Ala.**—Teal v. Chancellor, 117 Ala. 612, 23 So. 651; McGhee v. Alexander, 104 Ala. 116, 16 So. 148; Wright v. Robinson, 94 Ala. 479, 10 So. 319; Cooper v. Davison, 86 Ala. 367, 5 So. 650; Sullivan v. Lawler, 72 Ala. 68. See Costephens v. Dean, 69 Ala. 385. **Ga.**—Hill v. Maffett, 3 Ga. App. 89, 59 S. E. 325. See Bryant v. Atlantic C. L. R. Co., 119 Ga. 607, 46 S. E. 829; Juhan v. Juhan, 104 Ga. 253, 30 S. E. 779. **Ill.**—Moore v. Brandenburg, 248 Ill. 232, 93 N. E. 733, 140 Am. St. Rep. 206. **Ind.**—Finnegan v. Finnegan, 125 Ind. 262, 25 N. E. 341; Humphries v. Davis, 100 Ind. 369; Douglass v. McCarrer, 80 Ind. 91; Begien v. Freeman, 75 Ind. 398; Westfield v. Spencer, 61 Ind. 339; Ferguson v. Barnes, 58 Ind. 169; Barrett v. Sipp, 50 Ind. App. 304, 98 N. E. 310; Hall v. Brownlee, 28 Ind. App. 178, 62 N. E. 457. **Ia.**—See Christie v. Chicago, etc. R. Co., 104 Iowa 707, 74 N. W. 697. **Miss.**—Traweck v. Kelly, 60 Miss. 652; Kitchens v. Harrall, 54 Miss. 474; Ricks v. Hilliard, 45 Miss. 359; Manly v. Kidd, 33 Miss. 141; Wood v. Ford, 29 Miss. 57. **Mo.**—Todd v. James, 157 Mo. App. 416, 138 S. W. 929; Griesel v.

Jones, 123 Mo. App. 45, 99 S. W. 769. **Neb.**—Prusa v. Everett, 78 Neb. 250, 110 N. W. 568; Tecumseh Nat. Bank v. McGee, 61 Neb. 709, 85 N. W. 949; Cox v. Yeazel, 49 Neb. 343, 68 N. W. 483. **Pa.**—Roberts v. Messenger, 134 Pa. 298, 310, 19 Atl. 625; McLean's Exrs. v. Wade, 53 Pa. 146. **Tenn.**—Hurt v. Fisher, 96 Tenn. 570, 35 S. W. 1085; Christian v. Clark, 10 Lea 630; Smith v. Gooch, 6 Lea 536. **Tex.**—Richardson v. Vaughan, 86 Tex. 93, 23 S. W. 640, *affirming* (Tex. Civ. App.), 22 S. W. 1112; Webster v. Willis, 56 Tex. 468; Rylie v. Stammire (Tex. Civ. App.), 77 S. W. 626.

[a] **The distributees may sue in equity**, but not at law. **Ga.**—Hill v. Maffett, 3 Ga. App. 89, 59 S. E. 325. **Miss.**—Jones v. Clemmer, 98 Miss. 508, 54 So. 4. **S. C.**—Grant v. Poyas, 62 S. C. 426, 40 S. E. 891, *citing* Richardson v. Cooley, 20 S. C. 347; Markley v. Singletary, 11 Rich. Eq. 393, 401; Huson v. Wallace, 1 Rich. Eq. 1.

[b] **What Must Be Proved.**—"To recover, the heirs must allege and prove that there is no executor, administrator, creditor, widow or other person entitled to control or share in the claim sued upon." Jewell v. Gaylor, 157 Ind. 188, 60 N. E. 1083; Church v. Grand Rapids & I. R. Co., 70 Ind. 161; Schneider v. Piessner, 54 Ind. 524.

[c] **No Administration in the State.** The fact that no administrator was ever appointed in the state does not authorize the heirs to sue, when there is a foreign administrator whom the statute authorizes to sue in the state. Cox v. Yeazel, 49 Neb. 343, 68 N. W. 483.

[d] One to whom personalty has been specifically bequeathed by a will probated in one state, and who has been admitted to the ownership thereof in an administration in that state, may sue thereon in another state in which the will has not been probated. Simpson v. Foster, 46 Tex. 618.

[e] Where it is alleged that there are no debts and no necessity for administration in the state, the heirs may sue on a note though there is an administration pending in another state. Hynes v. Winston (Tex. Civ. App.), 54 S. W. 1069.

the statute within which an administrator may be appointed has expired.⁷¹

In some states, where the whole estate goes to the surviving husband or wife or minor children, the probate court may, by order, dispense with administration, in which case they may sue for any property belonging to the estate.⁷²

4. After Final Settlement.—As a rule the distributee or legatee may sue where the estate has been fully settled,⁷³ and the administrator

[f] **Lapse of Time as Excluding Debts.**—“Where no administration has been had and such number of years have elapsed since the ancestor’s death to make it beyond any reasonable probability that there can be any outstanding debts the heir may, on proper proof, maintain his action for personal property inherited.” *McDowell v. Orphan School*, 87 Mo. App. 386.

[g] Where there is no administration, and the debts, if any, are barred by limitations, and the heirs have distributed the property among themselves, one to whom a note is set apart in such distribution may sue thereon. *Granger v. Harriman*, 89 Minn. 303, 94 N. W. 869.

[h] **Minor Incapable of Incurring Debts.**—The next of kin of a child may recover the child’s distributive share of an estate without administration where the latter died at such an early age that he could not have contracted any debts or created any charges on his estate. *Hargroves v. Thompson*, 31 Miss. 211.

71. *Christie v. Chicago, etc. R. Co.*, 104 Iowa 707, 710, 74 N. W. 697; *Baird v. Brooks*, 65 Iowa 40, 21 N. W. 163; *Phinny v. Warren*, 52 Iowa 332, 1 N. W. 522, 3 N. W. 157, *distinguishing* *Haynes v. Harris*, 33 Iowa 516.

[a] May also sue to enforce a trust. *Murphy v. Murphy*, 80 Iowa 740, 45 N. W. 914.

[b] The note is the joint property of all the heirs and hence all must join. *Phinny v. Warren*, 52 Iowa 332, 1 N. W. 522, 3 N. W. 157.

[c] The objection that the suit is in equity instead of at law cannot be first raised on appeal. *Phinny v. Warren*, 52 Iowa 332, 1 N. W. 522, 3 N. W. 157.

72. Mo. Rev. St., 1909, §10; *Perkins v. Goddin*, 111 Mo. App. 429, 85 S. W. 936; *Adey v. Adey*, 58 Mo. App. 408; *McMillan v. Wacker*, 57 Mo. App. 220.

[a] An order dispensing with administration must be made before minor children may sue. *McMillan v. Wacker*, 57 Mo. App. 220.

73. **U. S.**—*Hubbard v. Urton*, 67 Fed. 419. **Ind.**—*Westerfield v. Spencer*, 61 Ind. 339; *Hall v. Brownlee*, 28 Ind. App. 178, 62 N. E. 457. **Kan.**—*Humphreys v. Keith*, 11 Kan. 108. **Ky.** *Suit v. Crawford*, 100 Ky. 355, 38 S. W. 500. **Miss.**—*Jones v. Clemmer & Son*, 98 Miss. 508, 54 So. 4 (may sue in chancery); *Hill v. Boyland*, 40 Miss. 618, 641. **Neb.**—*Prusa v. Everett*, 73 Neb. 250, 110 N. W. 568; *Sharp v. Citizens’ Bank*, 70 Neb. 758, 98 N. W. 50; *Tecumseh Nat. Bank v. McGee*, 61 Neb. 709, 85 N. W. 949; *Cox v. Yeazel*, 49 Neb. 343, 68 N. W. 483. **S. D.** *Mears v. Smith*, 19 S. D. 79, 102 N. W. 295. **Tex.**—*Webster v. Willis*, 56 Tex. 468; *Lacy v. Williams*, 8 Tex. 182.

[a] An assignee of the heirs may enforce a judgment recovered by the administrator on a claim due the estate, after the estate has been settled and the administrator discharged. *Winningsham v. Holloway*, 51 Ark. 385, 11 S. W. 579.

[b] After payment of the debts and expenses, final settlement, and discharge of the administrator, a claim in favor of the estate becomes the property of the heirs, and the court cannot reappoint the administrator to bring suit thereon. *Jordan v. Hunnell*, 96 Iowa 334, 65 N. W. 302.

[c] The objection that all the distributees are not joined is waived where not taken by demurrer or answer. *Humphreys v. Keith*, 11 Kan. 108.

[d] **Where an administrator dies** pending proceeding by scire facias instituted by him to revive a judgment recovered by him on a debt due the estate, and the estate has been fully settled, and all the debts against it paid, the proceeding may be revived in

discharged at the time when the action is commenced.⁷⁴

5. Pleading.—In an action by a distributee or legatee to recover personal assets, he must bring the case within the exceptions to the rule requiring such suits to be brought by the representative,⁷⁵ and must show a cause of action in himself.⁷⁶

Thus, for example, he must allege that there is no administration and that there are no debts,⁷⁷ or that the estate has been settled and

the name of the heirs. *Crane v. Crane*, 51 Ark. 287, 11 S. W. 1.

[e] **Debts Remaining Unpaid.**—The heirs cannot sue though the administrator has made his final report and been discharged, where the estate was insolvent and debts in excess of the amount sought to be recovered remain unpaid. *Sharp v. Citizens' Bank*, 70 Neb. 758, 98 N. W. 50.

74. *Cox v. Yeazel*, 49 Neb. 343, 68 N. W. 483.

[a] That the executor files his account and is directed to turn over the personalty to the residuary legatee pending the action does not authorize such legatee to maintain it. *Griswold v. Metropolitan Elev. R. Co.*, 122 N. Y. 102, 640, 25 N. E. 331.

[b] **Distribution Approved.—Administrator Not Discharged.**—Where all the debts and expenses have been paid, and the estate has been distributed and the distribution approved by the court, the sole heirs and distributees may sue to foreclose unadministered mortgages, which, with the notes secured thereby, were delivered to them by the representative, though the representative was not discharged. *Stanley v. Mather*, 31 Fed. 860.

75. U. S.—*Newman v. Schwerin*, 61 Fed. 865, 10 C. C. A. 129, Tennessee. **Ala.**—*Sullivan v. Lawler*, 72 Ala. 72. **Ga.**—*Morgan v. Woods*, 69 Ga. 599. **Ind.** *Jewell v. Gaylor*, 157 Ind. 188, 60 N. E. 1083. **Ky.**—*Brunk v. Means*, 11 B. Mon. 214; *Turner v. Gerald*, 16 Ky. L. Rep. 30. **N. C.**—*Nance v. Powell*, 39 N. C. 297. **Tex.**—*Richardson v. Vaughan*, 86 Tex. 93, 23 S. W. 640, *affirming* 22 S. W. 1112; *Rylie v. Stammire* (Tex. Civ. App.), 77 S. W. 626. **Vt.**—*Mason v. Mason's Exrs.*, 76 Vt. 287, 56 Atl. 1011.

76. *Finnegan v. Finnegan*, 125 Ind. 262, 25 N. E. 341; *Williams v. Riley*, 88 Ind. 290; *Westerfield v. Spencer*, 61 Ind. 339; *Schneider v. Piessner*, 54 Ind. 524; *Hall v. Brownlee*, 28 Ind. App. 178, 62 N. E. 457.

[a] The complaint must show that the heirs are entitled to the money. It is not sufficient to show that there are no debts to be paid. *Williams v. Riley*, 88 Ind. 290; *Begien v. Freeman*, 75 Ind. 398; *Schneider v. Piessner*, 54 Ind. 524; *Hall v. Brownlee*, 28 Ind. App. 178, 62 N. E. 457.

77. U. S.—*Newman v. Schwerin*, 61 Fed. 865, 10 C. C. A. 129. **Ga.**—*Bryant v. Atlantic C. L. R. Co.*, 119 Ga. 607, 46 S. E. 829; *Juhan v. Juhon*, 104 Ga. 253, 30 S. E. 779. **Ind.**—*Magel v. Milligan*, 150 Ind. 582, 50 N. E. 564, 65 Am. St. Rep. 382; *Humphries v. Davis*, 100 Ind. 369; *Walpole's Admr. v. Bishop*, 31 Ind. 156; *Hall v. Brownlee*, 28 Ind. App. 178, 62 N. E. 457. **Miss.**—*Kitchens v. Harrall*, 54 Miss. 474. **Tex.**—*Richardson v. Vaughan*, 86 Tex. 93, 23 S. W. 640, *affirming* *Rylie v. Stammire* (Tex. Civ. App.), 77 S. W. 626.

[a] In *Sullivan v. Lawler*, 72 Ala. 68, an allegation on information and belief, without any indication that the information was obtained from persons having knowledge, or means of acquiring knowledge of the facts was held to be insufficient.

[b] An allegation that the decedent "died leaving no debts," is insufficient, since a liability against the estate may arise after his death. *Hall v. Brownlee*, 28 Ind. App. 178, 62 N. E. 457.

[c] A complaint which fails to allege that no letters of administration have been granted is fatally defective. It is not sufficient to merely allege that the deceased died intestate, leaving no widow, and that the debts due from his estate at the time of his death have been paid. *Finnegan v. Finnegan*, 125 Ind. 262, 25 N. E. 341.

[d] A complaint alleging that the only heirs are the widow and son, that there is no administration, and that all the debts have been paid, and alleging that defendant is indebted in a specified sum, which is in excess of the

the debts paid,⁷⁸ or that there is collusion between the representative and the defendant,⁷⁹ or that the representative refuses to act,⁸⁰ or is insolvent,⁸¹ or that the representative has assigned the claim to the plaintiff to prosecute for the benefit of the estate,⁸² or has consented to his bringing the suit,⁸³ or that it is necessary for him to sue to preserve the property of the estate.⁸⁴

C. ACTIONS ON CONTRACTS. — As a rule heirs cannot sue for breach of a contract made with their ancestor,⁸⁵ except for breach of covenants running with the land.⁸⁶

By statute in some states all actions founded on contracts may be maintained by and against the representative in all cases in which the same might have been maintained against the decedent.⁸⁷

D. COVENANTS. — The heir alone may sue for specific performance of a covenant running with the land.⁸⁸ If the breach of such a covenant occurs during decedent's lifetime the decedent's representative must bring actions for breach of it,⁸⁹ and if the breach occurs after

amount of the widow's allowance, shows that the plaintiff is entitled to a judgment in some amount, and hence is good on demurrer. *Merchants Nat. Bank v. McClellan*, 40 Ind. App. 1, 80 N. E. 854.

[e] "An averment that the estate is not in debt, or that 'there is no existing indebtedness,' or 'that his debts and funeral expenses have been fully paid,' would not be the equivalent of an averment that the widow's statutory allowance has been paid, or the estate released from its payment." *Merchants Nat. Bank v. McClellan*, 40 Ind. App. 1, 80 N. E. 854.

[f] The complaint must show that there is no widow, or that she has received or relinquished the amount to which she is entitled under the law. *Schneider v. Piessner*, 54 Ind. 524.

78. *Magel v. Milligan*, 150 Ind. 582, 50 N. E. 564, 65 Am. St. Rep. 382; *Hall v. Brownlee*, 28 Ind. App. 178, 62 N. E. 457.

79. *Sullivan v. Lawler*, 72 Ala. 68. See *Dorsheimer v. Rorback*, 23 N. J. Eq. 46.

[a] Though a general allegation of collusion may be sufficient to shut out a demurrer, it is proper to state the facts on which the allegation is made. *Nanee v. Powell*, 39 N. C. 297.

80. *Sullivan v. Lawler*, 72 Ala. 68; *Bennett v. Bennett's Admr.*, 134 Ky. 444, 120 S. W. 372; *Nelson v. Nelson*, 29 Ky. L. Rep. 885, 96 S. W. 794; *Loyd v. Loyd*, 20 Ky. L. Rep. 347, 46 S. W. 485.

[a] That he has neglected to sue,

or has causelessly refused to assent to the distributee suing. *Emerson v. Staton*, 3 T. B. Mon. (Ky.) 116.

[b] In a suit by a creditor, the bill must clearly show that the representative has refused to sue. An averment that he "has not brought suit although requested so to do," is not sufficient. *Hardwick v. Thomas*, 10 Ga. 266.

81. See *Dorsheimer v. Rorback*, 23 N. J. Eq. 46.

82. *Thompson v. Fenn*, 100 Ga. 234, 28 S. E. 39.

83. *Emerson v. Staton*, 3 T. B. Mon. (Ky.) 116.

84. *Richardson v. Vaughan*, 86 Fed. 93, 23 S. W. 640, *affirming* (Tex. Civ. App.), 22 S. W. 1112.

85. *Bourget v. Monroe*, 58 Mich. 563, 25 N. W. 514, contract to will land.

86. *Bourget v. Monroe*, 58 Mich. 563, 25 N. W. 514.

87. Cal.—Code Civ. Proc., §1582. Nev.—Rev. Laws, 1912, §6022. S. D. Prob. Code, §243, Comp. Laws, 1910, p. 505; *Subera v. Jones*, 20 S. D. 628, 108 N. W. 26. Utah.—Comp. Laws, 1907, §3917. Va.—Code, 1904, §2654. Wash.—Rem. & Ball. Ann. Codes & St., §1535. W. Va.—Code, 1906, §3273. Wyo. Comp. St., 1910, §5562.

88. The executors cannot sue to specifically enforce a covenant to furnish water for a mill. *United N. J. R. & C. Co. v. Hoppock*, 28 N. J. Eq. 261, *reversing* 27 N. J. Eq. 286.

89. *Hurt v. Dougherty*, 3 Sneed (Tenn.) 418.

the decedent's death, the heir must bring the action.⁹⁰ But to enable the heir to sue in the latter case he must show that the title to the land descended to him.⁹¹

Covenants in Deeds.—The heir may sue for breach of a general covenant of warranty,⁹² or a covenant of seizin⁹³ in a deed, where the breach occurs after the death of the decedent.

Where the covenant is regarded as a personal one, the representative may sue.⁹⁴ In some states the representative cannot sue for breach of a covenant of seizin,⁹⁵ or for quiet enjoyment against incumbrances,⁹⁶ in a deed, in the absence of an averment of special damage accruing to the decedent. The representative and not the heir must sue, however, where the breach occurs during the decedent's lifetime.⁹⁷

Heirs liable on a covenant of warranty in a deed executed by their ancestor may maintain a bill quia timet to prevent an unauthorized sale of the land by one to whom it was previously conveyed in trust, which would subject them to liability.⁹⁸

E. CONTRACTS FOR PURCHASE OR SALE OF LAND BY DECEDENT. SPECIFIC PERFORMANCE.⁹⁹—The heir or devisee may maintain a suit to compel specific performance of a contract to sell land to a deceased vendee;¹ and generally he alone can do so.²

[a] At common law. *Allen v. Greene*, 19 Ala. 34.

90. *Hurt v. Dougherty*, 3 Sneed (Tenn.) 418.

[a] At common law. *Allen v. Greene*, 19 Ala. 34.

[b] **Bond.**—May sue on a bond conditioned for the performance of a covenant for quiet enjoyment of land. *Eppes' Exr. v. Demoville*, 2 Call. (Va.) 22.

[c] **Lease.**—For breach of a covenant by a lessee to pay taxes, where the substantial right of action arose on payment of a tax incumbrance by the heirs, though it did not appear whether there were any breaches in the lessor's lifetime. *Hendrix v. Dickson*, 69 Mo. App. 197. See *Giannetti v. Smith*, 66 N. J. L. 374, 49 Atl. 516, *affirmed*, 67 N. J. L. 687, 52 Atl. 1131.

91. *Allen v. Greene*, 19 Ala. 34.

92. *Tapscott v. Williams*, 10 Ohio 442; *King v. Kerr's Admrs.*, 5 Ohio 154.

[a] All the heirs to whom the land descends in common must join in a single action. *Tapscott v. Williams*, 10 Ohio 442.

93. *Admrs. of Baekus v. McCoy*, 3 Ohio 211, 218.

94. *Lowry v. Tilleny*, 31 Minn. 500, 18 N. W. 452, covenant of seisin.

[a] He may sue for breach of a covenant against incumbrances occur-

ring after the decedent's death. *Kellogg v. Malin*, 62 Mo. 429.

95. *Frink v. Bellis*, 33 Ind. 135, 5 Am. Rep. 193; *Martin v. Baker*, 5 Blackf. (Ind.) 232. See *Coleman v. Lyman*, 42 Ind. 289.

96. *Frink v. Bellis*, 33 Ind. 135, 5 Am. Rep. 193; *Martin v. Baker*, 5 Blackf. (Ind.) 232. See *Coleman v. Lyman*, 42 Ind. 289.

97. *Burnham v. Lasselle*, 35 Ind. 425; *Frink v. Bellis*, 33 Ind. 135, 5 Am. Rep. 193. See *Coleman v. Lyman*, 42 Ind. 289; *Upper Appomattox Co. v. Hardings*, 11 Gratt. (Va.) 1.

[a] Covenant of general warranty. *Tapscott v. Williams*, 10 Ohio 442; *McConaughy v. Bennett's Exrs.*, 50 W. Va. 172, 40 S. W. 540.

98. The representative is a necessary party. *Peebles' Heirs v. Estill*, 7 J. J. Marsh. (Ky.) 408.

99. See generally the title "**Specific Performance.**"

1. Ala.—*McKay v. Broad*, 70 Ala. 377. Mich.—*House v. Dexter*, 9 Mich. 245. N. C.—*Tate v. Conner*, 17 N. C. 224.

See *Hays v. McLain*, 66 Ark. 400, 50 S. W. 1006.

[a] A devisee bringing such a suit need not make the heirs at law parties plaintiff. *Spier v. Robinson*, 9 How. Pr. (N. Y.) 325.

2. *Buck v. Eaman*, 18 Ill. 529. And

The personal representative of the deceased cannot maintain such a suit,³ unless it is shown that a necessity exists for the exercise of his statutory authority over the real estate,⁴ or the will gives him the legal title to the realty with power of sale.⁵

In case of the vendor's death, his heirs or devisees are necessary parties defendant to such a suit by a vendee,⁶ and generally his personal representative is a necessary⁷ and proper,⁸ party thereto.

Generally the representative of the vendor is the proper party to compel specific performance by the vendee.⁹ In some states, however, the heirs or devisees of the deceased vendor are necessary parties¹⁰ to

see *House v. Dexter*, 9 Mich. 245, holding heir-at-law of vendee, and not administrator, proper party complainant.

[a] The administrator and the heir cannot join in such a suit, though the administrator might be a proper party to the bill if any part of the purchase money remained unpaid. This is true even though the bill seeks to recover damages for trespass and to stay waste. *McKay v. Broad*, 70 Ala. 377.

3. *McKay v. Broad*, 70 Ala. 377; *Carpenter v. Fopper*, 94 Wis. 146, 68 N. W. 378. And see *House v. Dexter*, 9 Mich. 245.

[a] In Maine by express provision of statute the personal representative of the vendee may sue. *Godfrey v. Dwinell*, 40 Me. 94.

4. Not where the bill affirmatively shows that no such necessity exists. *McKay v. Broad*, 70 Ala. 377.

[a] Not unless the personality is shown to be insufficient to pay debts. *Carpenter v. Fopper*, 94 Wis. 146, 68 N. W. 378.

5. *Stewart v. Griffith*, 217 U. S. 323, 30 Sup. Ct. 528, 54 L. ed. 782.

6. **U. S.**—*Morgan's Heirs v. Morgan*, 2 Wheat. 290, 4 L. ed. 242, should be made parties plaintiff or defendant. Ala.—*Moore v. Murrell*, 40 Ala. 573. Pa.—*Hoffner v. Wynkoop*, 97 Pa. 130.

7. *Potter v. Ellice*, 48 N. Y. 321; *Hill v. Proctor*, 10 W. Va. 59, citing *Nichols v. Heirs of Nichols*, 8 W. Va. 174. Contra, *Cowan v. Hite*, 2 A. K. Marsh. (Ky.) 238.

[a] Nonjoinder of the representative is waived by failure to demur. *Potter v. Ellice*, 48 N. Y. 321.

8. *Hill v. Proctor*, 10 W. Va. 59.

9. **III.**—See *Robinson v. Appleton*, 124 Ill. 276, 15 N. E. 761. **Mo.**—*Scott v. Davis*, 141 Mo. 213, 42 S. W. 714. **Neb.**—*Comp. St.*, 1911, §3144; *Solt v.*

Anderson, 67 Neb. 103, 93 N. W. 205. **N. J.**—*Miller's Admr. v. Miller*, 25 N. J. Eq. 354. **N. Y.**—*Wheeler v. Crosby*, 20 Hun 140. **Pa.**—*Simmons' Estate*, 140 Pa. 567, 21 Atl. 402; *West Hickory Min. Assn. v. Reed*, 80 Pa. 38; *Anshutz's Appeal*, 34 Pa. 375.

[a] He may sue the vendee for specific performance though the land is homestead property. *Solt v. Anderson*, 67 Neb. 103, 93 N. W. 205.

10. *Mitchell v. Shell*, 49 Miss. 118. And see *Scott v. Davis*, 141 Mo. 213, 42 S. W. 714.

[a] In Nebraska the statute provides that the heirs, devisees, or other legal representatives of the deceased vendor, when not plaintiffs, must be made defendants. *Comp. St.*, 1911, §3144; *Solt v. Anderson*, 67 Neb. 103, 93 N. W. 205.

[b] Under a statute providing that where a decedent had bound himself in his lifetime to sell and convey real estate, and had made no sufficient provision for the performance of his contract, his executors or administrators, etc., may apply, by bill or petition, to a designated court, "and after due notice of such bill or petition . . . to the executors or administrators and heirs of the decedent or devisees of such estate, as the case may require, to appear in such court on a day certain, and answer such bill or petition," and if the case be sufficient, specific performance of the contract may be decreed, it has been decided that where the application is by the executors or administrators of a vendor, notice to his heirs or devisees is unnecessary, since by the contract for the sale of the land, the estate of the decedent is converted into personality, over which the personal representatives have absolute control. *Simmons' Estate*, 140 Pa. 567, 21 Atl. 402; *West*

proceedings by his representative to compel specific performance, at least if a conveyance is necessary.¹¹

In case of the vendee's death, his representative and heirs must be made parties to such a suit by the vendor or his representative, in case of his death.¹²

An unexercised option to purchase incident to a lease of land, passes to the personal representative of the lessee, and a suit to enforce a conveyance in accordance therewith must be brought by him,¹³ though the legatee may sue where the representative assents to his possession of the legacy.¹⁴

Where the suit is based on a demand for a conveyance made upon the lessor in his lifetime, both the lessor's heirs and his personal representatives are proper parties defendant.¹⁵

Actions for Purchase Price.—As a rule the representative alone can sue to recover the purchase price of land sold by the decedent.¹⁶

Damages for Breach.—In some states the representative may maintain an action for damages for breach of an agreement to convey land to the decedent,¹⁷ especially if the breach occurred during the decedent's lifetime,¹⁸ but the heir is the proper party to sue if the breach occurs after the decedent's death.¹⁹

Hickory Min. Assn. v. Reed, 80 Pa. 33, *correcting* Anshutz's Appeal, 34 Pa. 375, in this respect.

11. Scott v. Davis, 141 Mo. 213, 42 S. W. 714. And see Mitchell v. Shell, 49 Miss. 119.

[a] Where the heirs have conveyed to the representative their title to the property involved, to enable him to transfer it to the purchaser, in fulfillment of the agreement, they are no longer necessary parties to the action. Schroepel v. Hopper, 40 Barb. (N. Y.) 425.

12. Simmons' Estate, 140 Pa. 567, 21 Atl. 402; Anshutz's Appeal, 34 Pa. 375.

13. McCormick v. Stephany, 57 N. J. Eq. 257, 41 Atl. 840.

[a] His vendee may maintain a suit for specific performance. Gustin v. Union School Dist., 94 Mich. 502, 54 N. W. 156, 34 Am. St. Rep. 361.

14. McCormick v. Stephany, 57 N. J. Eq. 257, 41 Atl. 840.

15. McCormick v. Stephany, 57 N. J. Eq. 257, 41 Atl. 840.

16. Ga.—Bryant v. Atlantic C. L. R. Co., 119 Ga. 607, 46 S. E. 829. Ky.—Brackett's Admr. v. Boreing, 28 Ky. L. Rep. 386, 89 S. W. 496; Rachford v. Rachford, 13 S. W. 1075. Mo.—State ex rel. Hounsom v. Moore, 18 Mo. App. 406. Tenn.—Lunsford v. Jarrett, 11 Lea 192.

[a] The heirs are not necessary parties. Brackett's Admr. v. Boreing, 28 Ky. L. Rep. 386, 89 S. W. 496; Martin v. Carver's Admr., 8 Ky. L. Rep. 56, 1 S. W. 199.

17. Ala.—Allen v. Greene, 19 Ala. 34. Ia.—Iowa-Minnesota Land Co. v. Conner, 136 Iowa 674, 112 N. W. 820. Me.—Godfrey v. Dwinell, 40 Me. 94. Mo.—Brueggeman v. Jurgensen, 24 Mo. 87.

[a] The right to maintain the action is in the executor or administrator alone. The heirs are not proper parties. Brueggeman v. Jurgensen, 24 Mo. 87.

18. Ga.—Gibson v. Carreker, 82 Ga. 46, 9 S. E. 124. Ky.—Mt. Sterling & Howard M. Tpk. Co. v. Barry, 18 Ky. L. Rep. 937, 38 S. W. 847. Pa.—Irwin v. Hamilton, 6 Serg. & R. 208. Tenn.—Wilkins v. Frierson, 2 Sneed 708; Shaw v. Wilkins' Admr., 8 Humph. 647, 49 Am. Dec. 692.

[a] For breach of a bond for title, even if the bond is a covenant running with the land. Allen v. Greene, 19 Ala. 34.

19. Mt. Sterling & Howard M. Tpk. Co. v. Barry, 18 Ky. L. Rep. 937, 38 S. W. 847; Young v. Young, 81 N. C. 91; Tate v. Conner, 17 N. C. 224. See Allen v. Greene, 19 Ala. 34, holding that where a bond for title shows on

The representative may sue to recover the penalty of a bond conditioned to procure a release of land owned by the decedent from a mortgage,²⁰ but a suit to recover the land from the obligees, who are alleged to have fraudulently obtained the legal title thereto in violation of the terms of the bond, must be brought in the name of the heirs, or they must be parties.²¹

It has been held that the heir, rather than the representative, is the proper party to sue for the recovery of a part payment of the purchase price made by the decedent where the obligor makes performance impossible.²²

F. SUITS TO SET ASIDE CONVEYANCES AND TRANSFERS BY THE DECEDENT.—The heir may sue to set aside and cancel conveyances of realty made by the decedent,²³ on the ground that they were procured through fraud or undue influence,²⁴ or on the ground of the mental incapacity of the grantor,²⁵ or his minority,²⁶ or conveyances which have been fraudulently altered so as to include property not conveyed,²⁷ or to correct mistakes in deeds.²⁸

Except where the statute has changed the rule,²⁹ the representative

its face that the title is in a third person, the representative may sue for a breach occurring after the decedent's death.

20. *Webster v. Tibbits*, 19 Wis. 438.

21. *Webster v. Tibbits*, 19 Wis. 438.

22. *Buck v. Eaman*, 18 Ill. 529.

23. *Emmerson v. Merritt*, 249 Ill. 538, 94 N. E. 955; *Rakes v. Brown*, 34 Neb. 304, 51 N. W. 848.

24. *Cal.*—*Page v. Garver*, 146 Cal. 577, 80 Pac. 860; *Murphy v. Crowley*, 140 Cal. 141, 73 Pac. 820; *Trubody v. Trubody*, 137 Cal. 172, 69 Pac. 968. *Ga.*—*Kent v. Davis*, 89 Ga. 151, 15 S. E. 457. *Ill.*—See *Spencer v. Spruell*, 196 Ill. 119, 63 N. E. 621. *Ky.*—*Higgins v. Gose*, 144 Ky. 123, 137 S. W. 1038. *Mass.*—*Brown v. Brown*, 209 Mass. 388, 95 N. E. 796; *Busiere v. Reilly*, 189 Mass. 518, 75 N. E. 958. *Mich.*—*Snyder v. Snyder*, 131 Mich. 658, 92 N. W. 353; *Twist v. Babcock*, 48 Mich. 513, 12 N. W. 680. *N. C.*—*Foster v. Cook*, 8 N. C. 509. See *Daniels v. Baxter*, 120 N. C. 14, 26 S. E. 635.

[a] It is not necessary for the heir to show that there is no administration and no necessity therefor. *Veal v. Fortson*, 57 Tex. 482.

[b] In a suit by the heir the complaint should allege whether the deceased died testate or intestate, and if testate who were the devisees in his will, and that he was seized of an estate of inheritance in the property

at the time of his death. *Thomas v. McKay*, 143 Wis. 524, 128 N. W. 59.

25. *Cal.*—*Murphy v. Crowley*, 140 Cal. 141, 73 Pac. 820. *Ill.*—See *Spencer v. Spruell*, 196 Ill. 119, 63 N. E. 621; *Ring v. Lawless*, 190 Ill. 520, 60 N. E. 881. *Ind.*—*Physio-Medical College v. Wilkinson*, 108 Ind. 314, 9 N. E. 167. *Ky.*—*Higgins v. Gose*, 144 Ky. 123, 137 S. W. 1038. *Mass.*—*Brown v. Brown*, 209 Mass. 388, 95 N. E. 796; *Brigham v. Fayerweather*, 144 Mass. 48, 10 N. E. 735. *Mich.*—*Snyder v. Snyder*, 131 Mich. 658, 92 N. W. 353; *Twist v. Babcock*, 48 Mich. 513, 12 N. W. 680.

[a] To recover land conveyed by a third person under a power of attorney alleged to have been executed by the decedent while of unsound mind. *Townner v. Trustees*, 140 N. Y. Supp. 784.

26. The sole heir may avoid a conveyance by a minor made without consideration. He need not negative the existence of and the necessity for administration. *Veal v. Fortson*, 57 Tex. 482.

27. *McDaniel v. Pattison*, 98 Cal. 86, 27 Pac. 651, 32 Pac. 805.

28. *Emmerson v. Merritt*, 249 Ill. 538, 94 N. E. 955; *Shoemate v. Lockridge*, 53 Ill. 503; *Bailey v. Larrance*, 104 Ill. App. 662.

29. *Cal. Code Civ. Proc.*, §1582; *Colins v. O'Lavery*, 136 Cal. 31, 68 Pac. 327.

[a] Upon the death of the plain-

cannot maintain such suits,³⁰ unless the will gives him the title to the property,³¹ or in some states where there is not sufficient personalty to pay the debts.³² Nor can he sue to set aside the voluntary conveyance by his decedent, except where the statute so provides.³³

It has been held that a mortgage may be reformed in a suit by the representative to foreclose it.³⁴

Execution Sales.—The representative is not a proper party complainant to a suit to set aside an execution sale of land under a judgment against the deceased.³⁵ Ordinarily the heirs or devisees are necessary parties to a suit to set aside conveyances to the decedent,³⁶ except, perhaps, where the representative has been ordered by the court to take possession of the realty,³⁷ or title thereto is vested in him by the will.³⁸

Transfers of Personalty.—The representative may sue to set aside transfers of personal property made by the deceased during his lifetime on the ground of mental incapacity, or because of undue influence or fraud,³⁹ or may sue at law to recover money or property transferred under such circumstances.⁴⁰

The heir may sue to set aside transfers of personalty where there is no administration and no debts.⁴¹ Generally the representative alone may sue to set aside gifts of personalty,⁴² save under exceptional circumstances, as where the representative neglects or refuses to sue,⁴³

tiff, such a suit may be continued in the name of his executor. The legatees are not necessary parties. *Subera v. Jones*, 20 S. D. 628, 108 N. W. 26.

30. *Emmerson v. Merritt*, 249 Ill. 538, 94 N. E. 955; *Shoemate v. Lockridge*, 53 Ill. 503.

[a] A special administrator cannot maintain such an action. *Union Trust Co. v. Kirchberg*, 174 Mich. 161, 140 N. W. 464.

31. Not where the will merely gives the executor a power of sale. *Emmerson v. Merritt*, 249 Ill. 539, 94 N. E. 955.

[a] The representative cannot sue without any showing that the possession of the land was wrongfully withheld from him, or that it is necessary to sell the land to pay debts. *King v. Boyd*, 4 Ore. 326.

32. *Pratt v. Millard*, 154 Mich. 112, 117 N. W. 552; *Wheeler v. Single*, 62 Wis. 380, 22 N. W. 569. See also *Rakes v. Brown*, 34 Neb. 304, 51 N. W. 848.

33. *Eads v. Mason*, 16 Ill. App. 545.

[a] An administrator is bound thereby to the same extent as his intestate. *Choteau v. Jones*, 11 Ill. 300, 50 Am. Dec. 460.

As to fraudulent conveyances see the title "**Fraudulent Conveyances.**"

34. *Citizens' Nat. Bank v. Dayton*, 116 Ill. 257, 4 N. E. 492.

35. *Eldred v. Moehring*, 83 Ill. App. 264.

36. *Steere v. Tention*, 46 Fla. 510, 35 So. 106.

37. *Steere v. Tention*, 46 Fla. 510, 35 So. 106.

38. *Steere v. Tention*, 46 Fla. 510, 35 So. 106.

39. *Bruning v. Golden*, 159 Ind. 199, 64 N. E. 657; *Wright v. Holmes*, 100 Me. 508, 62 Atl. 507, 3 L. R. A. (N. S.) 769 (to recover personalty given away by decedent in fraud of her husband's rights).

[a] In a suit by heirs and distributees to recover personalty alleged to have been fraudulently obtained, it is not ground for demurrer that the representative is made a defendant instead of a plaintiff. *Daniels v. Baxter*, 120 N. C. 14, 26 S. E. 635.

40. May maintain assumpsit for money received. *Harty v. Teagan*, 150 Mich. 75, 113 N. W. 594.

41. *Kent v. Davis*, 89 Ga. 151, 15 S. E. 457.

42. On the ground of fraud and mental incapacity. *Patton v. Gregory*, 21 Tex. 513.

43. *Patton v. Gregory*, 21 Tex. 513.

though there is authority to the effect that such suits must be brought by the heirs.⁴⁴

The representative may sue to set aside an assignment of a lease,⁴⁵ or an assignment of notes⁴⁶ or mortgages,⁴⁷ or of a savings account,⁴⁸ on the ground of fraud or incapacity or undue influence.

It has been held that the validity of an assignment of a mortgage may be determined in a suit by the heir.⁴⁹

Pleading. — In a suit by an heir to set aside a conveyance by his ancestor he must allege facts showing that he is such heir,⁵⁰ but it is not necessary for him to allege that the ancestor died intestate.⁵¹ In such a suit the plaintiff may allege both undue influence and mental incapacity, and, if he does so, will not be required to elect between them.⁵²

In some states causes of action to enforce distinct and different trusts respecting different tracts of land, and arising out of different acts of fraud or undue influence may be united in the same complaint.⁵³

In a suit by the representative he must allege facts showing his right to sue.⁵⁴

If the heirs are not joined as defendants in a suit to set aside a conveyance to the decedent, the bill must allege facts showing that they are not necessary parties.⁵⁵

G. ACTIONS IN REGARD TO PROPERTY SOLD AFTER DECEDENT'S DEATH. — Where a sale of realty by the representative is not in substantial compliance with the statute, the heirs may recover the land,⁵⁶

44. *Ford v. Hennessy*, 70 Mo. 580.

45. A lease of lands is personality. *Mark v. North*, 155 Ind. 575, 57 N. E. 902.

46. *Mark v. North*, 155 Ind. 575, 57 N. E. 902.

[a] May sue in equity to recover notes which the defendant by fraud procured the decedent to indorse and deliver to him. *Sears v. Carrier*, 4 Allen (Mass.) 339.

47. *Mark v. North*, 155 Ind. 575, 57 N. E. 902.

48. Undue influence. *Derrick v. Emmons*, 14 N. Y. Supp. 360.

49. *Snyder v. Snyder*, 131 Mich. 658, 92 N. W. 353. See *Gilkeson v. Thompson*, 210 Pa. 355, 59 Atl. 1114.

50. An averment that the plaintiffs are the heirs of the intestate is sufficient, in the absence of a motion to make the complaint more specific. *Physio-Medical College v. Wilkinson*, 108 Ind. 314, 9 N. E. 167.

51. There is no presumption that the ancestor died testate. If in fact he left a will devising the property to others, that is a matter of defense.

Murphy v. Crowley, 140 Cal. 141, 73 Pac. 820.

52. *Murphy v. Crowley*, 140 Cal. 141, 73 Pac. 820.

53. Under Cal. Code Civ. Proc., §427, permitting the joinder of causes of action arising out of claims against a trustee. *Murphy v. Crowley*, 140 Cal. 141, 73 Pac. 820.

54. That there is insufficient personality to pay the debts and expenses of administration. *Pratt v. Millard*, 154 Mich. 112, 117 N. W. 552.

55. As that the court has ordered the representative to take possession of the realty, or that the will has vested the title in him. *Steere v. Tention*, 46 Fla. 510, 35 So. 106.

56. **U. S.**—*Gaines v. New Orleans*, 6 Wall. 642, 18 L. ed. 950. **Ala.**—*Woods v. Legg*, 91 Ala. 511, 8 So. 342; *Robertson v. Bradford*, 70 Ala. 385. **Mo.**—*Schaefer v. Causey*, 8 Mo. App. 142. **Wis.**—*Jones v. Billstein*, 28 Wis. 221.

[a] Equity will not entertain a suit to recover possession of the land and the rents and profits thereof where the order of sale is void on its face, since

provided they first make restitution of any part of the purchase price received by them.⁵⁷ Likewise they may sue to set aside fraudulent sales of land by the representative.⁵⁸

A representative who has sold land under an order of court may compel specific performance by the purchaser.⁵⁹

The heirs may enforce a vendor's lien for property sold by commissioners for purposes of distribution,⁶⁰ or may bring an action for damages against the purchaser for failure to comply with the terms of the sale.⁶¹

Ordinarily the representative is the proper party to sue for rescission of a sale of land made by him because of a mistake as to the quantity conveyed, or to recover for the excess,⁶² but the heirs or devisees may do so where the proceeds have been turned over to them, and the representative has failed to sue and has settled his accounts.⁶³

The heir may recover the purchase price of land sold by the representative under an order of court, after the administration has been closed.⁶⁴

Personalty. — The heir may sue to set aside fraudulent or illegal transfers of assets by the representative, where the latter will not sue,⁶⁵ or where there are no debts,⁶⁶ or to recover personal property sold by the representative to himself.⁶⁷

H. EJECTMENT AND LIKE ACTIONS.⁶⁸ — An heir or devisee may

there is an adequate remedy at law. *Tyson v. Brown*, 64 Ala. 241.

57. *Woods v. Legg*, 91 Ala. 511, 8 So. 342; *Schaefer v. Causey*, 8 Mo. App. 142.

[a] Equity will enjoin the heir from maintaining ejectment unless he tenders restitution. *Robertson v. Bradford*, 73 Ala. 116.

58. *Anderson v. Goodwin*, 125 Ga. 663, 54 S. E. 679; *Hawley v. Tesch*, 72 Wis. 299, 39 N. W. 483; *Bassett v. Warner*, 23 Wis. 673.

[a] In Texas an heir cannot recover land fraudulently conveyed by the administrator except after the close of administration, or perhaps, where there are no debts and the administration void. In such case the suit might perhaps be maintained on the ground that there are no debts and no administrator. *Giddings v. Steele*, 28 Tex. 732, 748.

59. *Angell v. Steere*, 16 R. I. 200, 14 Atl. 81.

60. *McIntosh v. Reid*, 45 Ala. 456.

61. *Howison v. Oakley*, 118 Ala. 215, 23 So. 810.

[a] The complaint must show that the plaintiffs are the only heirs. An averment that the plaintiffs are "the heirs at law of" the decedent is suffi-

cient, on demurrer, to show that they are his only heirs. *Howison v. Oakley*, 118 Ala. 215, 23 So. 810.

[b] The administrator might also bring the action. *Howison v. Oakley*, 118 Ala. 215, 23 So. 810.

62. Where a tract sold as containing 140 acres, more or less, is found to contain 255 acres. *Pratt v. Bowman*, 37 W. Va. 715, 17 S. E. 210.

63. *Pratt v. Bowman*, 37 W. Va. 715, 17 S. E. 210.

64. Where the administration has ceased by the death of the administrator, and there has been no effort by the creditors, if any, to renew it. *Sanders v. Moore*, 52 Ark. 376, 12 S. W. 783.

65. *Worthy v. Johnson*, 8 Ga. 236, 52 Am. Dec. 399.

[a] Property transferred to brokers as a margin for the purchase and sale of stocks for the individual account of the representative. *Randel v. Dyett*, 38 Hun (N. Y.) 347.

66. *Southwestern R. Co. v. Thomson*, 40 Ga. 408, stock sold at private sale.

67. *Rowell v. Rowell*, 122 Wis. 1, 99 N. W. 473.

68. As to ejectment generally, see the title "Ejectment."

maintain ejectment.⁶⁹ Indeed, both at common law,⁷⁰ and in states where the rule has not been modified by statute, the heir, and not the representative of the deceased, is the only one who can bring such actions,⁷¹ except where the decedent held a mere chattel interest in the land sought to be recovered.⁷²

Some statutes give the representative of the deceased express authority to sue to recover possession of the land, or give the representative a right to the possession of the realty, and in such cases he may maintain ejectment therefor,⁷³ but this right is limited under some statutes

69. **Ala.**—*Wilson v. Kirkland*, 172 Ala. 72, 55 So. 174; *McKay v. Broad*, 70 Ala. 377; *Tarver v. Smith*, 38 Ala. 135. **Cal.**—Code Civ. Proc., §1452; *Kimball v. Tripp*, 136 Cal. 631, 69 Pac. 428; *Estep v. Armstrong*, 91 Cal. 659, 27 Pac. 1091; *Spotts v. Hanley*, 85 Cal. 155, 24 Pac. 738; *Janes v. Throckmorton*, 57 Cal. 368; *McFadden v. Ellmaker*, 52 Cal. 348. **Mich.**—*Covert v. Morrison*, 49 Mich. 133, 13 N. W. 390. **Miss.**—*Cohea v. Jemison*, 68 Miss. 510, 10 So. 46. **Neb.**—*Lewon v. Heath*, 53 Neb. 707, 74 N. W. 274. **N. Y.**—*Chamberlin v. Taylor*, 105 N. Y. 185, 11 N. E. 625; *Hotchkiss v. Auburn & R. R. Co.*, 36 Barb. 600; *Fosgate v. Herkimer Mfg. & H. Co.*, 9 Barb. 287; *Stevens v. Fogle*, 73 Misc. 417, 130 N. Y. Supp. 1082. **N. C.**—*Beam v. Jennings*, 89 N. C. 451. **Pa.**—*Stevenson v. Scott*, 188 Pa. 234, 41 Atl. 533; *Webster v. Webster*, 53 Pa. 161. **Utah.**—Comp. Laws, 1907, §3912. **Va.**—Code, 1904, §2723; *Elys v. Wynne*, 22 Gratt. 224; *Tapscott v. Cobbs*, 11 Gratt. 172. **W. Va.**—Code, 1906, §3337. **Wis.**—*Filbey v. Carrier*, 45 Wis. 469. See *Thomas v. McKay*, 143 Wis. 524, 128 N. W. 59.

[a] The heir may maintain ejectment (1) though the will directs the executor to convert all the property into money as soon as practicable (*Estep v. Armstrong*, 91 Cal. 659, 27 Pac. 1091), (2) or notwithstanding a void decree of distribution. *Phelan v. Smith*, 100 Cal. 153, 34 Pac. 667.

[b] **Minnesota.**—The representative, either alone or jointly with the heirs, may maintain an action for possession. Rev. Laws, 1905, §3705. *Jenkins v. Jenkins*, 92 Minn. 310, 100 N. W. 7.

70. **Ala.**—*McKay v. Broad*, 70 Ala. 377. **Mont.**—*Carrhart v. Montana Mineral L. & M. Co.*, 1 Mont. 245. **Neb.**—*Dundas v. Carson*, 27 Neb. 634, 43 N. W. 399.

71. The representative cannot bring

such action. **Mo.**—*Burdyne v. Mackey*, 7 Mo. 374. **Mont.**—*Carrhart v. Montana Mineral L. & M. Co.*, 1 Mont. 245. **N. Y.**—*Chamberlin v. Taylor*, 105 N. Y. 185, 11 N. E. 625; *Stevens v. Fogle*, 73 Misc. 417, 130 N. Y. Supp. 1082. **N. C.**—*Hughes v. Gay*, 132 N. C. 50, 43 S. E. 539. **Tenn.**—*Rogers v. Marker*, 12 Heisk. 645; *Peck v. Henderson*, 7 Yerg. 18.

[a] The representative cannot sue for the recovery or maintenance of possession or title to realty. *Ryan v. Duncan*, 88 Ill. 144; *Phelps v. Funkhouser*, 39 Ill. 401; *Smith v. McConnell*, 17 Ill. 135, 63 Am. Dec. 340.

[b] The administrator cannot maintain any real action to recover seisin and possession. *Fuller v. Young*, 10 Me. 365.

[c] The executor cannot maintain the statutory action for possession, though the statute gives the representative the right to possession for purposes of administration. *Humphreys v. Taylor*, 5 Ore. 260.

72. Such as a leasehold estate limited to ten years. *Sutter v. Lackmann*, 39 Mo. 91.

73. **U. S.**—*Meeks v. Olpherts*, 100 U. S. 564, 25 L. ed. 735. **Ala.**—*Wilson v. Kirkland*, 172 Ala. 72, 55 So. 174; *Moragne v. Doe*, 143 Ala. 459, 462, 39 So. 161, 111 Am. St. Rep. 52; *Woods v. Legg*, 91 Ala. 511, 8 So. 342; *McKay v. Broad*, 70 Ala. 377; *Evans v. Welch*, 63 Ala. 250. **Ark.**—*Jones v. Jones*, 107 Ark. 402, 155 S. W. 117; *Cook v. Franklin*, 73 Ark. 23, 83 S. W. 325; *Hopson v. Oxford*, 72 Ark. 272, 79 S. W. 1051; *Chowning v. Stanfield*, 49 Ark. 87, 4 S. W. 276; *Culberhouse v. Shirey*, 42 Ark. 25. **Cal.**—Code Civ. Proc., §§1452, 1582; *Spotts v. Hanley*, 85 Cal. 155, 24 Pac. 738; *Janes v. Throckmorton*, 57 Cal. 368. **Mich.**—*Moody v. Macomber*, 159 Mich. 657, 124 N. W. 549, 134 Am. St. Rep. 755;

to cases where there is a necessity to take possession of the realty to pay debts.⁷⁴

The fact that the statute gives the representative a right to the possession does not deprive the heir or devisee of the right to sue pending administration unless the representative has actually taken possession, or has asserted his right thereto and has instituted proceedings to obtain it;⁷⁵ nor of the right to sue after the administration has closed, if the rights of the representative have not been asserted.⁷⁶ The representative cannot sue where he has been divested of the right to possession.⁷⁷

Under some statutes, if there is an administrator, the sole right to sue for land is in him,⁷⁸ and the heir or devisee may sue only under

Barlage v. Detroit, etc. R. Co., 54 Mich. 564, 20 N. W. 587; *Whitford v. Crooks*, 54 Mich. 261, 20 N. W. 45; *Kline v. Moulton*, 11 Mich. 370. **Minn.**—Rev. Laws 1905, §3705; *Jordan v. Secombe*, 33 Minn. 220, 22 N. W. 383; *Miller v. Hoberg*, 22 Minn. 249. **Nev.**—Rev. Laws, 1912, §6022. **S. D.** Prob. Code, §243, Comp. Laws, 1910, p. 505; *Subera v. Jones*, 20 S. D. 628, 108 N. W. 26. **Tex.**—*Sayles' Civ. St.*, 1897, art. 1197; *Lawson v. Kelley*, 82 Tex. 457, 17 S. W. 717; *Bogges v. Brownson*, 59 Tex. 417; *Barrett v. Barrett's Admr.*, 31 Tex. 344; *Purington v. Broughton* (Tex. Civ. App.), 158 S. W. 227. **Utah.**—Comp. Laws, 1907, §3914; *Jenkins v. Jensen*, 24 Utah 108, 66 Pac. 773, 91 Am. St. Rep. 783. **Vt.** Pub. St., 1906, §2834. **Wash.**—Rem. & Ball. Ann. Codes & St., §1535; *Gibson v. Slater*, 42 Wash. 347, 84 Pac. 648; *Balch v. Smith*, 4 Wash. 497, 30 Pac. 648. **Wis.**—St., 1898, §3083.

Formerly the representative (1) could maintain the action (*Rose v. Withers*, 39 Fla. 460, 22 So. 724, and cases cited), (2) but the heirs could not do so pending administration (*Doyle v. Wade*, 23 Fla. 90, 1 So. 516, 11 Am. St. Rep. 334). (3) Now the heirs alone must sue unless realty required to be sold for debts. Fla. Gen. St., 1906, §2414.

74. Fla.—*Finlayson v. Love*, 44 Fla. 551, 33 So. 306; *Rose v. Withers*, 39 Fla. 460, 22 So. 724. **Mo.**—Rev. St., 1909, §139; *Grant v. Hathaway*, 215 Mo. 141, 114 S. W. 609; *Hall v. Farmers & M. Bank*, 145 Mo. 418, 46 S. W. 1000; *Thorp v. Miller*, 137 Mo. 231, 38 S. W. 929; *Meeks v. Clear Jack Min. Co.*, 141 Mo. App. 648, 124 S. W. 1084. **Neb.**—*Dundas v. Carson*, 27 Neb.

634, 43 N. W. 399, where the estate is insolvent.

[a] **Homestead.**—Since the representative can never be entitled to the possession of the homestead land, or have any interest in, or concern with it, he is not a proper party to a suit in ejectment to recover the same. *Finlayson v. Love*, 44 Fla. 551, 33 So. 306, citing *Baker v. State*, 17 Fla. 406; *Barco v. Fennell*, 24 Fla. 378, 5 So. 9.

75. Ala.—*Calhoun v. Fletcher*, 63 Ala. 574. **Mich.**—*Marvin v. Schilling*, 12 Mich. 356; *Streeter v. Paton*, 7 Mich. 341. See *Warren v. Tobey*, 32 Mich. 45. **Minn.**—*Jenkins v. Jenkins*, 92 Minn. 310, 100 N. W. 7. **Wis.**—*Filbey v. Carrier*, 45 Wis. 469; *Marsh v. Board of Suprs.*, 38 Wis. 250; *Jones v. Billstein*, 28 Wis. 221.

[a] Where all the debts have been paid. *Gossage v. Crown Point G. & S. Min. Co.*, 14 Nev. 153.

[b] The representative cannot recover realty in the absence of a showing that the rents and profits are needed to pay debts or legacies. The burden of proving that there are debts is on him. *Volk v. Stowell*, 98 Wis. 385, 74 N. W. 118.

[c] **Arkansas.**—During the pendency of the administration and before the debts are paid the heir cannot recover the land from one holding as tenant of the administrator. *Hopson v. Oxford*, 72 Ark. 272, 79 S. W. 1051.

76. Calhoun v. Fletcher, 63 Ala. 574.

77. Emerie v. Penniman, 26 Cal. 119, as where title under a Mexican land grant was confirmed in the heirs with the consent of the executor.

78. Ga.—Code, 1911, §§3657, 3933; *Wilson v. Wood*, 127 Ga. 316, 56 S. E. 457; *Doris v. Story*, 122 Ga. 611, 50

exceptional circumstances,⁷⁹ as where the representative will not sue,⁸⁰ or where his interests are antagonistic to those of the heirs,⁸¹ or he has been guilty of fraud or collusion,⁸² or where a suit by the heir is necessary for the preservation of the estate,⁸³ or where there is no administration,⁸⁴ or where the administration has been closed,⁸⁵ or after the time for paying debts has expired.⁸⁶ If the representative

S. E. 348; *Crummey v. Bentley*, 114 Ga. 746, 40 S. E. 765; *Greenfield v. McIntyre*, 112 Ga. 691, 38 S. E. 44. **Tex.**—*Northcraft v. Oliver*, 74 Tex. 162, 11 S. W. 1121; *Rogers v. Kennard*, 54 Tex. 36; *Giddings v. Steele*, 28 Tex. 732, 747; *Baker v. Hamblen* (Tex. Civ. App.), 75 S. W. 362. **Vt.**—Pub. St., 1906, §2838; *Clark v. Clark's Estate*, 58 Vt. 527, 3 Atl. 508; *Austin v. Bailey*, 37 Vt. 219, 86 Am. Dec. 703; *Roberts v. Morgan*, 30 Vt. 319; *Abbott v. Pratt*, 16 Vt. 626; *Merriam v. Barton*, 14 Vt. 501. Formerly the rule was otherwise. *Cushman v. Jordon*, 13 Vt. 597. **Wash.** *Hazelton v. Bogardus*, 8 Wash. 102, 35 Pac. 602; *Lawrence v. Bellingham Bay*, etc. R. Co., 4 Wash. 664, 30 Pac. 1099; *Balch v. Smith*, 4 Wash. 497, 30 Pac. 648; *Dunn v. Peterson*, 4 Wash. 170, 29 Pac. 998.

[a] If he is joined as plaintiff in a suit by the heirs, the other plaintiffs may have his name stricken on motion. *Doris v. Story*, 122 Ga. 611, 50 S. E. 348.

79. *Rogers v. Kennard*, 54 Tex. 36; *Hazelton v. Bogardus*, 8 Wash. 102, 35 Pac. 602; *Lawrence v. Bellingham Bay*, etc. R. Co., 4 Wash. 664, 30 Pac. 1099; *Balch v. Smith*, 4 Wash. 497, 30 Pac. 648.

80. *Rogers v. Kennard*, 54 Tex. 36.

81. Where the defendants claim under deeds from the administrator made in both his representative and individual capacity. *Rogers v. Kennard*, 54 Tex. 36.

82. *Anderson v. Goodwin*, 125 Ga. 663, 54 S. E. 679.

[a] Heirs and creditors may sue in equity to recover land which equitably belongs to the estate where the representative refuses to sue because of collusion between himself and the defendant. *Edwards v. Kilpatrick*, 70 Ga. 328.

[b] This right of action exists in the same manner and to the same extent only as it does in the administrator, and the action can only be

brought in the county where the latter could have brought it. *Edwards v. Kilpatrick*, 70 Ga. 328.

83. As where the administrator was dead, and no administration was pending, and none had existed for five years, and there existed a reasonable probability that the estate was in danger of losing a part of the land by adverse possession. *Baker v. Hamblen* (Tex. Civ. App.), 75 S. W. 362.

84. **Ga.**—Code, 1911, §§3657, 3933; *Wilson v. Wood*, 127 Ga. 316, 56 S. E. 457; *Crummey v. Bentley*, 114 Ga. 746, 40 S. E. 765; *Greenfield v. McIntyre*, 112 Ga. 691, 38 S. E. 44. **Tex.**—Where there is no administration and no debts. *Northcraft v. Oliver*, 74 Tex. 162, 74 S. W. 1121; *Giddings v. Steele*, 28 Tex. 732, 747; *Baker v. Hamblen* (Tex. Civ. App.), 75 S. W. 362. **Vt.** *Buck v. Squiers*, 22 Vt. 484. **Wash.** See *Balch v. Smith*, 4 Wash. 497, 30 Pac. 648; *Dunn v. Peterson*, 4 Wash. 170, 29 Pac. 998.

[a] If there has been an administration, but the administrator has been discharged, the case stands as if there had been no administration. *Crummey v. Bentley*, 114 Ga. 746, 40 S. E. 765.

[b] Where the administratrix had died and her executor had been discharged before the action was brought, and there was only a temporary administrator at that time. *Doris v. Story*, 122 Ga. 611, 50 S. E. 348.

[c] **Homestead.**—Since the homestead cannot be converted to the use of creditors, the heir may sue in reference to it. *Sossaman v. Powell*, 21 Tex. 664.

85. *Giddings v. Steele*, 28 Tex. 732, 747; *Hazelton v. Bogardus*, 8 Wash. 102, 35 Pac. 602; *Balch v. Smith*, 4 Wash. 497, 30 Pac. 648.

86. **Vt.** Pub. St., 1906, §2838; *Clark v. Clark's Est.*, 58 Vt. 527, 3 Atl. 508; *Austin v. Bailey*, 37 Vt. 219, 86 Am. Dec. 703; *Roberts v. Morgan*, 30 Vt. 319.

consents thereto,⁸⁷ or surrenders the possession of the land to him, the heir may bring such action.⁸⁸

An executor may maintain ejectment where the will gives him the legal title to the land with power of sale,⁸⁹ but he has no such authority under a naked power of sale,⁹⁰ unless authorized by statute.⁹¹

Joinder of Heirs and Representative. — Except where the statute permits them to do so,⁹² the heirs or devisees and the representative cannot join in actions to recover possession of the realty, even though either might have sued alone.⁹³

By express statute in some states in every suit against the estate of a decedent involving the title to real estate, the representative, if

87. Ga. Code, 1911, §3933; *Buchan v. Williamson*, 131 Ga. 509, 62 S. E. 819; *Wilson v. Wood*, 127 Ga. 316, 56 S. E. 457; *Doris v. Story*, 122 Ga. 611, 50 S. E. 348; *Crummey v. Bentley*, 114 Ga. 746, 40 S. E. 765; *Greenfield v. McIntyre*, 112 Ga. 691, 38 S. E. 44.

[a] In Georgia a temporary administrator has no right to consent to a suit by the heir. *Doris v. Story*, 122 Ga. 611, 50 S. E. 348; *Banks v. Walker*, 112 Ga. 542, 37 S. E. 866.

88. Vt. Pub. St., 1906, §2838; *Clark v. Clark's Est.*, 58 Vt. 527, 3 Atl. 508; *Austin v. Bailey*, 37 Vt. 219, 86 Am. Dec. 703; *Roberts v. Morgan*, 30 Vt. 319.

89. *Moody v. Macomber*, 159 Mich. 657, 124 N. W. 549, 134 Am. St. Rep. 755.

[a] Not where the will merely gives him a power of sale. *Chamberlin v. Taylor*, 105 N. Y. 185, 11 N. E. 625.

90. A direction that land be sold and the proceeds divided does not vest the legal estate in the executor, or preclude the heirs from maintaining ejectment. *Beam v. Jennings*, 89 N. C. 451.

[a] A devise to executors to sell passes the interest in it to them, but a devise that executor shall sell, or that the land shall be sold by them, gives them a mere power of sale. *Rogers v. Marker*, 12 Heisk. (Tenn.) 645; *Peck v. Henderson*, 7 Yerg. (Tenn.) 18.

[b] As a general rule a devise of land to executors to sell passes the interest in it, but a devise that the land shall be sold by executors confers but a naked power to sell. In the absence of language conferring an estate upon executors, an estate by implication will arise where it is necessary that it

should exist in order that the trust conferred upon them may be executed. *Cohea v. Jemison*, 68 Miss. 510, 10 So. 46.

91. 1 Purdon's Dig. (Pa.), 1099, §93; *Kirk v. Carr*, 54 Pa. 285; *Chew's Exrs. v. Chew*, 28 Pa. 17.

[a] It is not necessary that he first obtain authority from the orphan's court. *Kirk v. Carr*, 54 Pa. 285.

92. See the statutes of the various states, including the following: Cal. Code Civ. Proc., §1452. Minn.—Rev. Laws, 1905, §3705. Utah.—Comp. Laws, 1907, §3912.

93. *Wilson v. Kirkland*, 172 Ala. 72, 55 So. 174; *Tarver v. Smith*, 38 Ala. 135; *Shaddix v. Watson*, 130 Ga. 764, 61 S. E. 828.

[a] "The rights of the executor, as such, in the lands of his testator, are entirely unlike those of the devisees of the fee. The devisees have the absolute property in the estate, subject to be defeated in a limited class of cases, by the assertion of certain specified powers with which the legislature has clothed the executor. The respective rights of the parties cover no ground in common; the rights of the one yielding to the extent that the other can be asserted. True, each may maintain an action of ejectment, to recover the possession of the lands, but their several rights over the lands when recovered are fundamentally unlike." *Tarver v. Smith*, 38 Ala. 135.

[b] Where the plaintiff dies pending ejectment, the action may be revived in the names of the representative and the heirs or devisees jointly, if it is proposed to have the suit, when revived, proceed for the recovery of possession and for rents or damages accruing prior and subsequent to

any, and the heirs are required to be made parties defendant.⁹⁴

Pleading.⁹⁵—If the heir is authorized to sue only under certain conditions, he must allege facts which bring him within the exceptions to the general rule,⁹⁶ as that there is no administration and no necessity therefor,⁹⁷ or that the representative has consented that he may sue,⁹⁸ or that a suit by him is necessary for the preservation of the estate,⁹⁹ or that the administration has been closed.¹

So, too, if the representative is authorized to recover land only when it is required for the payment of debts or legacies, he must allege facts showing that such necessity exists.²

Statutes sometimes provide what a declaration or complaint in ejectment by the representative must set forth.³

I. SUITS TO QUIET TITLE OR TO REMOVE CLOUDS FROM TITLE.⁴—As a general rule, the heir or devisee may sue to quiet title or to remove clouds from the title to realty,⁵ either alone or jointly with the executor or administrator, under some statutes;⁶ and this has been

the death of the plaintiff. *Wilson v. Kirkland*, 172 Ala. 72, 55 So. 174.

94. *Sayles' Civ. St. (Tex.)*, 1897, art. 1198; *Lawson v. Kelley*, 82 Tex. 457, 17 S. W. 717.

[a] The heirs are necessary parties defendant (1) to suits to quiet title (*Russell v. Texas & P. R. Co.*, 68 Tex. 646, 5 S. W. 686), (2) or in trespass to try title. *Barrett v. Barrett's Admr.*, 31 Tex. 344.

[b] If there is a will, the devisee must be made a party but the heirs need not be. *Lufkin v. City of Galveston*, 73 Tex. 340, 11 S. W. 340.

95. See generally the title "**Ejectment.**"

96. *Lawrence v. Bellingham Bay*, etc. R. Co., 4 Wash. 664, 30 Pac. 1099.

97. **Ga.**—*Wilson v. Wood*, 127 Ga. 316, 56 S. E. 457; *Crummey v. Bentley*, 114 Ga. 746, 40 S. E. 765; *Greenfield v. McIntyre*, 112 Ga. 691, 38 S. E. 44. **Tex.**—*Baker v. Hamblen* (Tex. Civ. App.), 75 S. W. 362. **Wash.**—*Balch v. Smith*, 4 Wash. 497, 30 Pac. 648; *Dunn v. Peterson*, 4 Wash. 170, 29 Pac. 998.

[a] Even where there is no administration he must allege that there is no necessity for one because there are no debts. *Norcraft v. Oliver*, 74 Tex. 162, 74 S. W. 1121.

[b] In *Tucker v. Brown*, 9 Wash. 357, 37 Pac. 456, the complaint was held to sufficiently show that no administration was pending and that there was no possibility of any administration being required in the state.

98. *Wilson v. Wood*, 127 Ga. 316, 56

S. E. 457; *Crummey v. Bentley*, 114 Ga. 746, 40 S. E. 765; *Greenfield v. McIntyre*, 112 Ga. 691, 38 S. E. 44.

99. *Baker v. Hamblen* (Tex. Civ. App.), 75 S. W. 362.

1. *Crummey v. Bentley*, 114 Ga. 746, 40 S. E. 765. See *Balch v. Smith*, 4 Wash. 497, 30 Pac. 648; *Dunn v. Peterson*, 4 Wash. 170, 29 Pac. 998.

2. *Volk v. Stowell*, 98 Wis. 385, 74 N. W. 118. See *Cook v. Franklin*, 73 Ark. 23, 83 S. W. 325.

3. See generally the statutes.

[a] In Wisconsin the complaint in ejectment by the representative must set forth the nature and extent of the interest of the heirs, devisees or successors in interest of the deceased, and also that the plaintiff, as such representative, is entitled to the possession thereof. *St.*, 1898, §3083.

4. See generally the title "**Quieting Title.**"

5. **Ia.**—See *Cooley v. Maine*, 143 N. W. 431. **Minn.**—*Rev. Laws*, 1905, §3705. **Neb.**—*Rakes v. Brown*, 34 Neb. 304, 51 N. W. 848.

6. **Cal. Code Civ. Proc.**, §1452; *Estep v. Armstrong*, 91 Cal. 659, 27 Pac. 1091; *Miller v. Luco*, 80 Cal. 257, 22 Pac. 195; *Janes v. Throckmorton*, 57 Cal. 368; *Boye v. Andrews*, 10 Cal. App. 494, 102 Pac. 551; *Utah Comp. Laws*, 1907, §3912.

[a] In states where the representative is entitled to possession of the realty it is sometimes provided that his possession shall be deemed that of the heirs or devisees for the purpose of

held to be true even where the representative is entitled to possession of the realty, if he has not actually asserted such right and taken possession.⁷

As a general rule, the representative may not maintain such actions alone,⁸ though in some states he is permitted to do so,⁹ at least if it

bringing suits to quiet title, but that such possession of the heirs or devisees shall be subject to the possession of the representative for purposes of administration. **Cal.**—Code Civ. Proc., §1581. **Nev.**—Rev. Laws, 1912, §6021. **S. D.**—Prob. Code, §242, Comp. Laws, 1910, p. 505; *Subera v. Jones*, 20 S. D. 628, 108 N. W. 26. **Utah.** Comp. Laws, 1907, §3913. **Wyo.**—Comp. St., 1910, §5561.

[b] The grantee of a devisee may sue. *Jordan v. Fay*, 98 Cal. 264, 33 Pac. 95.

7. *Marsh v. Board of Supers.*, 38 Wis. 250.

[a] Even in states where the realty is regarded as assets and all suits in relation thereto are required to be brought by the representative, the heir may sue to remove a cloud from the title to the homestead. In no event can it be converted to the use of creditors. *Sossaman v. Powell*, 21 Tex. 664.

8. **Ala.**—*Gulf Coal & Coke Co. v. Appling*, 157 Ala. 325, 47 So. 730; *Nashville, C. & St. L. Ry. v. Procter*, 152 Ala. 482, 44 So. 669. **Colo.**—*McKee v. Howe*, 17 Colo. 538, 31 Pac. 115. **Ill.** *Ryan v. Duncan*, 88 Ill. 144; *Le Moyne v. Quimby*, 70 Ill. 399; *Shoemate v. Lockridge*, 53 Ill. 503; *Cutter v. Thompson*, 51 Ill. 390, 531; *Phelps v. Funkhouser*, 39 Ill. 401; *Smith v. McConnell*, 17 Ill. 135, 63 Am. Dec. 340. **N. Y.** *Stevens v. Fogle*, 73 Misc. 417, 130 N. Y. Supp. 1082.

[a] Not where he does not show that he is in possession of the realty or that he has obtained a license to sell it. *Paine v. St. Paul & P. R. Co.*, 14 Minn. 65.

[b] Not where it is not alleged that the estate is insolvent, or that it is necessary to sell the property to pay debts, even if he could in any event. *McKee v. Howe*, 17 Colo. 538, 31 Pac. 115.

[c] The administrator is not entitled to a writ of error to review a decree in a suit to remove a cloud, but the right to review is in the heirs.

Strong v. Peters, 212 Ill. 282, 72 N. E. 369.

9. **Cal.**—Code Civ. Proc., §§1452, 1582; *Collins v. O'Laverty*, 136 Cal. 31, 68 Pac. 327; *Pennie v. Hildreth*, 81 Cal. 127, 22 Pac. 398; *Miller v. Luco*, 80 Cal. 257, 22 Pac. 195; *Janes v. Throckmorton*, 57 Cal. 368; *Curtis v. Sutter*, 15 Cal. 259; *Boye v. Andrews*, 10 Cal. App. 494, 102 Pac. 551. **Neb.** See *Rakes v. Brown*, 34 Neb. 304, 51 N. W. 848. **Utah.**—Comp. Laws, 1907, §§3912, 3913, 3914. **Wash.**—*Boyer v. Robinson*, 26 Wash. 117, 66 Pac. 119.

[a] In **Kansas** a foreign executor or representative may do so. If the heir is not a necessary party, his joinder is not prejudicial, and is waived where no objection is taken by demurrer or answer. *Quinton v. Neville*, 152 Fed. 879, 81 C. C. A. 673.

[b] In **Minnesota** he may sue, either alone or jointly with the heirs or devisees. Rev. Laws, 1905, §3705.

[c] In **Oregon** the representative may maintain a statutory action to determine an adverse claim to realty, especially where the estate is insolvent, and it is necessary to sell or dispose of the property for the purpose of paying claims. *Ladd v. Mills*, 44 Ore. 224, 75 Pac. 141.

[d] He cannot sue of his own motion, and in the absence of a showing that possession of the property is wrongfully withheld from him, or that it is necessary for him to sell it to pay debts. *King v. Boyd*, 4 Ore. 326.

[e] **Texas.**—Under Sayles' Civ. St., art. 1197, the representative may sue. The heirs are not necessary parties. *Russell v. Texas & P. R. Co.*, 68 Tex. 646, 5 S. W. 686.

[f] The administrator of a purchaser at a tax sale cannot sue without joining the heirs. *Jenkins v. Bacon*, 30 Mich. 154.

[g] A creditor cannot sue except by leave of court after the administrator has refused to do so. *Marshall v. Blass*, 82 Mich. 518, 46 N. W. 947, 47 N. W. 516.

appears that it is necessary to resort to the realty to pay the debts,¹⁰ or if the court has licensed him to sell it for that purpose,¹¹ or where the court orders him to take possession of the land,¹² or he is given the possession and control of it by the will.¹³ He is sometimes regarded as a proper, though not a necessary, party.¹⁴

In at least one state the right of action is exclusively in the representative,¹⁵ the heir being able to sue only under exceptional circumstances,¹⁶ or after the administration has closed.¹⁷

In at least one state both the heirs and the representative are necessary parties defendant to such a suit.¹⁸

Pleading.—If the representative is authorized to sue only when it is necessary to sell the land to pay debts, he must allege that such necessity exists.¹⁹ And in case of suit on that ground, the bill must make a full statement of the claims against the estate,²⁰ and must show the disposition made of the personalty,²¹ or that no personalty has come into his hands.²²

J. ACTIONS FOR INJURIES TO LAND.—At common law, causes of action for trespass did not survive, and hence, neither the heir nor the representative could sue for damages for trespass committed during

10. *Wheeler v. Single*, 62 Wis. 380, 22 N. W. 569. And see: **Conn.**—*Hall v. Pierson*, 63 Conn. 332, 28 Atl. 544. **Neb.**—*Rakes v. Brown*, 34 Neb. 304, 51 N. W. 848, where it is said that perhaps such an action may be revived in the name of the representative of a deceased plaintiff where it is shown that the realty is needed to pay debts. **Ore.**—*Ladd v. Mills*, 44 Ore. 224, 75 Pac. 141; *King v. Boyd*, 4 Ore. 326.

[a] May sue to cancel a void tax deed, when it is necessary to sell the land to pay debts. *Hogan v. Piggott*, 60 W. Va. 541, 56 S. E. 189.

[b] **The Heirs Must Be Made Parties.**—*Gladson v. Whitney*, 9 Iowa 267.

11. *Laverty v. Sexton*, 41 Iowa 435.

[a] **In Michigan** it is his duty to institute a proceeding to clear a cloud from the title to realty which he has obtained a license to sell. *Marshall v. Blass*, 82 Mich. 518, 46 N. W. 947, 47 N. W. 516.

12. **In Missouri** he cannot sue in the absence of an order of the probate court authorizing him to take possession of the realty and rent the same for the payment of debts. *Rev. St.*, 1909, §139.

13. *Laverty v. Sexton*, 41 Iowa 435.

[a] **Power of Sale.**—He cannot sue where the will gives him a mere power of sale. *Stevens v. Fogle*, 73 Misc. 417, 130 N. Y. Supp. 1082.

14. *Spicer v. Spicer*, 249 Mo. 582, 155 S. W. 832.

15. **In Washington** the heir cannot sue since the administrator is in the possession, actual or constructive, of the real estate, and it is his duty to take every step necessary to protect the interests of the estate. *Hazelton v. Bogardus*, 8 Wash. 102, 35 Pac. 602.

16. *Hazelton v. Bogardus*, 8 Wash. 102, 35 Pac. 602.

17. The approval of the administrator's final account cannot be deemed a termination of the administration within the meaning of this rule. *Hazelton v. Bogardus*, 8 Wash. 102, 35 Pac. 602.

18. *Sayles' Civ. St. (Tex.)*, 1897, art. 1198; *Russell v. Texas & P. R. Co.*, 68 Tex. 646, 5 S. W. 686.

19. *McKee v. Howe*, 17 Colo. 538, 31 Pac. 115.

20. A mere statement that the deceased was indebted in a specified amount and that such debts remain unpaid is insufficient. *Gladson v. Whitney*, 9 Iowa 267.

21. *Gladson v. Whitney*, 9 Iowa 267.

22. The existence of personal assets should be clearly negatived. An averment "that there are no assets belonging to the estate, which are now tangible, out of which the claims against the estate may be paid," is insufficient. *Gladson v. Whitney*, 9 Iowa 267.

the decedent's lifetime,²³ and this rule still obtains except where it has been changed by statute.²⁴ But by virtue of statutes now in many states, the representative may sue for injuries done to the realty during the decedent's lifetime.²⁵ The rule has not, so far as concerns the heir or devisee, been changed in some states.²⁶

23. **Ill.**—*Reed v. Peoria & O. R. Co.*, 18 Ill. 403. **Mass.**—*Wilbur v. Gilmore*, 21 Pick. 250. **Miss.**—*Conklin v. Alabama & V. R. Co.*, 81 Miss. 152, 32 So. 920. **N. H.**—*Forist v. Androscoggin R. I. Co.*, 52 N. H. 477. **N. J.**—*Ten Eyck v. Runk*, 31 N. J. Law 428. **N. C.**—*Howcott v. Warren*, 29 N. C. 20.

See generally the title "**Trespass.**"

24. *Reed v. Peoria & O. R. Co.*, 18 Ill. 403; *Conklin v. Alabama & V. R. Co.*, 81 Miss. 152, 32 So. 920.

[a] Representative cannot maintain an action for an injury done to the realty (1) during the lifetime of his intestate. *Hill v. Penny*, 17 Me. 409. (2) He cannot maintain an action for breaking or entering the close, or for cutting down trees, but he may maintain trespass de bonis asportatis for taking and carrying away the trees after they are cut. *Hill v. Penny*, 17 Me. 409.

[b] Under the statute of 4 Edw. III., "it has been holden that trespass quare clausum fregit could not be maintained by an executor for cutting down trees, etc., though trespass de bonis asportatis for the same trees might be. *Williams v. Breedon*, 1 Bos. & Pul. 329; *Emerson v. Emerson*, 1 Ventr. 187; *Le Mason v. Dixon*, W. Jones 174." *Wilbur v. Gilmore*, 21 Pick. (Mass.) 250.

25. See the following: **Cal.**—Code Civ. Proc., §1583. **Ind.**—Burns' Ann. St., 1908, §2808; *Pittsburgh, F. W. & C. R. Co. v. Swinney*, 97 Ind. 586. **Md.**—*Lake Roland El. R. Co. v. Friek*, 86 Md. 259, 37 Atl. 650; *Barton Coal Co. v. Cox*, 39 Md. 1, 33, 17 Am. Rep. 525; *Kennerly v. Wilson*, 1 Md. 102, 2 Md. 245. **Mass.**—*Wilbur v. Gilmore*, 21 Pick. 250. **Miss.**—*Conklin v. Alabama & V. R. Co.*, 81 Miss. 152, 32 So. 920 (under code 1892, §§1916, 1917); *New Orleans, etc. R. Co. v. Moye*, 39 Miss. 374. **Mo.**—*Musick v. Kansas City, S. & M. R. Co.*, 114 Mo. 309, 21 S. W. 491; *Mitchell v. St. Louis, etc. R. Co.*, 123 Mo. App. 545, 101 S. W. 127. **Mont.**—Rev. Codes, 1907, §7605. **Nev.**—Rev. Laws, 1912, §6023; *Price v. Ward*,

25 Nev. 203, 215, 58 Pac. 849, 46 L. R. A. 459. **N. H.**—*Forist v. Androscoggin R. I. Co.*, 52 N. H. 477. **N. Y.**—*Griswold v. Metropolitan El. R. Co.*, 122 N. Y. 102, 25 N. E. 331; *Shepard v. Manhattan R. Co.*, 117 N. Y. 442, 23 N. E. 30. **N. C.**—*Howcott v. Warren*, 29 N. C. 20. **S. D.**—Prob. Code, §244, Comp. Laws, 1910, p. 506. **Utah.**—Comp. Laws, 1907, §3915. **Va.**—Code, 1904, §2655. **Wash.**—Rem. & Ball. Ann. Codes & St., §1536. **W. Va.**—*Fleming v. Baltimore & O. R. Co.*, 51 W. Va. 54, 41 S. E. 168. **Wyo.**—Comp. St., 1910, §5563.

[a] This rule was changed by the statute of 3 & 4 William IV, which saves to personal representatives causes of action for trespass to real and personal property. **Ill.**—*Reed v. Peoria & O. R. Co.*, 18 Ill. 403. **N. H.**—*Forist v. Androscoggin R. I. Co.*, 52 N. H. 477. **N. C.**—*Howcott v. Warren*, 29 N. C. 20.

26. *Conklin v. Alabama & V. R. Co.*, 81 Miss. 152, 32 So. 920, the heir cannot recover at law, even though there are no debts and no administration.

[a] Damage to the land by reason of the excavation and embankment and ditches dug thereon, and the removal of buildings therefrom by a railroad company wrongfully taking land for a right of way during the decedent's lifetime can only be recovered by the representative. *Hotchkiss v. Auburn & R. R. Co.*, 36 Barb. (N. Y.) 600.

[b] **Cutting Timber.**—The heir cannot recover compensation for timber cut during decedent's lifetime, but the right of action is solely in the representative. *Rowan v. Riley*, 6 Baxt. (Tenn.) 67. And see *McClain v. Todd's Heirs*, 5 J. J. Marsh. (Ky.) 335, 22 Am. Dec. 37.

[c] **Flooding Lands.**—*Madisonville, H. & E. R. Co. v. Wiard*, 144 Ky. 206, 138 S. W. 255.

[d] **Obstructing access to land.** *Mitchell v. St. Louis, etc. R. Co.*, 123 Mo. App. 545, 101 S. W. 127.

[e] **Impairment of Easements.**—Action for impairment of the appurtenant

In at least one state, however, the statute provides that an heir may bring and maintain an action for waste done in the time of his ancestor, as well as in his own time.²⁷ It has been held that the representative has the exclusive right to recover damages for the wrongful detention of realty during the decedent's lifetime.²⁸

After Death of Decedent.—At common law, the heir or devisee alone could sue for injuries to the land occurring after the death of the decedent,²⁹ and this rule still prevails in some states,³⁰ wherein the representative cannot as a rule sue.³¹

Statutes, however, sometimes expressly provide that such suits may be brought by the representative.³² And in states where by statute

easements of light, air and access by construction, maintenance and operation of an elevated railroad. *Griswold v. Metropolitan El. R. Co.*, 122 N. Y. 102, 25 N. E. 331.

[f] **Expenses incurred by the heir in recovering possession of land** from which the decedent was ousted during his lifetime can only be recovered by the representative. *Rowan v. Riley*, 6 Baxt. (Tenn.) 67.

[g] **Waste.**—The representative has the exclusive right to maintain actions for waste. *Dunn v. Peterson*, 4 Wash. 170, 29 Pac. 998.

27. *Mo. Rev. St.*, 1909, §7915; *Mize v. Burnett*, 162 Mo. App. 441, 145 S. W. 150.

28. *Evans v. Welch*, 63 Ala. 250.

[a] The representative, rather than the heir, is the proper party to recover damages accruing in the decedent's lifetime from the wrongful use of her lands by a railroad company, the interruption of her easement in a highway, and the consequential injury to her other lands, for which she could have maintained a personal action. *Lawrence R. Co. v. O'Harra*, 50 Ohio St. 667, 36 N. E. 14.

29. *Ala.*—*McKay v. Broad*, 70 Ala. 377. *Cal.*—*Colton v. Onderdonk*, 69 Cal. 155, 10 Pac. 395, 58 Am. Rep. 556, heir or devisee in possession. *Ind.*—See *Taylor v. Fiekas*, 64 Ind. 167, 31 Am. Rep. 114. *Minn.*—*Noon v. Finnegan*, 29 Minn. 418, 13 N. W. 197. *Mont.*—*Carrhart v. Montana Mineral L. & M. Co.*, 1 Mont. 245.

30. *Colo.*—*Adams v. Slattery*, 36 Colo. 35, 85 Pac. 87. *Ia.*—*Hook v. Garfield Coal Co.*, 112 Iowa 210, 83 N. W. 963. *Ky.*—*Madisonville, etc. R. Co. v. Wiarr*, 144 Ky. 206, 138 S. W. 255. *Mo.*—*Aubuchon v. Lory*, 23 Mo. 99. *Mont.*—*Carrhart v. Montana Mineral*

L. & M. Co., 1 Mont. 245. *Nev.*—See *Price v. Ward*, 25 Nev. 203, 58 Pac. 849, 46 L. R. A. 459.

[a] The heir or devisee may maintain trover or detinue against persons trespassing on the land and carrying away timber severed from the freehold. *Leatherwood v. Sullivan*, 81 Ala. 458, 1 So. 718.

31. *Colo.*—*Adams v. Slattery*, 36 Colo. 35, 85 Pac. 87. *Ill.*—Page v. Davidson, 22 Ill. 111. *Ind.*—See *Taylor v. Fiekas*, 64 Ind. 167, 31 Am. Rep. 114. *Mo.*—*Mize v. Burnett*, 162 Mo. App. 441, 145 S. W. 150, citing *Proffitt v. Henderson*, 29 Mo. 325; *Van Hoozer v. Van Hoozer*, 18 Mo. App. 19. *N. Y.*—*Shepard v. Manhattan R. Co.*, 117 N. Y. 442, 23 N. E. 30.

[a] Where the will does not give him the fee, the executor cannot maintain an action against his lessee for cutting down trees and pulling down buildings and converting the same to his own use. *Page v. Davidson*, 22 Ill. 111.

[b] The representative cannot sue to enjoin waste where it is not alleged that there are any debts, nor that the waste complained of would lessen the rental value of the estate or would prejudice the estate. *Adams v. Slattery*, 36 Colo. 35, 85 Pac. 87.

32. *In Texas* (1) the statute provides that suits for any injury or damage done to the realty may be brought by the representative (*Sayles' Civ. St.*, 1897, art. 1197; *Lee v. Turner*, 71 Tex. 264, 9 S. W. 149), (2) and the courts there hold that the heirs cannot sue pending administration. *Lee v. Turner*, 71 Tex. 264, 9 S. W. 149.

But see *Houston & C. R. Co. v. Knapp*, 51 Tex. 569 (where it is held that an heir in possession may sue for damages to land and crops (1) result-

now the representative has a right to the possession of the realty under certain circumstances, he may maintain such actions,³³ at least after he has taken possession,³⁴ though even in such case the heir

ing from the diversion of water by the construction of a railroad, and that no administration is necessary to enable them to do so), (2) save where it is shown to be necessary for their protection. *Lee v. Turner*, 71 Tex. 264, 9 S. W. 149.

[a] **In Vermont** (1) the statute provides that actions of trespass or trespass on the case for damages done to real estate may be commenced or prosecuted by the representative (Pub. St., 1906, §2834), (2) and that when an executor or administrator is appointed and assumes the trust, no action for damage done to the land shall be maintained by an heir or devisee until the land has been assigned to him by a decree of the probate court or the time allowed for paying debts has expired (Pub. St., 1906, §2838), (3) unless the representative surrenders possession to him. Pub. St., 1906, §2838; *Plumley's Admr. v. Plumley*, 84 Vt. 286, 79 Atl. 45. See *Lyman v. Webber*, 17 Vt. 489.

[b] The mere fact that the plaintiff is administrator does not give him the right to maintain an action for trespass committed after the decedent's death, since he may have surrendered possession to the heir before there has been a decree of the probate court and before the time for paying debts has expired. *Plumley's Admr. v. Plumley*, 84 Vt. 286, 79 Atl. 45.

33. **Ala.**—*Leatherwood v. Sullivan*, 81 Ala. 458, 1 So. 718; *McKay v. Broad*, 70 Ala. 377; *Calhoun v. Fletcher*, 63 Ala. 574. **Ga.**—See *Hodges v. Stuart Lumb. Co.*, 140 Ga. 569, 79 S. E. 462, s. c., 128 Ga. 733, 58 S. E. 354. **Nev.** See *Price v. Ward*, 25 Nev. 203, 215, 58 Pac. 849, 46 L. R. A. 459.

[a] The right of an administrator with the will annexed to sue for trespass depends upon whether he has the right to recover possession of the land. *Hodges v. Stuart Lumb. Co.*, 140 Ga. 569, 79 S. E. 462, s. c., 128 Ga. 733, 58 S. E. 354.

[b] After the lapse of twenty years from the date of the qualification of the first representative, it will ordinarily be presumed that the estate has

been fully administered and a distribution had, and the burden is on an administrator with the will annexed, suing for trespass, to show the contrary. *Hodges v. Stuart Lumb. Co.*, 140 Ga. 569, 79 S. E. 462, s. c., 128 Ga. 733, 58 S. E. 354.

[c] **Where Estate Is Insolvent.**—N. H. Pub. St., 1901, ch. 191, §15; *Carter v. Jackson*, 56 N. H. 364; *Forist v. Androscoggin R. I. Co.*, 52 N. H. 477.

[d] **In Maine** (1) he may recover damages for waste in an action of trespass (Rev. St., 1903, ch. 68, §22; *McNichol v. Eaton*, 77 Me. 246; *Bates v. Avery*, 59 Me. 354). (2) If the estate is represented insolvent, he may recover trebled damages from the heir or devisee (Rev. St., 1903, ch. 97, §16; *McNichol v. Eaton*, 77 Me. 246). (3) To recover from the heir the estate must be proved to be insolvent. *McNichol v. Eaton*, 77 Me. 246.

[e] But he cannot maintain the action where the bill affirmatively shows that no such necessity exists. *McKay v. Broad*, 70 Ala. 377.

34. *Drake v. Lady Ensley Coal, I. & R. Co.*, 102 Ala. 501, 14 So. 749, 48 Am. St. Rep. 77, 24 L. R. A. 64.

[a] Until the representative takes possession, the heirs or devisees alone can sue for trespass committed after the death of the decedent. *Noon v. Finnegan*, 29 Minn. 418, 13 N. W. 197, s. c., 32 Minn. 81, 19 N. W. 391.

[b] When he does take possession, he must sue for the trespass. In such case his possession relates back to the death of the decedent, and he may maintain the action though the trespass was committed before he took possession. *Noon v. Finnegan*, 29 Minn. 418, 13 N. W. 197, s. c., 32 Minn. 81, 19 N. W. 391.

[c] He is entitled to the benefit of a judgment previously recovered by them, or if it has been collected by them, to demand that the amount be paid over to him. *Noon v. Finnegan*, 29 Minn. 418, 13 N. W. 197, s. c., 32 Minn. 81, 19 N. W. 391.

[d] If the heirs or devisees have already commenced suit, the representative, when he takes possession, has a

may generally sue pending administration,³⁵ or after the administration has closed,³⁶ if the representative has not effectively asserted his right. The representative cannot sue where the right of action is given to the owner of the land.³⁷ Nor can the representative, even where otherwise entitled to sue, sue for damages for trespass committed on lands situated in a state other than that in which his letters issued.³⁸

Effect of Provisions in Will.—An executor may sue for damages for trespass,³⁹ or to enjoin a threatened trespass,⁴⁰ or for damages for waste and an injunction,⁴¹ where the will gives him title to the property or a right to the possession thereof.

Wrongful Taking of Land.—The heir, rather than the representative, is the proper party to recover for the wrongful taking of the land of the decedent during his lifetime,⁴² or for the wrongful taking of easements which belong to the land and are regarded as a part of the realty.⁴³

Pleading.—A representative suing for injuries to land occurring after the death of the decedent must allege facts showing his right to

right to be substituted. *Noon v. Finnegan*, 29 Minn. 418, 13 N. W. 197.

[e] If the land is vacant, the bringing of the action by the representative for the trespass amounts to, or is equivalent to, taking possession. *Noon v. Finnegan*, 29 Minn. 418, 13 N. W. 197, s. c., 32 Minn. 81, 19 N. W. 391.

[f] **Trover by heir for sand taken from the land after the death of the decedent**, where the representative never took possession or control of the land. *Nashville, C. & St. L. Ry. v. Karthaus*, 150 Ala. 633, 43 So. 791.

35. *Calhoun v. Fletcher*, 63 Ala. 574; *Colton v. Onderdonk*, 69 Cal. 155, 10 Pac. 395, 58 Am. Rep. 556.

[a] A judgment in favor of the devisee in such an action is a bar to a subsequent recovery by the representative for the same cause of action. *Colton v. Onderdonk*, 69 Cal. 155, 10 Pac. 395, 58 Am. Rep. 556.

36. *Calhoun v. Fletcher*, 63 Ala. 574.

37. The representative cannot sue for the statutory penalty for cutting timber even though he has taken possession of the land for purposes of administration. *Louisville & N. R. Co. v. Hill*, 115 Ala. 334, 345, 22 So. 163.

38. *Price v. Ward*, 25 Nev. 203, 215, 58 Pac. 849, 46 L. R. A. 459.

39. *Pittsburgh, F. W. & C. R. Co. v. Swinney*, 97 Ind. 586.

[a] In *Dascomb v. Davis*, 5 Mete. (Mass.) 335, it was held that executors could maintain trespass *quare clausum* in view of the broad authority given them to manage and control the property.

40. *Meeks v. Metropolitan El. R. Co.*, 11 N. Y. Supp. 697.

41. *Halstead v. Coen*, 31 Ind. App. 302, 67 N. E. 957.

[a] It has been held that an executor to whom the will gives a power to lease land may sue to enjoin the commission of waste (1) by his tenant and to recover damages for waste already committed (*Halstead v. Coen*, 31 Ind. App. 302, 67 N. E. 957), (2) or on a covenant against waste in the lease. *Page v. Davidson*, 22 Ill. 111.

42. *Lawrence R. Co. v. O'Harra*, 50 Ohio St. 667, 36 N. E. 14.

[a] The heir is entitled to recover the land with damages for withholding the same. *Hotchkiss v. Auburn & R. R. Co.*, 36 Barb. (N. Y.) 600.

[b] **The contrary is true** where there is a rightful taking by due process of law, but the compensation was not paid in the owner's lifetime. *Lawrence R. Co. v. O'Harra*, 50 Ohio St. 667, 36 N. E. 14.

43. Easement in a highway as a means of egress and ingress. *Lawrence R. Co. v. O'Harra*, 50 Ohio St. 667, 36 N. E. 14.

sue,⁴⁴ and the same is true where he sues to enjoin waste.⁴⁵

In states where the heirs cannot sue save where it is shown to be necessary for their protection, they must allege facts showing such necessity.⁴⁶

K. PARTITION.⁴⁷—As a general rule, the representative cannot maintain an action for partition of real estate owned by the decedent at the time of his death in common with others,⁴⁸ except where the statute expressly so provides,⁴⁹ or where the will gives him the title to the property.⁵⁰

The heirs, however, may maintain partition where it does not appear that the administration will be in any way prejudiced thereby.⁵¹ So, too, the heirs or devisees of a deceased co-tenant are the proper parties defendant in partition proceedings,⁵² rather than the representative, who is not a necessary or even proper party,⁵³ unless the will invests the representative with the title and authorizes him to represent it,⁵⁴ and the same is true in proceedings to partition community

44. *Forist v. Androscoggin R. I. Co.*, 52 N. H. 477, as that the estate is insolvent.

45. *Adams v. Slattery*, 36 Colo. 35, 85 Pac. 87.

46. *Lee v. Turner*, 71 Tex. 264, 9 S. W. 149.

[a] A plea in abatement to a petition by heirs will be sustained in the absence of such allegations. *Lee v. Turner*, 71 Tex. 264, 9 S. W. 149.

47. See generally the title "Partition."

48. **Cal.**—*Ryer v. Fletcher Ryer Co.*, 126 Cal. 482, 58 Pac. 908. **Fla.**—*Lyon v. Register*, 36 Fla. 273, 18 So. 589; *Greeley v. Hendricks*, 23 Fla. 366, 2 So. 620; *Whitlock v. Willard*, 18 Fla. 156. **Mass.**—*Nason v. Willard*, 2 Mass. 478.

[a] At common law he could not do so. *Whitlock v. Willard*, 18 Fla. 156.

[b] He is not a necessary (*Tindal v. Drake*, 51 Ala. 574), or even a proper (*Throckmorton v. Pence*, 121 Mo. 50, 25 S. W. 843) party.

[c] The administrator cannot be made a party to a petition for partition upon the death of his intestate. *Richards v. Richards*, 136 Mass. 126.

[d] The representative cannot sue though the statute gives him a right to the possession of the realty. *Phillips v. Doris*, 56 Neb. 293, 76 N. W. 555.

49. A statute providing that, for the purpose of bringing suits for partition, the possession of the representative is that of the heirs or devisees does not give the representative the right to maintain such an action. *Ryer v.*

Fletcher Ryer Co., 126 Cal. 482, 58 Pac. 908, under Code Civ. Proc., §1581.

50. *Hamilton v. Hamilton*, 63 Misc. 533, 118 N. Y. Supp. 588, as where it creates a trust.

51. *Field v. Leiter*, 16 Wyo. 1, 44, 90 Pac. 378, 92 Pac. 622, 125 Am. St. Rep. 997.

[a] Co-heirs may maintain partition pending administration. *Kelly v. Kelly*, 41 N. H. 501.

[b] That the statute gives the representative the right to take possession of the realty for the payment of debts does not deprive the heirs of the right to sue for partition as between themselves. *Campau v. Campau*, 19 Mich. 116.

52. On the death of a co-tenant defendant pending partition, his heir or devisee must be made a party. *Nelson v. Haisley*, 39 Fla. 145, 22 So. 265; *Lyon v. Register*, 36 Fla. 273, 18 So. 589; *Requa v. Holmes*, 16 N. Y. 193, 26 N. Y. 338.

53. **Fla.**—*Lyon v. Register*, 36 Fla. 273, 18 So. 589. **Miss.**—*Foster v. Newton*, 46 Miss. 661. **Mo.**—*Throckmorton v. Pence*, 121 Mo. 50, 25 S. W. 843.

[a] He is not the proper party to represent the heir or devisee. *Nelson v. Haisley*, 39 Fla. 145, 22 So. 265.

[b] The representative is not a necessary party to a suit for partition of a decedent's realty among his heirs. *Speer v. Speer*, 14 N. J. Eq. 240. See *Garrison v. Cox*, 99 N. C. 478, 6 S. E. 124.

54. *Nelson v. Haisley*, 39 Fla. 145,

really after divorce and the death of one of the parties.⁵⁵

Personalty.—The representative is a necessary party to a suit for the partition of personalty,⁵⁶ except under circumstances dispensing with the necessity for administration.⁵⁷

L. ACTIONS IN REGARD TO TRUSTS.—The heir or devisee may sue to establish a trust in real property,⁵⁸ and, as a rule, he alone may do so, the representative not even being a proper party to a suit by him,⁵⁹ at least where the land is not needed for the payment of debts.⁶⁰ In at least one state, however, the representative may sue.⁶¹

Trusts in Personalty.—As a rule, the representative alone, and not the heir, can sue to enforce a trust in personalty;⁶² but the heir is permitted to sue under certain circumstances,⁶³ as where there are no debts and no administration, and the time within which an administrator could

22 So. 265; *Lyon v. Register*, 36 Fla. 273, 18 So. 589.

55. Where the husband dies after a decree of divorce directing the division of the property, a supplemental decree directing a sale of the property and a division of the property is void as to the heirs if the proceeding is not reversed as to them. The substitution of the husband's representatives is not sufficient. *Ewald v. Corbett*, 32 Cal. 493.

56. *Tindal v. Drake*, 51 Ala. 578.

57. *Tindal v. Drake*, 51 Ala. 574.

58. *Murphy v. Crowley*, 140 Cal. 141, 73 Pac. 820; *Janes v. Throckmorton*, 57 Cal. 368; *Barnes v. Prewitt*, 28 Mo. App. 163.

[a] In property held by the defendant as the decedent's agent. *Kimball v. Tripp*, 136 Cal. 631, 69 Pac. 428, under Code Civ. Proc., §1452.

59. *Raleigh v. Hulett*, 2 Utah 122.

[a] The heir (1) rather than the representative is the proper party to sue to establish a resulting trust (*Janes v. Throckmorton*, 57 Cal. 368; *Johnston v. Johnston*, 173 Mo. 91, 121, 73 S. W. 202, 96 Am. St. Rep. 486, 61 L. R. A. 166). (2) Indeed, the representative may not maintain a suit to establish a resulting trust (*Lill v. Brant*, 6 Ill. App. 366. And see *Janes v. Throckmorton*, 57 Cal. 368; *Raleigh v. Hulett*, 2 Utah 122), (3) or to enforce a resulting trust for the benefit of heirs or devisees. *Jones v. Jones*, 107 Ark. 402, 155 S. W. 117; *Raleigh v. Hulett*, 2 Utah 122.

60. *Jones v. Jones*, 107 Ark. 402, 155 S. W. 117.

[a] The representative is a proper

party where it is shown that the personal assets are insufficient to pay the debts established against the estate. *Crawford v. Ginn*, 35 Iowa 543.

61. *Burdett v. Haley*, 51 Tex. 540.

62. **U. S.**—*Ware v. Galveston City Co.*, 111 U. S. 170, 4 Sup. Ct. 337, 28 L. ed. 393. **Colo.**—*Hall v. Cowles' Estate*, 15 Colo. 343, 25 Pac. 705. **Neb.** *Prusa v. Everett*, 78 Neb. 250, 110 N. W. 568. **S. C.**—*Grant v. Poyas*, 62 S. C. 426, 40 S. E. 891.

[a] The next of kin cannot maintain a suit in equity to impress a trust *ex maleficio* upon real and personal property claimed to have been purchased by the defendant with money embezzled from the decedent. *Buchanan v. Buchanan*, 75 N. J. Eq. 274, 71 Atl. 745, 138 Am. St. Rep. 563, 22 L. R. A. (N. S.) 454.

[b] One of several heirs cannot sue to compel an accounting by the trustee of the decedent, though there is no administrator. *Richardson v. Cooley*, 20 S. C. 347.

[c] The heir cannot sue without showing a transfer of the cause of action to him in the regular course of administration. *Buttles v. De Baun*, 116 Wis. 323, 93 N. W. 5.

[d] The heirs at law need not join. *Seymour v. Freer*, 8 Wall. (U. S.) 202, 218, 19 L. ed. 306.

63. In property held by the defendant as the decedent's agent. Cal. Code Civ. Proc., §1452; *Kimball v. Tripp*, 136 Cal. 631, 69 Pac. 428.

[a] A sole distributee may sue to enforce a resulting trust where there are no debts. *Grant v. Poyas*, 62 S. C. 426, 40 S. E. 891.

have been appointed has expired,⁶⁴ or where the representative refuses to sue,⁶⁵ or where the administration is closed.⁶⁶

M. ACTIONS TO RECOVER RENTS AND PROFITS. — As a rule the representative alone has the right to recover rents and profits accruing prior to the death of the decedent.⁶⁷ As for rents and profits of realty accruing after the death of the decedent, however, the heir or devisee may sue.⁶⁸

Indeed, at common law the heir or devisee alone could sue,⁶⁹ and this rule still obtains in some states,⁷⁰ where the representative is

64. *Murphy v. Murphy*, 80 Iowa 740, 45 N. W. 914.

65. For money collected by the defendants as attorneys for the executrix, where the administrator de bonis non refuses to sue, where the debts have been paid and nothing remains to be done but to formally settle the estate. *Prusa v. Everett*, 78 Neb. 250, 110 N. W. 568.

[a] Where he neglects or refuses to sue, the next of kin may sue, joining him as a defendant. *Buchanan v. Buchanan*, 75 N. J. Eq. 274, 71 Atl. 745, 138 Am. St. Rep. 563, 22 L. R. A. (N. S.) 454.

66. In Nevada, where there has been a settlement and distribution, the debts have been paid, and the administrator discharged, the heirs and next of kin may maintain a suit in equity against the representative and others to compel them to account for unadministered assets alleged to have been fraudulently converted by them to their own use. *Hubbard v. Urton*, 67 Fed. 419.

67. Ala.—*Wilson v. Kirkland*, 172 Ala. 72, 55 So. 174; *Evans v. Welch*, 63 Ala. 250; *Tarver v. Smith*, 38 Ala. 135. Ga.—*Autrey v. Autrey*, 94 Ga. 579, 20 S. E. 431; *Strickland v. Thornton*, 2 Ga. App. 377, 58 S. E. 540. Ind.—*McDowell v. Hendrix*, 67 Ind. 513. Ia.—*Crawford v. Ginn*, 35 Iowa 543. Me.—*Plummer v. Bowie*, 76 Me. 496. Mo.—*Bealey v. Blake's Admr.*, 70 Mo. App. 229. N. J.—*Allen v. Van Houten*, 19 N. J. L. 47. N. Y.—*Hotchkiss v. Auburn & R. R. Co.*, 36 Barb. 600. Ohio.—*Noble v. Tyler*, 61 Ohio St. 432, 56 N. E. 191, 48 L. R. A. 735. Pa.—1 *Purdon's Dig.*, 1111, §129. Tenn.—*Rowan v. Riley*, 6 Baxt. 67. W. Va.—See Code, 1906, §3401.

[a] He is a necessary party to a suit for their recovery. *Tindal v. Drake*, 51 Ala. 574.

68. Cal.—*Estep v. Armstrong*, 91 Cal. 659, 27 Pac. 1091. Ill.—*McGillick v. McAllister*, 10 Ill. App. 40, may maintain distress therefor. Ind.—*McDowell v. Hendrix*, 67 Ind. 513; *Hendrix v. Hendrix*, 65 Ind. 329; *Murray v. Cazier*, 23 Ind. App. 600, 53 N. E. 476, 55 N. E. 880. Ia.—See *Laverty v. Woodward*, 16 Iowa 1. Mass.—*Jaques v. Gould*, 4 Cush. 384; *Clapp v. Inhab. of Stoughton*, 10 Pick. 463. N. J.—*Harrison v. Righter*, 11 N. J. Eq. 389. N. Y.—*Hotchkiss v. Auburn & R. R. Co.*, 36 Barb. 600; *Wright v. Williams*, 5 Cow. 501. Tenn.—*Rowan v. Riley*, 6 Baxt. 67. W. Va.—Code, 1906, §3401.

[a] They belong to the heirs or devisees (1) and cannot be applied to the payment of debts (*Smith v. Heirs of Thomas*, 14 Leigh [Tenn.] 324), (2) except, where the estate of the decedent in the land was less than a fee, in which case they belong to the representative. *Clayton v. McKinney*, 10 Heisk. (Tenn.) 72. See W. Va. Code, 1906, §3401.

[b] This is true though the will directs the executor to convert the property into money. *Estep v. Armstrong*, 91 Cal. 659, 27 Pac. 1091.

69. *McKay v. Broad*, 70 Ala. 377; *Beezley v. Burgett*, 15 Iowa 192. See *Laverty v. Woodward*, 16 Iowa 1.

70. Ind.—*McDowell v. Hendrix*, 67 Ind. 513; *Hendrix v. Hendrix*, 65 Ind. 329. Me.—See *Stinson v. Stinson*, 38 Me. 593. Mo.—*Bealey v. Blake's Admr.*, 70 Mo. App. 229; *Hendrix v. Dickson*, 69 Mo. App. 197; *Landree v. Warren*, 53 Mo. App. 442. N. J.—*Allen v. Van Houten*, 19 N. J. L. 47. N. Y.—*Hotchkiss v. Auburn & R. R. Co.*, 36 Barb. 600. Ohio.—*Overturf v. Dugan*, 29 Ohio St. 230. Pa.—*Haslage v. Krugh*, 25 Pa. 97. Tenn.—*Clayton v. McKinney*, 10 Heisk. 72.

[a] An executor or administrator cannot distrain for rent accruing after

not ordinarily even a proper party,⁷¹ unless the will gives him the right to collect them,⁷² or gives him the title to the property, in which case it has been held that he may sue for use and occupation.⁷³

Under statutes now in some states, however, the representative has the right to such rents, and hence may maintain an action to recover them;⁷⁴ but the heir is not thereby deprived of his right to sue until

the death of the decedent. *Wright v. Williams*, 5 Cow. (N. Y.) 501.

[b] **Rent cannot be apportioned** between the administrator and the heir. Hence the latter alone can recover rent falling due after the death of the decedent. *Allen v. Van Houten*, 19 N. J. L. 47.

[c] **The executor cannot maintain trespass for mesne profits** against one wrongfully acquiring possession of the land after the death of the decedent. *Brown v. McCloud*, 3 Head (Tenn.) 280.

71. *Harrison v. Righter*, 11 N. J. Eq. 389.

72. He may sue for rents accruing after the decedent's death where the will charges him with the duty of collecting all rents that may accrue, and of applying the same to the payment of debts and legacies, and it is alleged that the rent sued for is needed for that purpose. *McDowell v. Hendrix*, 71 Ind. 286.

[a] Executors to whom the will gives a power to sell real estate may recover arrears of ground rent (1) accruing after decedent's death (*Cobb v. Biddle*, 14 Pa. 444), (2) or may recover in trespass for mesne profits, where the statute provides that an executor to whom is given such a power shall have the same interest, remedies and powers as if the land had been devised to him to sell. *Blight's Exrs. v. Ewing*, 26 Pa. 135.

73. *Meeks v. Metropolitan El. R. Co.*, 11 N. Y. Supp. 697.

74. **Ala.**—*Wilson v. Kirkland*, 172 Ala. 72, 55 So. 174; *Evans v. Welch*, 63 Ala. 250; *Tarver v. Smith*, 38 Ala. 135. **Ark.**—*Stewart v. Smiley*, 46 Ark. 373. **Colo.**—*McKee v. Howe*, 17 Colo. 538, 31 Pac. 115. **Tex.**—*Smart v. Panther*, 42 Tex. Civ. App. 262, 95 S. W. 679.

[a] This right "is the result of statutory law, and rests upon the liability of lands to be applied in satisfaction of the debts of the decedent." *Woods v. Legg*, 91 Ala. 511, 8 So. 342.

[b] In Iowa, under Code, 1897,

§§3333, 3334, the representative is entitled to the rents only if there is no heir or devisee present and competent to take possession of the realty, or where the court directs him to apply them to the payment of debts, and hence can sue for them only under such circumstances. *Durlam v. Steele*, 88 Iowa 498, 55 N. W. 509; *Toerring v. Lamp*, 77 Iowa 488, 42 N. W. 378; *Shawhan v. Long*, 26 Iowa 488, 96 Am. Dec. 164.

[c] In Missouri (1) the court may, by order, direct the representative to take possession of and lease the lands for the purpose of paying debts. Rev. St., 1909, §139. (2) Such an order has no retroactive effect, and does not authorize the representative to recover from the heir rents collected by him before it was made (*Bealey v. Blake's Admr.*, 70 Mo. App. 229), (3) nor does it authorize the representative to recover rent from a tenant of a devisee. *Brent v. Chipley*, 104 Mo. App. 645, 73 S. W. 270.

[d] In New Hampshire he is entitled to receive the rents and profits in case the estate is insolvent. Pub. St., 1901, ch. 189, §13; *Carter v. Jackson*, 56 N. H. 364; *Baker v. Haskell*, 48 N. H. 426; *Plumer v. Plumer*, 30 N. H. 558.

[e] Though the estate is administered as insolvent, where it is in fact solvent, and the debts have all been paid, and the administrator's accounts have been settled, and he never took possession of the premises and does not object, one heir may sue another for his share of the rents and profits of realty in the exclusive possession of the latter pending administration. *Baker v. Haskell*, 48 N. H. 426.

[f] If the estate is in fact solvent, though administered as insolvent, and the land is not taken to pay debts, the heir may maintain trover against a tenant for removal of manure from a leased farm. *Plumer v. Plumer*, 30 N. H. 558.

[g] **Use and Occupation.**—The representative has the exclusive right to

the representative asserts his power to maintain an action therefor.⁷⁵

The representative may lose his right to sue by unreasonable delay in exercising it,⁷⁶ and has no right to sue after the debts have been paid and the administration closed.⁷⁷

N. ENFORCEMENT OF LIENS.—1. Mortgages.⁷⁸—Suits or proceedings to foreclose mortgages in favor of a decedent may ordinarily be brought by the representative,⁷⁹ and, as a general rule, he rather than the heirs or devisees, is the proper party to bring them,⁸⁰ the heirs not being necessary or proper parties,⁸¹ except in some states,

sue for use and occupation. *Dunn v. Peterson*, 4 Wash. 170, 29 Pac. 998.

75. *Tindal v. Drake*, 51 Ala. 574.

[a] "If the administrator has not taken possession of the land, if the rent of it is not needed in the settlement of the estate, and if there is nothing in his relations to the occupant analogous to the relation of landlord and tenant, he cannot maintain an action for use and occupation." *Filbey v. Carrier*, 45 Wis. 469.

[b] **Representative not a necessary party** in suit by heir before right attaches in representative by assertion of his power. *Tindal v. Drake*, 51 Ala. 574.

76. "The heirs cannot be forever deterred from the possession of the lands of their ancestor by the neglect of the administrator and the creditors to enforce payment of debts due by the estate." *Stewart v. Smiley*, 46 Ark. 373.

77. An administrator *de bonis non* has no power to control the rents, where the debts of the estate were paid, and the administration practically closed, and the lands had passed into the possession of the heirs long before his appointment. *Stewart v. Smiley*, 46 Ark. 373.

78. See generally the title "**Mortgages.**"

79. **Ga.**—Code, 1911, §3277, 3303; *Dixon v. Cuyler*, 27 Ga. 248. **Minn.** Rev. Laws, 1905, §3717; *Kenaston v. Lorig*, 81 Minn. 454, 84 N. W. 323; *Eliason v. Sidle*, 61 Minn. 285, 63 N. W. 730. **N. H.**—*Gibson v. Bailey*, 9 N. H. 168. **N. J.**—*Moss v. Lane*, 50 N. J. Eq. 295, 23 Atl. 481; *Copper v. Wells*, 1 N. J. L. 10; *Osborne v. Tunis*, 25 N. J. L. 633. See *Wilbur v. Jones*, 80 N. J. Eq. 520, 86 Atl. 769. **Vt.**—Pub. St., 1906, §2852; *Herriek's Admr. v. Teachout*, 74 Vt. 196, 52 Atl. 432; *Collamer*

v. Langdon, 29 Vt. 32. **Wis.**—St., 1898, §3829.

80. **U. S.**—*Stanley v. Mather*, 31 Fed. 860. **Colo.**—*Buck v. Fischer*, 2 Colo. 182. **Conn.**—*Roath v. Smith*, 5 Conn. 133. **Ind.**—*Schneider v. Piessner*, 54 Ind. 524. **Me.**—See *Felch v. Hooper*, 20 Me. 159. **Md.**—See *Kirby v. State*, 51 Md. 383. **Mass.**—*Sheldon v. Smith*, 97 Mass. 34; *Johnson v. Bartlett*, 17 Pick. 477; *Smith v. Dyer*, 16 Mass. 18. **Mich.**—*Miller v. Clark*, 56 Mich. 337, 23 N. W. 35. See *Snyder v. Snyder*, 131 Mich. 658, 92 N. W. 353. **N. J.** *Woodruff v. Mutschler*, 34 N. J. Eq. 33. **N. Y.**—*Robinson v. Brower*, 57 Hun 585, 10 N. Y. Supp. 854. **Ohio.** *Chappelear v. Martin*, 45 Ohio St. 126, 12 N. E. 448. **Va.**—*Harrison v. Harrison*, 1 Call 419. **W. Va.**—See *Curry v. Hill*, 18 W. Va. 370.

[a] The right to sue does not belong to the heirs in the first instance, but to the executor or administrator. *Brunson v. Henry*, 140 Ind. 455, 39 N. E. 256.

[b] The heirs cannot proceed by *scire facias*, but an administrator must be appointed even though it is morally certain that there are no debts. *Griffin v. Brower*, 21 Pa. Co. Ct. 188.

[c] The heir cannot sue where there is no administrator. *Darwin v. Moore*, 58 S. C. 164, 36 S. E. 539.

[d] The representative of the beneficiary is a necessary party to a suit by a trustee involving a determination of the amount due on notes secured by a trust deed. *Bryan v. McCann*, 55 W. Va. 372, 47 S. E. 143.

81. **Cal.**—*Grattan v. Wiggins*, 23 Cal. 16. **Ill.**—*Citizens' Nat. Bank v. Dayton*, 116 Ill. 257, 4 N. E. 492; *McGooden v. Bartholic*, 132 Ill. App. 392; *Marsh v. Wells*, 89 Ill. App. 485. **Miss.** *Griffin v. Lovell*, 42 Miss. 402.

[a] *Contra.*—*Hughes v. Gay*, 132 N. C. 50, 43 S. E. 539, citing *Pullen v. Her-*

where there are no debts and no administration,⁸² in which case the heirs may sue,⁸³ or where the estate has been fully settled and the administration closed, in which case the heirs to whom the note and mortgage are assigned may sue.⁸⁴

Generally the heirs of the mortgagor are necessary parties defendant to a suit to foreclose a mortgage upon realty,⁸⁵ especially after the administration is closed.⁸⁶

As a rule the representative of the mortgagor is not a necessary party,⁸⁷ except where a personal judgment for a deficiency is sought against the estate,⁸⁸ though he is a proper one.⁸⁹

ron Min. Co., 71 N. C. 567; *Hughes v. Hodges*, 94 N. C. 56; *Graves v. Trueblood*, 96 N. C. 495, 1 S. E. 918, and holding that the representative cannot maintain an action to foreclose without making the heirs parties.

[b] Where the mortgagor declines to raise the question, the heir may maintain the suit as between the parties thereto. *Darwin v. Moore*, 58 S. C. 164, 36 S. E. 539.

82. *Babbitt v. Bowen*, 32 Vt. 437.

83. *Magel v. Milligan*, 150 Ind. 582, 50 N. E. 564, 65 Am. St. Rep. 382; *Brunson v. Henry*, 140 Ind. 455, 39 N. E. 256.

[a] Distributees may sue in equity. *Wright v. Robinson*, 94 Ala. 479, 10 So. 319; *Cooper v. Davison*, 86 Ala. 367, 5 So. 650.

[b] If there is no representative, it should be so stated in the bill, and all the heirs made parties. *Harrison v. Harison*, 1 Call (Va.) 419.

84. *Magel v. Milligan*, 150 Ind. 582, 50 N. E. 564, 65 Am. St. Rep. 382; *Westerfield v. Spencer*, 61 Ind. 339.

[a] The sole heirs and devisees may sue to foreclose unadministered mortgages delivered to them by the representative after distribution, where the debts and expenses have been paid, and the estate distributed and the distribution approved by the court, though the administrator has not been discharged. *Stanley v. Mather*, 31 Fed. 860.

85. **Fla.**—Formerly the rule was otherwise and the heirs were not necessary parties. *Scott v. Jenkins*, 46 Fla. 518, 35 So. 101; *Merritt v. Daffin*, 24 Fla. 320, 4 So. 806. **Kan.**—*Britton v. Hunt*, 9 Kan. 228. **Minn.**—*Hill v. Townley*, 45 Minn. 167, 47 N. W. 653. **Wash.**—*Anrud v. Scandinavian-American Bank*, 27 Wash. 16, 67 Pac. 364.

W. Va.—*McNeel's Exrs. v. Auldridge*, 25 W. Va. 113.

[a] At least where there has been no order of court authorizing the representative to take possession of the realty. "Even if such an order were alone sufficient to render the heirs unnecessary parties, such an order should be alleged in the bill." *Scott v. Jenkins*, 46 Fla. 518, 35 So. 101.

[b] The interest of the heirs cannot be divested by a foreclosure to which they are not parties. *Stark v. Brown*, 12 Wis. 572, 78 Am. Dec. 762.

[c] The objection that the heirs are not parties is not waived by failure to raise it by demurrer, plea or answer. *Scott v. Jenkins*, 46 Fla. 518, 35 So. 101.

86. Where the property has been delivered to the widow and heirs with the consent of the mortgagee. *Barton v. Burbank*, 114 La. 224, 38 So. 150.

87. **Minn.**—*Hill v. Townley*, 45 Minn. 167, 47 N. W. 653. **N. J.**—*United Security L. I. & T. Co. v. Vandergrift*, 51 N. J. Eq. 400, 26 Atl. 985. **N. C.**—*Fraser v. Bean*, 96 N. C. 327, 2 S. E. 159, citing *Averett v. Ward*, 45 N. C. 192. **Ohio.**—*McMahon v. Davis*, 19 Ohio C. C. 242.

[a] Though the will gives him a power of sale. *Steinhardt v. Cunningham*, 130 N. Y. 292, 29 N. E. 100.

[b] "While the administrator may be a proper party in foreclosure proceedings, it is only in exceptional cases that he is a necessary party where the mortgagor dies seized of the fee." *Anrud v. Scandinavian-American Bank*, 27 Wash. 16, 67 Pac. 364.

88. He may be joined if it is desired to obtain further relief against the estate. *Britton v. Hunt*, 9 Kan. 228.

89. **Minn.**—*Hill v. Townley*, 45 Minn. 167, 47 N. W. 653. **N. J.**—*Uni-*

In some states, however, he is a necessary party,⁹⁰ at least in the absence of a showing that the estate is not liable for any deficiency.⁹¹ Indeed, under some statutes he is the only necessary party,⁹² though he need not be joined where the entire estate has been set apart to the family of the deceased as exempt, or as a probate homestead, and the administration has been closed.⁹³

The heirs of the mortgagor are not necessary parties to a suit to foreclose a chattel mortgage.⁹⁴

Generally the heir, rather than the representative, is the proper party to enforce an equity of redemption belonging to the deceased,⁹⁵ though in some states the representative may do so.⁹⁶ So, too, the heirs alone may sue to set aside a foreclosure sale.⁹⁷

ted Security L. I. & T. Co. v. Vandergrift, 51 N. J. Eq. 400, 26 Atl. 985. **N. C.**—Averett v. Ward, 45 N. C. 192. **Ohio.**—McMahon v. Davis, 19 Ohio C. C. 242. **Wash.**—Arrud v. Scandinavian-American Bank, 27 Wash. 16, 67 Pac. 364.

[a] The representative of the husband is a proper, if not a necessary party in a suit to foreclose a mortgage on the wife's separate property given to secure the husband's debt. *Mebane v. Mebane*, 80 N. C. 34.

90. **Ark.**—Hays v. McLain, 66 Ark. 400, 50 S. W. 1006. **Cal.**—Harwood v. Marye, 8 Cal. 580. **S. C.**—Simon v. Sabb, 56 S. C. 38, 33 S. E. 799.

91. Where the bill does not show that the estate is not liable on the bond secured by the mortgage for any balance which the land may be insufficient to pay, or that such balance could not for any reason be collected from the assets of the estate. *Eslava v. New York Nat. Bldg. & L. Assn.*, 121 Ala. 480, 25 So. 1013, citing *Dooley v. Villalonga*, 61 Ala. 129; *Wilkins & Hall v. Wilkins*, 4 Port. (Ala.) 245.

92. *Seals v. Chadwick*, 2 Penne. (Del.) 381, 45 Atl. 718.

[a] The heirs are not necessary parties. *Collins v. Scott*, 100 Cal. 446, 34 Pac. 1085; *Monterey Co. v. Cushing*, 83 Cal. 507, 23 Pac. 700; *Bayly v. Muehe*, 65 Cal. 345, 3 Pac. 467, 4 Pac. 486; *Dixon v. Cuyler*, 27 Ga. 248.

93. *Browne v. Sweet*, 127 Cal. 332, 59 Pac. 774.

94. *Scott v. Jenkins*, 46 Fla. 518, 35 So. 101.

95. *Lill v. Brant*, 6 Ill. App. 366.

[a] At common law an administrator could not maintain a bill for redemption. *Libby v. Cobb*, 76 Me. 471;

Price v. Ward, 25 Nev. 203, 58 Pac. 849, 46 L. R. A. 459.

96. **Cal.**—See *Collins v. Scott*, 100 Cal. 446, 34 Pac. 1085. **Me.**—*Libby v. Cobb*, 76 Me. 471, may do so under the statute. **Vt.**—*Merriam v. Barton*, 14 Vt. 501, 513.

[a] A special administrator may do so when the right to redeem would probably expire before a general administrator could be appointed. *Libby v. Cobb*, 76 Me. 471.

[b] In Massachusetts the heirs or devisees, or the executor or administrator may commence or prosecute a suit for redemption. Rev. Laws, ch. 187, §33; *Long v. Richards*, 170 Mass. 120, 48 N. E. 1083, 64 Am. St. Rep. 281; *Aiken v. Morse*, 104 Mass. 277.

[c] An executor who has obtained a license to sell the realty for the payment of debts may do so. *Mason v. Daly*, 117 Mass. 403.

[d] **Nevada.**—The right to redeem is based upon the statute making realty assets in his hands and giving him the right to the possession thereof, and hence it cannot extend to lands in another state, since they are not assets in his hands and he is not entitled to take possession of them. He cannot maintain an action to redeem from a mortgage on lands in another state by setting off against the mortgage debt waste committed thereon by the mortgagee in possession as mortgagee after the death of the intestate. *Price v. Ward*, 25 Nev. 203, 212, 58 Pac. 849, 46 L. R. A. 459.

97. The administrator cannot sue to set aside the sale and cancel the sheriff's deed on the ground that the sale was invalid and fraudulent. *Thorp v. Miller*, 137 Mo. 231, 38 S. W. 929.

2. Vendor's Liens.—As a general rule a suit to enforce a vendor's lien for the purchase price of lands sold by the decedent must be brought by the representative;⁹⁸ but such lien may be enforced by the next of kin, where there are no debts, and there has been no administration, and the only office of an administration would be to reduce the assets to possession and distribute them,⁹⁹ or after final settlement of the estate.¹ In some states the heirs of the vendor are necessary parties,² at least if the legal title has not been made.³

In case of the vendee's death, not only the heirs of the vendee,⁴ but his representative is a necessary party to a suit to enforce a vendor's lien,⁵ except where there is no administration and no necessity for one,⁶ or where the administration has been closed.⁷

3. Pleading.—In an action by the heir to foreclose a mortgage given to his decedent, he must allege the existence of the conditions which authorize him to sue,⁸ as that there are no debts and no ad-

[a] In *Van Dyke v. Van Dyke*, 31 N. J. Eq. 176, a sale was set aside at the instance of a creditor, on the ground of fraud and inadequacy of price, where the estate was insolvent and the representative refused to act.

98. Ala.—*Costephens v. Dean*, 69 Ala. 385. N. J.—*Hubbard's Admr. v. Clark*, 7 Atl. 26. Tenn.—*Christian v. Clark*, 10 Lea 630.

See also *Kitchens v. Harrall*, 54 Miss. 474.

[a] The lien follows the debt. *McGhee v. Alexander*, 104 Ala. 116, 16 So. 148.

99. Ala.—*McGhee v. Alexander*, 104 Ala. 116, 16 So. 148. Miss.—*Kitchens v. Harrall*, 54 Miss. 474. Tenn.—*Christian v. Clark*, 10 Lea 630.

1. *Hanrick v. Walker*, 50 Ala. 34; *Phillips v. Breck's Exr.*, 3 Ky. L. Rep. 271.

[a] They may sue where there are no debts, and the administration has been dropped from the records of the probate court, even if the administration should be regarded as still open. *Reed v. Ash*, 30 Ark. 775.

[b] The heirs or devisees are proper parties where they hold the legal title. *Phillips v. Breck's Exr.*, 3 Ky. L. Rep. 271.

2. *Morris' Admr. v. Peyton's Admr.*, 10 W. Va. 1.

[a] "The heirs of the vendor should be made parties, and their presence cannot be dispensed with by tendering, either in the pleadings or at the trial, a deed from such heirs to the vendee, unless the vendee accept such deed." *Leeper v. Lyon*, 68 Mo. 216.

[b] That the heirs are not made parties is immaterial after answer, where the representative declares his readiness and ability to make a good and sufficient deed to convey the title upon payment of the demand. *Wollenberg v. Rose*, 41 Ore. 314, 68 Pac. 804.

3. *Mott v. Carter's Admr.*, 26 Gratt. (Va.) 127.

4. *Morris' Admr. v. Peyton's Admr.*, 10 W. Va. 1.

5. *Willard v. Cleveland*, 14 Tex. Civ. App. 557, 38 S. W. 222 (an administrator appointed pending suit); *Morris' Admr. v. Peyton's Admr.*, 10 W. Va. 1.

6. *Willard v. Cleveland*, 14 Tex. Civ. App. 557, 38 S. W. 222.

7. The representative need not be made a defendant where all the debts have been paid, even though he has not been formally discharged. *Henry v. McNew*, 29 Tex. Civ. App. 288, 69 S. W. 213.

8. *Brunson v. Henry*, 140 Ind. 455, 39 N. E. 256.

[a] He must aver every fact necessary to give the plaintiff a right of action and must show that he is entitled to the money. *Westerfield v. Spencer*, 61 Ind. 339; *Schneider v. Piessner*, 54 Ind. 524.

[b] He must show that there is no widow, or that she has received or relinquished the amount to which she is entitled in cash under the law. *Schneider v. Piessner*, 54 Ind. 524.

[c] It is not sufficient merely to show that there are no debts to be paid. *Schneider v. Piessner*, 54 Ind. 524.

ministration,⁹ or that the estate has been settled.¹⁰ Likewise in an action to foreclose a mortgage given by a decedent, if the heirs of the deceased mortgagor need not be joined as defendants under certain conditions, the existence of those conditions must be alleged.¹¹

O. ACTIONS FOR ACCOUNTING.¹² — Generally the representative alone, and not the heirs, of a deceased partner may sue the surviving partner for an accounting and settlement of the partnership affairs, regardless of whether such property consists of realty or personalty, or both;¹³ but it has been held that the heirs may properly join as complainants where there is partnership realty.¹⁴

9. *Magel v. Milligan*, 150 Ind. 582, 568, 42 Pac. 1086; *Smith v. Walker*, 38 Cal. 385, 99 Am. Dec. 415; *Mason v. Mason's Exrs.*, 76 Vt. 287, 56 Atl. 1011.

[a] Otherwise the complaint is subject to a demurrer for want of facts. *Brunson v. Henry*, 140 Ind. 455, 39 N. E. 256.

10. *Magel v. Milligan*, 150 Ind. 582, 50 N. E. 564, 65 Am. St. Rep. 382; *Westerfield v. Spencer*, 61 Ind. 339.

11. *Scott v. Jenkins*, 46 Fla. 518, 35 So. 101, such as an order giving the administrator the right to take possession of the realty.

12. See generally the title "**Account and Accounting.**"

13. *Robertson v. Burrell*, 110 Cal. 27 S. E. 68.

568, 42 Pac. 1086; *Smith v. Walker*, 38 Cal. 385, 99 Am. Dec. 415; *Mason v. Mason's Exrs.*, 76 Vt. 287, 56 Atl. 1011.

[a] The action may be maintained by the representative. *Newell v. Humphrey*, 37 Vt. 265.

[b] A special administrator may bring an action for an accounting against a surviving partner. *Bruning v. Golden*, 159 Ind. 199, 64 N. E. 657.

[c] The next of kin cannot compel the surviving partner to settle the partnership accounts with the administrator of the deceased partner. *Harrison v. Righter*, 11 N. J. Eq. 389.

14. *Wagner v. Sanders*, 49 S. C. 192, 27 S. E. 68.

INITIALS. — See **Abbreviations; Certainty in Pleading; Indictment and Information; Names.**

INJUNCTIONS

By the Editorial Staff.

I. DEFINITIONS, DISTINCTIONS AND GENERAL STATEMENTS, 993

- A. *Injunction Defined*, 993
- B. *Interlocutory or Permanent Injunctions*, 994
- C. *Restraining Order and Temporary Injunction*, 996
- D. *Prohibitive or Mandatory Injunctions*, 998
- E. *Common and Special Injunctions*, 1006
- F. *Mandamus and Mandatory Injunctions Distinguished*, 1007
- G. *Injunctions and Stay of Proceedings Distinguished*, 1008
- H. *Injunctions and Writs of Prohibition Distinguished*, 1008

II. JURISDICTION AND VENUE, 1009

- A. *Jurisdiction*, 1009
 - 1. *Incident of Chancery Only*, 1009
 - 2. *Of Particular Courts*, 1009
 - a. *In General*, 1009
 - b. *Appellate Courts*, 1011
 - 3. *In Case of Absence or Disability of Judge*, 1014
 - 4. *To Enjoin Actions in Other States*, 1015
 - 5. *To Enjoin Proceedings in Courts of Concurrent Jurisdiction*, 1016
 - 6. *Conflicting Jurisdiction Between State and Federal Courts*, 1017
 - 7. *As Dependent Upon Amount in Controversy*, 1019
- B. *Venue*, 1021
 - 1. *In General*, 1021
 - 2. *Suits To Stay Proceedings on Judgments or Suits at Law*, 1022
 - 3. *Title or Possession of Land Involved*, 1024

- III. **PARTIES.** [See 13 STANDARD PROC.]
- IV. **PLEADING.** [See 13 STANDARD PROC.]
- V. **SUMMONS OR PROCESS.** [See 13 STANDARD PROC.]
- VI. **CONSIDERATIONS INVOLVED IN GRANTING OR REFUSING INJUNCTIONS.** [See 13 STANDARD PROC.]
- VII. **PRELIMINARY OR INTERLOCUTORY INJUNCTIONS.** [See 13 STANDARD PROC.]
- VIII. **PERMANENT INJUNCTIONS.** [See 13 STANDARD PROC.]
- IX. **THE WRIT OR ORDER OF INJUNCTION.** [See 13 STANDARD PROC.]
- X. **COSTS OF INJUNCTION SUIT.** [See 13 STANDARD PROC.]
- XI. **DISSOLUTION OR CONTINUANCE.** [See 13 STANDARD PROC.]
- XII. **DISMISSAL OR DISCONTINUANCE.** [See 13 STANDARD PROC.]
- XIII. **MODIFICATION OR VACATION.** [See 13 STANDARD PROC.]
- XIV. **REVIVAL OR REINSTATEMENT OF INJUNCTION AFTER DISSOLUTION.** [See 13 STANDARD PROC.]
- XV. **REMEDIES FOR WRONGFUL ISSUANCE OF INJUNCTION.** [See 13 STANDARD PROC.]
- XVI. **REMEDIES FOR VIOLATION OF INJUNCTION.** [See 13 STANDARD PROC.]

CROSS-REFERENCES:

Equity Jurisdiction and	Nuisance;
Procedure;	Parties;
Highways, Streets and Bridges;	Pleading;
Judgments and Decrees,	Taxation;
Enforcement of;	Waste.

For appeals from interlocutory injunctions, see 2 STANDARD PROC. 176.

For attachment in aid of, see 3 STANDARD PROC. 746.

For power to grant when suspended by appeals, see 2 STANDARD PROC. 328.

For forms, see 9 STANDARD PROC. 620, et seq.

For other particular instances of injunction see the specific titles and the index to this work.

I. DEFINITIONS, DISTINCTIONS AND GENERAL STATEMENTS.—A. INJUNCTION DEFINED.—A writ of injunction has been described as a judicial process, whereby a party is required to do, or refrain from doing a particular thing.¹ Statutes, however, in sev-

1. **Ark.**—Gaines *v.* Hale, 26 Ark. 168, 199. **Del.**—Tebo *v.* Hazel, 74 Atl. 841, 846. **La.**—McDonogh *v.* Calloway, 7 Rob. 442. **Mo.**—Schubach *v.* McDonald, 179 Mo. 163, 194, 78 S. W. 1020, 101 Am. St. Rep. 452, 65 L. R. A. 136. **N. J.**—Rogers Locomotive, etc. Wks. *v.* Erie R. Co., 20 N. J. Eq. 379, 388, quoting from 2 Story Eq. Jur., §861. **S. C.**—Pelzer *v.* Hughes, 27 S. C. 408, 414, 3 S. E. 781. **Tenn.**—Childress *v.* Perkins, Cooke 87.

[a] **Other Definitions.**—An injunction is “a prohibitory writ restraining a person from committing or doing a thing which appears to be against equity and conscience.” *Ex parte* Grimball, T. U. P. Charlt. (Ga.) 153, 155.

[b] “An injunction is a writ framed according to the circumstances of the case, commanding an act which the court regards as essential to justice, or restraining an act which it considers contrary to equity and good con-

science.” *Western Union Tel. Co. v. Postal Tel. Co.*, 217 Fed. 533, 539, 133 C. C. A. 385; *Parsons v. Marye*, 23 Fed. 113, 121; *Rodney Com. Bank v. State*, 4 Smed. & M. (Miss.) 439, 514, all quoting *Jeremy Eq. Jur.* 307.

[c] “A writ issuing by the order and under the seal of a court of equity; and though the ordering of it may be the exercise of a mere ministerial discretion, yet such act can only be issued by a judicial officer.” *Ex parte* Kennedy, 11 Ark. 598. See *French v. Hay*, 22 Wall. (U. S.) 250n, 22 L. ed. 857.

[d] **An injunction is always personal**, that is to say, some person, natural or artificial, is forbidden to do something. *American, etc. Co. v. Voigt*, 103 Ill. App. 659, 661.

[e] **Direction to Trustee as to Conduct of Trust as Injunction.**—An order directing the trustees how to vote certain stock of a corporation, in a special proceeding to remove one of the trustees, is an injunction and not a mere

eral states define an injunction as simply "a writ or order requiring a person to refrain from doing a particular act."²

Statutory Order as Substitute for Writ.—In some states the writ of injunction is abolished and in its stead a statutory order or writ substituted.³

B. INTERLOCUTORY OR PERMANENT INJUNCTIONS.—Injunctions are classified as preliminary and permanent injunctions, the former being the more common and sometimes called the remedial writ of injunction. A permanent injunction, or as sometimes called, the judicial writ, issues only after a decree, and is in the nature of an execution to enforce the decree.⁴ A preliminary injunction is a provisional remedy,

direction of the court for the method of execution of the trust in a special case, where one of the trustees was about to act in bad faith and for his own benefit, and where a disagreement existed between the trustees as to their course of action. *In re Dietz*, 138 App. Div. 283, 122 N. Y. Supp. 1063.

2. Cal. Code Civ. Proc., §525; *Gardner v. Stroever*, 81 Cal. 148, 22 Pac. 483, 6 L. R. A. 90; Idaho Rev. Codes, §4287; *Brinton v. Steele*, 19 Idaho 71, 112 Pac. 319; *Roberts v. Kartzke*, 18 Idaho 552, 111 Pac. 1. See also *Gobbi v. Dilco*, 58 Ore. 14, 111 Pac. 49, 113 Pac. 57, 34 L. R. A. (N. S.) 951.

[a] Though under this definition (1) it has been held that an injunction is not a writ commanding a person to do a certain act, and that a mandatory injunction will not issue (*Brinton v. Steele*, 19 Idaho 71, 112 Pac. 319; *Roberts v. Kartzke*, 18 Idaho 552, 111 Pac. 1); (2) in other jurisdictions it has been held not to affect the general jurisdiction of a court of equity and that a mandatory injunction will issue though an injunction is defined in the code as being a preventive remedy only. *Gardner v. Stroever*, 81 Cal. 148, 22 Pac. 483, 6 L. R. A. 90.

3. See: Cal.—*Hicks v. Michael*, 15 Cal. 107. Kan.—*Andrews v. Love*, 46 Kan. 264, 26 Pac. 746. Ky.—Civ. Code Prac., §271; *Bartram v. Ohio*, etc. R. Co., 141 Ky. 100, 132 S. W. 188. Mont. *Fabian v. Collins*, 2 Mont. 510. Neb. *Boyd v. State*, 19 Neb. 128, 26 N. W. 925. N. Y.—*Jackson v. Bunnell*, 113 N. Y. 216, 219, 21 N. E. 79; *Erie R. Co. v. Ramsey*, 45 N. Y. 637, 645; *Harold v. Hefferman*, 42 How. Pr. 241, 242. N. D.—Rev. Codes, §5343; *Forman v. Healey*, 11 N. D. 563, 93 N. W. 866. S. D.—*Ellis v. Commander*, 1 Strobh. Eq. 188. Wis.—Rev. St., 1858, ch. 129;

Trustees German Ev. Cong. v. Hoessli, 13 Wis. 348.

[a] In lieu of it, the court, or officer of the court delegated by statute, issues, that is, enters an order in the case restraining the defendant from committing some act alleged and shown or threatened, detrimental to the plaintiff's rights, or commanding him to do an act which he is refusing to do, and which the plaintiff is entitled to have done. *Bartram v. Ohio*, etc. R. Co., 141 Ky. 100, 132 S. W. 188.

[b] **New York.**—This statutory order "can be awarded only in the cases and in the manner specifically prescribed, and is impliedly forbidden in any others." *Jackson v. Bunnell*, 113 N. Y. 216, 219, 21 N. E. 79. See also *Fellows v. Hermans*, 13 Abb. Pr. N. S. (N. Y.) 1.

[c] **Distinction Disregarded.**—"The distinction between the writ of injunction, strictly so called, and an order in the nature of an injunction, has been disregarded in practice, and such orders, although not enforced by writ of injunction, have long since indiscriminately obtained the name of injunctions." *Ellis v. Commander*, 1 Strobh. Eq. (S. C.) 188, 192.

[d] **The writ of injunction was abolished in Oklahoma** by §5755, *Comp. Laws*, 1909, (1) "but the same seems to have been revived by sections 2 and 10 (sections 187 and 195, *Williams' Ann. Const. Okla.*), Art. 7, of the Constitution of this state." *Murphy v. Fitch*, 35 Okla. 364, 130 Pac. 298. (2) It is not an exclusive remedy in that state. *Murphy v. Fitch*, *supra*.

4. *Gaines v. Hale*, 26 Ark. 168, 199; *Smith v. People*, 2 Colo. App. 99, 107, 29 Pac. 924. See *Riggins v. Thompson*, 96 Tex. 154, 71 S. W. 14; *Ex parte Zuccaro* (Tex.), 163 S. W. 579.

the sole object of which is to preserve the subject in controversy in its then condition and without determining any question of right, merely prevent the further perpetration of wrong, or the doing of any act whereby the right in controversy may be materially injured or endangered.⁵ Hence it will not issue to correct wrongs or injuries which have been completed before the institution of the injunction

5. **U. S.**—Colorado, etc. R. Co. v. Chicago, etc. R. Co., 141 Fed. 898, 73 C. C. A. 132; Denver, etc. R. Co. v. United States, 124 Fed. 156, 59 C. C. A. 579; Buskirk v. King, 72 Fed. 22, 18 C. C. A. 418; Carpenter v. Knollwood Cemetery, 188 Fed. 856; Harriman v. Northern Securities Co., 132 Fed. 464, 475; Sanitary Reduction Wks. v. California Reduction Co., 94 Fed. 693, 696; Ladd v. Oxnard, 75 Fed. 703; Toledo, etc. Co. v. Pennsylvania Co., 54 Fed. 730, 741, 19 L. R. A. 387. **Cal.**—Stewart v. Superior Court, 100 Cal. 543, 35 Pac. 156, 563; Hatch v. Raney, 9 Cal. App. 716, 100 Pac. 886; Knight v. Cohen, 5 Cal. App. 296, 90 Pac. 145, 7 Cal. App. 43, 93 Pac. 396. **Colo.**—McLeod v. Farmers', etc. Co., 44 Colo. 184, 98 Pac. 16. **Del.**—Tebo v. Hazel, 74 Atl. 841. **Ga.**—Moody v. Cleveland Woolen Mills, 133 Ga. 741, 66 S. E. 908; Thomas v. Herrington, 129 Ga. 271, 58 S. E. 834; Payton v. Payton, 86 Ga. 773, 13 S. E. 127; Old Hickory D. Co. v. Bleyer, 74 Ga. 201; National Bank v. Printup, 63 Ga. 570. **Idaho.**—Staples v. Rossi, 7 Idaho 618, 626, 65 Pac. 67. **Ill.**—Rock Island v. Central U. Tel. Co., 132 Ill. App. 248. **Ia.**—Snodgrass v. McDaniel, 144 Iowa 674, 123 N. W. 336; Gilman v. Talley, 140 Iowa 718, 119 N. W. 144. **Kan.** State v. Johnston, 78 Kan. 615, 97 Pac. 790. **La.**—State v. New Orleans Debenture R. Co., 107 La. 562, 32 So. 102. **Md.**—Bosley v. Susquehanna Canal, 3 Bland 63; Murdock's Case, 2 Bland 461, 40 Am. Dec. 381. **Mich.**—Ladd v. Flynn, 90 Mich. 181, 51 N. W. 203. **Minn.**—Mann v. Flower, 26 Minn. 479, 5 N. W. 365. **Mo.**—Graden v. Parkville, 114 Mo. App. 527, 90 S. W. 115. **Mont.**—Custer Consol. M. Co. v. Helena, 45 Mont. 146, 122 Pac. 567; Doulan v. Thompson, etc. Mill Co., 42 Mont. 257, 112 Pac. 445. **Neb.**—State v. Graves, 66 Neb. 17, 92 N. W. 144; Calvert v. State, 34 Neb. 616, 52 N. W. 687. **Nev.** Phenix r. Frampton, 29 Nev. 306, 90 Pac. 2, 124 Am. St. Rep. 926. **N. J.** Meyer v. Somerville W. Co., 79 N. J. Eq. 613, 82 Atl. 915; Board of Health v. Du Pont, etc. Co., 79 N. J. Eq. 31, 80 Atl. 998. **N. Y.**—Third Ave. R. Co. v. New York, 54 N. Y. 159; Osborn v. Taylor, 5 Paige 515; Brown v. Cole, 54 Misc. 278, 104 N. Y. Supp. 109. **N. C.**—Harrison v. Bray, 92 N. C. 488. **Ohio.**—Gould v. Chesapeake & O. R. Co., 10 Ohio N. P. (N. S.) 129. **Ore.** Gobbi v. Dileo, 58 Ore. 14, 111 Pac. 49, 113 Pac. 57, 34 L. R. A. (N. S.) 951; Helm v. Gilroy, 20 Ore. 517, 26 Pac. 851. **Pa.**—Pennsylvania Canal Co. v. Lewisburg M. & W. Co., 203 Pa. 282, 52 Atl. 1135; Fredericks v. Huber, 180 Pa. 572, 37 Atl. 90. **R. I.** American El. Wks. v. Varley Duplex M. Co., 26 R. I. 440, 59 Atl. 110. **S. C.** Atlantic Coast, etc. Co. v. Burton L. Co., 89 S. C. 143, 71 S. E. 820; Andrews v. Sumter Commercial, etc. Co., 87 S. C. 301, 69 S. E. 604; Northwestern R. Co. v. Colclough, 84 S. C. 37, 65 S. E. 950; Evans v. Mayes, 81 S. C. 188, 62 S. E. 207; Pelzer v. Hughes, 27 S. C. 408, 414, 3 S. E. 781. **Tenn.** Savage v. Pickard, 14 Lea 46, 50. **Tex.** Galveston, etc. R. Co. v. Galveston (Tex. Civ. App.), 137 S. W. 724; Norwood v. Leevies (Tex. Civ. App.), 115 S. W. 53. **W. Va.**—Powhatan Coal & C. Co. v. Ritz, 60 W. Va. 395, 56 S. E. 257; Bettman v. Harness, 42 W. Va. 433, 26 S. E. 271, 36 L. R. A. 566. **Wis.**—State v. Wadhams Oil Co., 149 Wis. 58, 134 N. W. 1121, 40 L. R. A. (N. S.) 607; Linden Land Co. v. Milwaukee Elec., etc. Co., 107 Wis. 493, 83 N. W. 851, 856. **Wyo.**—Stowe v. Powers, 19 Wyo. 291, 116 Pac. 576. **Can.**—Erie, etc. R. Co. v. Great Western R. Co., 21 Grant Ch. (U. C.) 171.
- [a] The function of a preliminary injunction, whether it be prohibitory or mandatory, is to preserve the status quo until, upon final hearing, the court may grant full relief. Powhatan Coal & C. Co. v. Ritz, 60 W. Va. 395, 56 S. E. 257. And see: **U. S.**—F. W. Cook Brew. Co. v. Garber, 168 Fed. 942, 951; Ladd v. Oxnard, 75 Fed. 703; Buskirk v. King, 72 Fed. 22, 25, 18

proceedings.⁶ And a preliminary injunction doing virtually what a perpetual injunction on final decree would have done, goes too far, because it gives to the complainant the right for which he contends in advance of a decision.⁷

C. RESTRAINING ORDER AND TEMPORARY INJUNCTION. — While often used synonymously, the terms "temporary injunction" and "restraining order" are properly distinguished.⁸ The effect and not the name

C. C. A. 418. **Del.**—Tebo *v.* Hazel, 74 Atl. 841. **Ohio.**—Gould *v.* Chesapeake & O. R. Co., 10 Ohio N. P. (N. S.) 129, 130. **Pa.**—Fredericks *v.* Huber, 180 Pa. 572, 37 Atl. 90.

[b] **What Statu Quo Preserved.** "The modern cases therefore have established the rule that the status quo which will be preserved by preliminary injunction is the last actual, peaceable, noncontested status which preceded the pending controversy, and equity will not permit a wrongdoer to shelter himself behind a suddenly or secretly changed status, though he succeeded in making the change before the chancellor's hand actually reached him." Fredericks *v.* Huber, 180 Pa. 572, 37 Atl. 90.

6. **U. S.**—United States *v.* La Compagnie Francaise Des Cables Telegraphiques, 77 Fed. 495. **Cal.**—Flood *v.* Goldstein Co., 158 Cal. 247, 110 Pac. 916; Hatch *v.* Raney, 9 Cal. App. 716, 100 Pac. 886. **Ga.**—Abbott *v.* Berrie, 135 Ga. 369, 69 S. E. 477. **Idaho.**—Wilson *v.* Boise City, 7 Idaho 69, 60 Pac. 84. **Ind.**—Shافر *v.* Fry, 164 Ind. 315, 319, 73 N. E. 698; Heintz *v.* Terre Haute, 161 Ind. 44, 66 N. E. 450. **Kan.**—Alma *v.* Loehr, 42 Kan. 368, 22 Pac. 424. **Md.**—Goldberg *v.* Novickow, 113 Md. 29, 77 Atl. 261. **Mo.**—Brier *v.* State Exch. Bk., 225 Mo. 673, 125 S. W. 469. **Neb.**—Vogel *v.* Rawley, 85 Neb. 600, 123 N. W. 1037. **Okla.**—Walcott *v.* Denness, 29 Okla. 228, 116 Pac. 784. **Pa.**—Schuykill Trac. Co. *v.* Shenandoah, 9 Pa. Dist. 77, 22 Pa. Co. Ct. 222; Nocton *v.* Pennsylvania R. Co., 20 Montg. Co. Rep. 25. **Tex.**—Norwood *v.* Leevies (Tex. Civ. App.), 115 S. W. 53.

See *infra*, I, D, note 19.

7. **U. S.**—Spring Valley Water Co. *v.* San Francisco, 165 Fed. 667, 710; Trow Directory, etc. Co. *v.* Boyd, 97 Fed. 586. **Ky.**—Weaver *v.* Toney, 107 Ky. 419, 54 S. W. 732, 50 L. R. A. 105. **Mich.**—Ladd *v.* Flynn, 90 Mich.

181, 51 N. W. 203, 204. **Neb.**—Calvert *v.* State, 34 Neb. 616, 52 N. W. 687, 692. **N. J.**—Becker *v.* Gilbert (N. J. Eq.), 60 Atl. 29; Levi *v.* Schoenthal, 57 N. J. Eq. 244, 41 Atl. 105; National Docks, etc., R. Co. *v.* Pennsylvania R. Co., 54 N. J. Eq. 10, 33 Atl. 219; Pennsylvania R. Co. *v.* National Docks, etc. R. Co., 53 N. J. Eq. 178, 32 Atl. 220. **N. Y.**—Barzilay *v.* Loewenthal, 134 App. Div. 502, 119 N. Y. Supp. 612; Van Veghten *v.* Howland, 12 Abb. Pr. (N. S.) 461; Cohen *v.* United Garment Workers, 35 Misc. 748, 72 N. Y. Supp. 341. **N. D.**—Forman *v.* Healey, 11 N. D. 563, 93 N. W. 866. **Pa.**—Chester Trac. Co. *v.* Philadelphia, W. & B. R. Co., 174 Pa. 284, 34 Atl. 619. **Tex.**—Ort *v.* Bowden (Tex. Civ. App.), 148 S. W. 1145; Galveston, etc. Ry. Co. *v.* Galveston (Tex. Civ. App.), 137 S. W. 724. **W. Va.**—Bettman *v.* Harness, 42 W. Va. 433, 26 S. E. 271, 36 L. R. A. 566. **Wis.**—Consolidated Vinegar Wks. *v.* Brew, 112 Wis. 610, 88 N. W. 603.

See *infra*, I, D, note 21.

[a] "The granting or denial of a preliminary injunction does not amount to an adjudication of the ultimate rights in controversy. It merely determines that the court, balancing the respective equities of the parties, concludes that, pending a trial on the merits, the defendant should or that he should not be restrained from exercising the rights claimed by him. When the cause is finally tried, it may be found that the facts require a decision against the party prevailing on the preliminary application." Miller & Lux *v.* Madera Canal & Irr. Co., 155 Cal. 59, 99 Pac. 502, 511, 22 L. R. A. (N. S.) 391.

8. State *v.* Johnston, 78 Kan. 615, 97 Pac. 790.

[a] "There is a material distinction between a preliminary writ of injunction and an ad interim restraining order. The injunction runs, to use its language, until the defendant 'shall

by which an order may be called determines to which class it belongs, however,⁹ a restraining order being effective only until an application for an injunction can be heard; a temporary injunction being effective until the trial of the action in which it is issued.¹⁰ Except as to

have fully answered the bill of complaint and our said court shall make other order to the contrary.' An ad interim restraining order always commands the defendant to show cause on a certain day why an injunction should not issue, and he is therefore brought into court for the purpose of that motion only, and thus afforded an opportunity to litigate with the complainant as to the propriety of the issuance of an interlocutory injunction, without the filing of an answer and without appearing generally in the cause." *Allman v. United Brotherhood of Carpenters, etc.*, 79 N. J. Eq. 150, 81 Atl. 116.

[b] "The restraining order is a restraint of the same nature as an injunction, but the statute not only does not designate it as an injunction but discriminates between it and an injunction. It is a restraint pending the consideration of the court as to whether the party is entitled to a preliminary injunction." *San Diego W. Co. v. Pacific Coast Steamship Co.*, 101 Cal. 216, 218, 35 Pac. 651, *quoted in Ex parte Grimes*, 20 Okla. 446, 94 Pac. 668.

[c] The office of a restraining order is, in injunction cases, definite and distinct, and the granting or the withholding of the same is an entirely different thing from the granting or refusal of an interlocutory injunction. *Savannah v. Grayson*, 104 Ga. 105, 30 S. E. 693.

9. **Kan.**—*State v. Johnston*, 78 Kan. 615, 97 Pac. 790. **Neb.**—*State v. Baker*, 62 Neb. 840, 88 N. W. 124, determined by the character, scope and effect of writ. **Tex.**—*Riggins v. Thompson*, 96 Tex. 154, 158, 71 S. W. 14, determined from language of judge's fiat.

[a] If the effect that should be given to the court's order is doubtful, or if the language of the order will admit of such construction, then it should be considered as a temporary restraining order only. *State v. Dungan*, 89 Neb. 738, 132 N. W. 305.

[b] An injunctional order which does not contemplate a hearing as to whether a temporary injunction shall

be allowed is of itself a temporary injunction and must be so treated. *State v. Graves*, 82 Neb. 282, 117 N. W. 717. See *State v. Dungan*, 89 Neb. 738, 132 N. W. 305.

[c] **Restraint Until Proper Judge Shall Act Is Restraining Order.**—An order by a probate judge made in the absence of the district judge from the county, and in an action pending or being commenced in the district court, which order is by its terms operative until the district court or the judge thereof shall act in the matter, is a restraining order, and not a temporary injunction. *State v. Johnston*, 78 Kan. 615, 97 Pac. 790.

[d] "Until the further order of the court," added to the order does not make it a temporary injunction, but the language is restricted and limited in its scope by the inherent character of the order itself. *Ex parte Grimes*, 20 Okla. 446, 94 Pac. 668. See also: **U. S.** *Houghton v. Meyer*, 208 U. S. 149, 28 Sup. Ct. 234, 52 L. ed. 432. **Cal.**—*Curtiss v. Bachman*, 110 Cal. 433, 42 Pac. 910, 52 Am. St. Rep. 111. **N. Y.**—*Sweet v. Mowry*, 71 Hun 381, 25 N. Y. Supp. 32.

[e] It is the fundamental inherent difference in the character of relief granted in a restraining order from that granted in a temporary injunction which causes the courts, notwithstanding the fact that the order contains provisions similar to "until the further orders of this court," and like clauses, to adhere to the restraining character of the order and deny it the force and vigor of an injunction. For, as is said in the case of *San Diego Water Co. v. Pacific Coast Steamship Co.*, 101 Cal. 216, 35 Pac. 651: "The restraining order is a restraint of the same nature as an injunction, but the statute not only does not designate it as an injunction, but discriminates between it and an injunction. It is a restraint pending the consideration of the court as to whether the party is entitled to a preliminary injunction." *Ex parte Grimes*, 20 Okla. 446, 94 Pac. 668.

10. **U. S.**—*Houghton v. Meyer*, 208 U. S. 149, 28 Sup. Ct. 234, 52 L. ed. 432;

duration there is little or no distinction as to a temporary injunction and a temporary restraining order, however.¹¹ It has been held that temporary restraining orders are not permissible except where authorized by statutes.¹²

D. PROHIBITIVE OR MANDATORY INJUNCTIONS.—Injunctions are also classified as mandatory or preventive according as they command

Worth Mfg. Co. v. Bingham, 116 Fed. 785, 789, 54 C. C. A. 119; North American, etc. Co. v. Watkins, 109 Fed. 101, 106, 48 C. C. A. 254. Cal.—Neumann v. Moretti, 146 Cal. 31, 33, 79 Pac. 512; San Diego W. Co. v. Pacific Coast Steamship Co., 101 Cal. 216, 35 Pac. 651. Ga.—Strickland v. Griffin, 70 Ga. 541. Ind.—College Corner, etc. Co. v. Moss, 77 Ind. 139, 142. Kan.—State v. Werner, 80 Kan. 222, 101 Pac. 1004; State v. Johnston, 78 Kan. 615, 97 Pac. 790. Mont.—Wetzstein, etc. Co. v. Boston, etc. Co., 25 Mont. 135, 136, 63 Pac. 1043. Neb.—State v. Baker, 62 Neb. 840, 88 N. W. 124; State v. Wakeley, 28 Neb. 431, 44 N. W. 488. Okla.—*Ex parte* Grimes, 20 Okla. 446, 94 Pac. 668. Tex.—Riggins v. Thompson, 93 Tex. 154, 157, 71 S. W. 14. Utah.—Miles v. Sheep Rock, etc. Co., 15 Utah 436, 49 Pac. 536.

[a] A restraining order (1) is in aid only, and not a part of the main action; its purpose being only to keep things in statu quo pending the motion for a preliminary hearing to determine whether a preliminary injunction shall issue (*State v. Graves*, 82 Neb. 282, 117 N. W. 717; *Trester v. Pike*, 60 Neb. 510, 83 N. W. 676), (2) and should not go further than to suspend the action of the defendant until an opportunity is afforded to answer and defend. Ind.—*Wallace v. McVey*, 6 Ind. 300. Md.—*Thompson Seenic Ry. Co. v. Young*, 90 Md. 278, 283, 44 Atl. 1024. Ohio.—*Vornholt v. Gordon*, 4 Ohio Dec. 498.

[b] Where a restraining order is issued pending an order to show cause why a temporary injunction should not issue until the final determination of the suit, it does not affect the validity of an assessment sought to be enjoined, but simply suspends the power to collect it, until the date fixed for the hearing on the order to show cause. "If upon the date so fixed there is no appearance of the parties, and no continuance of the hearing on the motion for the injunction, the restraining

order falls with the motion, and the restraint upon the collection of the assessment is at an end. Under such circumstances it requires no order of court to dissolve the restraining order. Its life ceases with that of the motion, for such an order is not intended as an injunction *pendente lite*, and is not an injunction within the meaning of the provision of the statute above quoted." *Miles v. Sheep Rock Min. & Mill. Co.*, 15 Utah 436, 49 Pac. 536.

11. Duration Determines Distinction.—*State v. Werner*, 80 Kan. 222, 101 Pac. 1004. See also *Strickland v. Griffin*, 70 Ga. 54.

[a] The chief distinguishing characteristics between a temporary injunction and a mere restraining order depends upon the question of whether or not the order appears in itself to be a finality or whether there is to be a future hearing to determine whether or not an injunction *pendente lite* shall be issued. *State v. Baker*, 62 Neb. 840, 88 N. W. 124.

12. *Castleman v. State*, 94 Miss. 609, 47 So. 647. But see *State ex rel. Downing v. Greene*, 48 Neb. 327, 67 N. W. 162; and *Riggins v. Thompson*, 96 Tex. 154, 71 S. W. 14, where it is said: "We understand that under the practice of the American courts three species of injunctions may be issued: 1. A restraining order, which is defined to be: 'A restraining order is an interlocutory order made by a court of equity upon an application for an injunction and as part of the motion for a preliminary injunction, by which the party is restrained pending the hearing of the motion' (*Bouvier's Law Dict.*, 2 ed.) 2. One which is intended to operate, and which does operate unless dissolved by an interlocutory order, until the final hearing; and, 3. A perpetual injunction which can be properly ordered only upon the final decree." *Quoted with approval in Ex parte Zuccaro* (Tex.), 163 S. W. 579.

a defendant to do or not to do a certain act or acts.¹³ A mandatory injunction, of course, compels the affirmative performance of an act.¹⁴

Power To Grant Mandatory Injunction.—Though some courts have stated broadly that the object and purpose of an injunction is merely preventive, it is well settled that in cases of extreme necessity and hardship and where complainant's right is clear, that a court of equity is not limited to the restraint of a contemplated or threatened action, but may even require affirmative action¹⁵ by the issuance of a manda-

13. *Mason v. Byrley*, 26 Ky. L. Rep. 487, 84 S. W. 767. See also *Black v. Jackson*, 177 U. S. 349, 361, 20 Sup. Ct. 648, 44 L. ed. 801; *In re Lennon*, 166 U. S. 548, 556, 17 Sup. Ct. 658, 41 L. ed. 1110; *Toledo, etc., R. Co. v. Pennsylvania Co.*, 54 Fed. 730, 19 L. R. A. 387; *Bachman v. Harrington*, 184 N. Y. 458, 77 N. E. 657.

[a] "Originally injunctions were preventive only, and it is only within recent years that a mandatory injunction has sprung into existence. Preventive injunctions necessarily operate upon an unperformed and unexecuted act, and prevent a threatened, but non-existent injury." *Schubach v. McDonald*, 179 Mo. 163, 78 S. W. 1020, 101 Am. St. Rep. 452, 65 L. R. A. 136.

14. **U. S.**—*Carver v. San Pedro, etc. R. Co.*, 151 Fed. 334. **Cal.**—*Clute v. Superior Court*, 155 Cal. 15, 99 Pac. 362, 132 Am. St. Rep. 54. **Minn.**—*Wayzata v. Great Northern R. Co.*, 67 Minn. 385, 69 N. W. 1073; *Central T. Co. v. Moran*, 56 Minn. 188, 57 N. W. 471, 29 L. R. A. 212. **N. J.**—*Bailey v. Schnitzins*, 45 N. J. Eq. 178, 13 Atl. 247, 16 Atl. 680. **Pa.**—*Audenried v. Philadelphia, etc. R. Co.*, 68 Pa. 370, 8 Am. Rep. 195, injunctions commanding acts to be done or undone are termed mandatory.

[a] **Character Determined By Effect.**—"For the purpose of determining the effect of this injunction as mandatory or prohibitory, we must consider the result of an enforcement of the writ on the position of the defendant, as asserted in the court below. If the injunction compels him affirmatively to surrender a position which he holds, and which, upon the facts alleged by him, he is entitled to hold, it is mandatory." *Clute v. Superior Court*, 155 Cal. 15, 20, 99 Pac. 362, 132 Am. St. Rep. 54.

[b] An injunction is mandatory though restrictive in form, if its effect

is to compel the performance of a substantive act and change the relative positions or rights of the parties. *Mark v. Superior Court*, 129 Cal. 1, 61 Pac. 436; *Stewart v. Superior Court*, 100 Cal. 543, 35 Pac. 156, 563.

[c] "The mandatory injunction may be in the direct form of command, or in the direct form of prohibiting the refusal to do an act to which another has a right." *Parsons v. Marye*, 23 Fed. 113, 121.

15. **U. S.**—*In re Lennon*, 166 U. S. 548, 556, 17 Sup. Ct. 658, 41 L. ed. 1110, affirming 64 Fed. 320, 12 C. C. A. 134, 22 U. S. App. 561; *Mills v. Green*, 159 U. S. 651, 16 Sup. Ct. 132, 40 L. ed. 293; *Mugler v. Kansas*, 123 U. S. 623, 673, 8 Sup. Ct. 273, 31 L. ed. 205; *Western Union Tel. Co. v. Postal Tel. Co. (C. C. A.)*, 217 Fed. 533, 539; *Love v. Atchison, etc. R. Co.*, 185 Fed. 321, 107 C. C. A. 403, affirming 174 Fed. 59 and 177 Fed. 493; *St. Louis, etc. Co. v. Cross*, 171 Fed. 480; *Toledo, etc. R. Co. v. Pennsylvania Co.*, 54 Fed. 730, 746, 19 L. R. A. 387. **Cal.**—*Clute v. Superior Court*, 155 Cal. 15, 99 Pac. 362, 132 Am. St. Rep. 54; *Gardner v. Stroeever*, 81 Cal. 148, 22 Pac. 483, 6 L. R. A. 90. **Conn.**—*Hartford v. New York, etc. R. Co.*, 59 Conn. 250, 22 Atl. 37. **Fla.**—*Ocala v. Anderson*, 58 Fla. 415, 50 So. 572; *Florida East Coast R. Co. v. Taylor*, 56 Fla. 788, 47 So. 345; *Taylor v. Florida, etc. R. Co.*, 54 Fla. 635, 45 So. 574, 127 Am. St. Rep. 155. 16 L. R. A. (N. S.) 307. **Ind.**—*Brauns v. Glesige*, 130 Ind. 167, 29 N. E. 1061; *Evansville, etc. R. Co. v. Evansville, etc. R. Co.*, 50 Ind. App. 502, 98 N. E. 649. **Ia.**—*Snyder v. Ft. Madison St. R. Co.*, 105 Iowa 284, 75 N. W. 179, 41 L. R. A. 345. **Kan.**—*Atchison, etc. R. Co. v. Billings*, 77 Kan. 119, 93 Pac. 590; *Webster v. Cooke*, 23 Kan. 637. **Ky.**—*Dix River Baryes Co. v. Pence, Brotherhood of Carpenters & Joiners*, 79 N. J. Eq. 150, 81 Atl. 116.

- 123 S. W. 263; *Louisville v. Board of Park Comrs.*, 112 Ky. 409, 65 S. W. 860; *Henderson County v. Ward*, 107 Ky. 477, 54 S. W. 725. **La.**—*Board of Comrs. v. Iberia & V. R. Co.*, 117 La. 940, 42 So. 432; *New Iberia Rice-Milling Co. v. Romero*, 105 La. 439, 29 So. 876; *McDonogh v. Calloway*, 7 Rob. 442. **Md.**—*Henkel v. Millard*, 97 Md. 24, 54 Atl. 657; *Washington County v. Washington County School Comrs.*, 77 Md. 283, 26 Atl. 115. **Mass.**—*Stewart v. Finkelstone*, 206 Mass. 28, 92 N. E. 37, 135 Am. St. Rep. 370, 28 L. R. A. (N. S.) 634; *Curtis Mfg. Co. v. Spencer Wire Co.*, 203 Mass. 448, 89 N. E. 534, 133 Am. St. Rep. 307 (foundation of building wrongfully placed on complainant's land required to be removed); *Downey v. Hood & Sons*, 203 Mass. 4, 89 N. E. 24; *Codman v. Bradley*, 201 Mass. 361, 87 N. E. 591 (building in violation of building line required to be removed); *Cox v. Malden*, etc. Co., 199 Mass. 324, 85 N. E. 180, 127 Am. St. Rep. 503, 17 L. R. A. (N. S.) 1235. **Mich.**—*Gates v. Detroit*, etc. R. Co., 151 Mich. 548, 115 N. W. 420; *Gray v. Koch*, 2 Mich. N. P. 119. **Minn.**—*Wayzata v. Great Northern R. Co.*, 67 Minn. 385, 69 N. W. 1073; *Central T. Co. v. Moran*, 56 Minn. 188, 57 N. W. 471, 29 L. R. A. 212. **Miss.**—*Scherck v. Montgomery*, 81 Miss. 426, 33 So. 507; *Green v. Lake*, 54 Miss. 540, 28 Am. Rep. 378. **Mo.**—*Compton Hill Imp. Co. v. Strauch*, 162 Mo. App. 76, 141 S. W. 1159. **Neb.**—*Buettgenbach v. Gerbig*, 2 Neb. (Unof.) 889, 90 N. W. 654. **N. H.**—*Bailey v. Collins*, 59 N. H. 459. **N. J.**—*Supplee v. Cohen*, 80 N. J. Eq. 83, 83 Atl. 373; *Hyman v. Tash* (N. J. Eq.), 71 Atl. 742 (violation of building restriction); *Morrow v. Has-selman*, 69 N. J. Eq. 612, 61 Atl. 369; *Bailey v. Schnitzins*, 45 N. J. Eq. 178, 16 Atl. 680, 13 Atl. 247 (should rarely issue before a hearing on the merits); *Broome v. New York*, etc. Tel. Co., 42 N. J. Eq. 141, 7 Atl. 851. **N. Y.**—*Bachman v. Harrington*, 184 N. Y. 458, 77 N. E. 657 (must be exercised in conformity with code provision); *West Side Elec. Co. v. Consolidated Tel.*, etc. Co., 87 App. Div. 550, 84 N. Y. Supp. 1052; *Crocker v. Manhattan Life Ins. Co.*, 61 App. Div. 226, 70 N. Y. Supp. 492, 104 N. Y. St. 492, *modifying* 31 Misc. 687, 66 N. Y. Supp. 84, 100 N. Y. St. 84; *Eno v. Christ*, 25 Misc. 24, 54 N. Y. Supp. 400. **N. C.**—*Clinton-Dunn Tel. Co. v. Carolina Tel.*, etc. Co., 159 N. C. 9, 74 S. E. 636; *Sheppard v. Rockingham Power Co.*, 150 N. C. 776, 64 S. E. 894. **Ohio.**—*Harrison v. Pike's Heirs*, 7 Ohio Dec. (Reprint) 603; *Tol-edo v. Northwestern*, etc. Co., 6 Ohio N. P. 531. **Okla.**—*Jefferson v. Hicks*, 23 Okla. 684, 102 Pac. 79; *Cox v. Gar-rett*, 7 Okla. 375, 54 Pac. 546; *Sproat v. Durland*, 2 Okla. 24, 35 Pac. 682, 886. **Pa.**—*McCabe v. Watt*, 224 Pa. 253, 73 Atl. 453, 24 L. R. A. (N. S.) 274; *Chester*, etc. R. Co. v. *Chester*, etc. Co., 217 Pa. 272, 66 Atl. 358; *Pressed Steel Car Co. v. Standard Steel Car Co.*, 210 Pa. 464, 60 Atl. 4. **S. D.**—*Magpie*, etc. Co. v. *Sherman*, 23 S. D. 232, 121 N. W. 770. **Tenn.**—*State v. Condon*, 108 Tenn. 82, 65 S. W. 871; *Post v. Southern R. Co.*, 103 Tenn. 184, 52 S. W. 301, 55 L. R. A. 481. **Tex.**—*Holbein v. De La Garza* (Tex. Civ. App.), 126 S. W. 42 (even without notice); *Santa Fe*, etc. R. Co. v. *Norvell*, 55 Tex. Civ. App. 488, 118 S. W. 762; *Chaison T. Co. v. McFaddin*, etc. Co., 56 Tex. Civ. App. 611, 121 S. W. 716. **Wash.**—*Farnsworth v. Wilbur*, 49 Wash. 416, 95 Pac. 642, 19 L. R. A. (N. S.) 320; *Hart v. Seattle*, 45 Wash. 300, 88 Pac. 205; *Seattle El. Co. v. Snoqualmie Falls P. Co.*, 40 Wash. 380, 82 Pac. 713, 1 L. R. A. (N. S.) 1032; *White v. Codd*, 39 Wash. 14, 80 Pac. 836. **W. Va.**—*Powhatan Coal & C. Co. v. Ritz*, 60 W. Va. 395, 56 S. E. 257; *Boyd v. Woolwine*, 40 W. Va. 282, 21 S. E. 1020; *Lovett v. West Virginia*, etc. Co., 65 W. Va. 739, 65 S. E. 196, 24 L. R. A. (N. S.) 230 (knowingly violating complainant's rights). **Wis.**—*St. Hyacinth Cong. v. Borucki*, 141 Wis. 205, 124 N. W. 284. **Eng.**—*Hervey v. Smith*, 1 Kay & J. 389, 69 Eng. Reprint 510; *Isenberg v. East India House Est. Co.*, 3 De G., J. & S. 263, 46 Eng. Reprint 637, 3 N. R. 345, 33 L. J. Ch. 392, 10 Jur. (N. S.) 221, 12 W. R. 450; *Robinson v. Lord Byron*, 1 Bro. C. 588, 28 Eng. Reprint 1315; *Beadel v. Perry*, L. R. 3 Eq. 465; *Smith v. Smith*, 44 L. J. Ch. 630, L. R. 20 Eq. 500, 32 L. T. 787, 23 W. R. 771. **Can.**—*Hamilton v. Hamilton St. R. Co.*, 10 Ont. L. R. 594, 39 Can. Sup. Ct. 673.

[a] Mandatory injunctions are rarely granted before final hearing, and are, as a general rule, strictly confined to cases where the remedy at law is plainly inadequate. *Allman v. United*

[b] Where it would require close and continuous supervision by the court for an indefinite period of time, such an injunction will be refused. *Cameron v. Carbondale*, 227 Pa. 473, 76 Atl. 198, 28 L. R. A. (N. S.) 494.

[c] "While, however, the language of the Code in terms authorizes an injunction only against the commission of acts, still it is doubtless within the power of a court of equity, in proper cases, to issue mandatory injunctions, and the provisions of the code should not be so strictly construed as to deny that power in any case. But while such power may exist it is by no means unlimited, and when it exceeds the limit it is not a mere error, but void as without jurisdiction. It has been well said by Judge Cooley: 'The court of chancery has no more power than any other to condemn a man unheard, and to dispossess him of property *prima facie* his, and hand over its enjoyment to another on an *ex parte* claim to it.' *Arnold v. Bright*, 41 Mich. 207, 2 N. W. 16. So, in an action for the specific performance of a contract for the sale of real estate, the court doubtless may restrain the defendant pending the action from conveying, incumbering, or in any way incumbering, or in any way disposing of the subject of the suit; but an *ex parte* order that the defendant forthwith convey the premises to the plaintiff, even though phrased in the form of an injunction restraining him from refusing to forthwith make the conveyance, in my opinion would be not merely erroneous, but absolutely void. On the other hand, in the case of a threatened violation of a contract continuous in its character, such as a contract to furnish water or light during a term, the defendant might be restrained from failing to supply water or light during the pendency of the litigation." *Bachman v. Harrington*, 184 N. Y. 458, 77 N. E. 657, 658. Compare *Powhatan Coal & Coke Co. v. Ritz*, 60 W. Va. 395, 56 S. E. 257.

[d] Where Necessary To Make Restraining Order Effectual.—"While the office of an injunction primarily is to restrain, and not to compel, the performance of an act, yet, if it be necessary in order to make the restraining order effectual, the party against whom it is issued may be required to perform some affirmative act which will make

effectual the main and controlling purpose of the order. It cannot be maintained that, because an injunction primarily is to restrain, and not to compel, the performance of an act, it cannot be used, when the effect of yielding obedience thereto requires the performance of some affirmative act. That is, the court may grant an injunction, the essential nature of which is to restrain, although, in yielding obedience to the restraint, the party may be required to perform some affirmative act. Otherwise often the injunction would be ineffectual." *Falcon v. Boyer* (Iowa), 142 N. W. 427.

[e] Examples of Proper Issuance. Mandatory injunctions have been held proper (1) where they require the removal of an unauthorized encroachment on the streets (*United States v. Cole*, 7 Mack. [D. C.] 504), (2) or the removal of a building constructed in violation of a building line restriction (*Codman v. Bradley*, 201 Mass. 361, 87 N. E. 591; *Hyman v. Tash* (N. J. Eq.), 71 Atl. 742, erected in violation of express warning), (3) or the removal of the foundation of a building knowingly erected on another's land without his consent (*Curtis Mfg. Co. v. Spencer Wire Co.*, 203 Mass. 448, 89 N. E. 534, 133 Am. St. Rep. 307), (4) or the removal of a building interfering with light and air, and erected under an undertaking to pull it down if the judgment of the court should be against the right (*Greenwood v. Hornsey*, 55 L. J. Ch. 917, L. R. 33 Ch. Div. 471, 55 L. T. 135, 35 W. R. 163), (5) or requiring the return of complainant's blueprints and drawings coming into the hands of a competing manufacturer (*Pressed Steel Car Co. v. Standard Steel Car Co.*, 210 Pa. 464, 60 Atl. 4), (6) or require the fiscal court of a county to turn over the pest house to the board of health (*Henderson Co. v. Ward*, 107 Ky. 477, 54 S. W. 725), (7) or the election of officers of a corporation, or the election of officers of a corporation (*Sheppard v. Rockingham P. Co.*, 150 N. C. 776, 64 S. E. 894), (8) or the issuance of corporate stock which had been paid for (*Scherck v. Montgomery*, 81 Miss. 426, 33 So. 507), (9) or the removal of an embankment flooding others' lands (*Jefferson v. Hicks*, 23 Okla. 684, 102 Pac. 79), (10) or the restoring of land to the condition it was before trespasses

tory writ, where the circumstances of the case demand it, unless there is a statutory provision to the contrary.¹⁶

Preliminary Mandatory Injunction.—On the ground that the office of a preliminary injunction is merely to preserve the status quo pending the ultimate determination of the rights of the contesting parties, in many jurisdictions the power to issue a preliminary injunction, mandatory in character, is held not to exist.¹⁷ A more liberal view, however, of the power of the court to grant a preliminary injunction, mandatory in character, has been taken in some states, and they are allowable in extreme cases where the right is clear and free from doubt to the extent of restoring the status quo.¹⁸ Thus where the acts sought

in constructing a highway over the land were committed. *Ocala v. Anderson*, 58 Fla. 415, 50 So. 572.

[f] But where two persons are contesting in the land department over a tract of government land, and each is in possession of a portion thereof, the district court cannot, under the rules of equity jurisdiction, by mandatory injunction take the land in the possession of one of the contestants and give it to the other. *Brown v. Donnelly*, 19 Okla. 296, 91 Pac. 859.

16. *Aiken v. Wallace*, 134 Ga. 873, 68 S. E. 937; *Glover v. Newsome*, 134 Ga. 375, 67 S. E. 935; *Rudolph Wurlitzer Co. v. Jackson*, 134 Ga. 333, 67 S. E. 879; *Merchants', etc. Co. v. Granger*, 132 Ga. 167, 63 S. E. 700; *Hart v. Atlantic Term. Co.*, 128 Ga. 754, 58 S. E. 452; *Brinton v. Steele*, 19 Idaho 71, 112 Pac. 319; *Roberts v. Kartzke*, 18 Idaho 552, 111 Pac. 1.

[a] While under the code the court cannot issue a purely mandatory order, (1) the court may grant an injunction, the essential nature of which is to restrain, although in yielding obedience to the restraint the defendant may be incidentally required to perform some act. *Merchants', etc. Transp. Co. v. Granger*, 132 Ga. 167, 67 S. E. 700; *Hart v. Atlantic T. Co.*, 128 Ga. 754, 773, 58 S. E. 452. See also *Goodrich v. Georgia R. Co.*, 115 Ga. 340, 41 S. E. 659. (2) Thus where a railroad company was permitted to lay a track on the condition that they would remove it if required, it is proper for the court to require its removal by injunction. *Wayeross Air Line R. Co. v. Southern Pine Co.*, 111 Ga. 233, 36 S. E. 641.

17. *Colo.*—*Fulton Irr. Co. v. Twombly*, 6 Colo. App. 554, 42 Pac. 253, authority to grant *ex parte* mandatory

injunction is doubtful in any case. *Ga.* *Glover v. Newsom*, 134 Ga. 375, 67 S. E. 935; *Thomas v. Hawkins*, 20 Ga. 126, 134. *Mich.*—*Toledo, etc. R. Co. v. Detroit, etc. R. Co.*, 61 Mich. 9, 27 N. W. 715. *N. Y.*—*Schneider v. Miller*, 132 App. Div. 852, 117 N. Y. Supp. 287; *West Side El. Co. v. Consolidated Tel. etc. Co.*, 87 App. Div. 550, 84 N. Y. Supp. 1052.

[a] *Delaware.*—Power to issue mandatory preliminary injunction probably does not exist. *Tebo v. Hazel (Del.)*, 74 Atl. 841, discussing English and American cases.

[b] **Embodying Mandatory Requirements.**—On application for a preliminary injunction to enjoin the closing of an alley, it is improper to embody mandatory provisions requiring the removal of certain obstructions, but it will be amended by striking out such provision. *King Lumb. Co. v. Benton*, 186 Fed. 458, 108 C. C. A. 436.

18. *U. S.*—*In re Lennon*, 166 U. S. 548, 17 Sup. Ct. 658, 41 L. ed. 1110; *Pohegama Sugar Pine L. Co. v. Klamath R. L. Co.*, 86 Fed. 528; *Toledo, etc. Co. v. Pennsylvania Co.*, 54 Fed. 730, 19 L. R. A. 387. *Cal.*—*Hagen v. Beth*, 118 Cal. 330, 50 Pac. 425; *Gardner v. Stroever*, 81 Cal. 148, 22 Pac. 483, 6 L. R. A. 90. *Fla.*—*Florida, etc. R. Co. v. Taylor*, 56 Fla. 788, 47 So. 345.

Ill.—*Dunn v. Youmans*, 224 Ill. 34, 79 N. E. 321. *Ind.*—*Miller v. Shriner*, 86 Ind. 493. *Ia.*—*Ewell v. Greenwood*, 26 Iowa 377. *Ky.*—*Mason v. Byrley*, 26 Ky. L. Rep. 487, 84 S. W. 767. *La.*—*Board of Comrs. v. Iberia & V. R. Co.*, 117 La. 940, 42 So. 433; *New Iberia Rice Mill. Co. v. Romero*, 105 La. 439, 29 So. 876. *Md.*—*Clayton v. Shoemaker*, 67 Md. 216, 9 Atl. 635. *Mich.*—*Gates v. Detroit & M. R. Co.*, 151 Mich. 548, 552, 115 N. W. 420,

delivery of logs as per agreement required. **Minn.**—*Central T. Co. v. Moran*, 56 Minn. 188, 57 N. W. 471, 29 L. R. A. 212. **Miss.**—*Gulf Coast Ice Co. v. Bowers*, 80 Miss. 570, 32 So. 113. **N. J.**—*Pennsylvania R. Co. v. Kelley*, 77 N. J. Eq. 129, 73 Atl. 758, 140 Am. St. Rep. 541; *Jacquelin v. Erie R. Co.*, 69 N. J. Eq. 432, 61 Atl. 18 (granted in rare cases and then only to remove obstructions to easements and the like); *Grand Castle v. Bridgeon Castle* (N. J. Eq.), 40 Atl. 849; *Bailey v. Schnitzins*, 45 N. J. Eq. 178, 13 Atl. 247, 16 Atl. 680; *Hodge v. Giese*, 43 N. J. Eq. 342, 11 Atl. 484 (interference with easements and other cases demanding immediate relief); *Whitecar v. Michenor*, 37 N. J. Eq. 6; *Longwood Val. R. Co. v. Baker*, 27 N. J. Eq. 166; *Rogers Locomotive, etc. Wks. v. Erie R. Co.*, 20 N. J. Eq. 379. **N. Y.** *Bachman v. Harrington*, 184 N. Y. 458, 77 N. E. 657, 659. **Ohio.**—*Sampson v. Escher*, 11 Ohio Dec. (Reprint) 351; *Harrison v. Craighead*, 8 Ohio Dec. (Reprint) 35. **Pa.**—*Black Lick Mfg. Co. v. Saltsburg Gas Co.*, 139 Pa. 448, 21 Atl. 432; *Taylor v. Sauer*, 40 Pa. Super. 229. The rule was formerly otherwise in Pennsylvania. *Audenried v. Philadelphia, etc. Co.*, 68 Pa. 370, 8 Am. Rep. 195. **S. C.**—*Norris v. Cobb*, 8 Rich. L. 58. **Tex.**—*Ort v. Bowden* (Tex. Civ. App.), 148 S. W. 1145; *Holbein v. De La Garza* (Tex. Civ. App.), 126 S. W. 42; *Jeff Chaison Town Site Co. v. McFadden, etc. Co.*, 56 Tex. Civ. App. 611, 121 S. W. 716, 719. **Wash.**—*Lanham v. Wenatchee Canal Co.*, 48 Wash. 337, 93 Pac. 522. **W. Va.** *Powhatan Coal & C. Co. v. Ritz*, 60 W. Va. 395, 56 S. E. 257, 259. **Wis.** *Inglis v. Fahey*, 136 Wis. 28, 116 N. W. 857, payment of monthly rental into court required pending result of action. **Eng.**—*Bonner v. Great W. R. Co.*, L. R. 24 Ch. Div. 1, 48 L. T. 619; *Strelley v. Pearson*, 49 L. J. Ch. 406, L. R. 15 Ch. Div. 113, 43 L. T. 155, 28 W. R. 752. **Can.**—*Hathaway v. Doig*, 6 Ont. App. 264; *Toronto Brg., etc. Co. v. Blake*, 2 Ont. 175.

[a] **To Preserve Status Quo.**—(1) "The office of a preliminary injunction is to preserve the status quo until, upon final hearing, the court may grant full relief. Generally this can be accomplished by an injunction prohibitory in form, but it sometimes happens that the status quo is a condition not of

rest, but of action, and the condition of rest is exactly what will inflict the irreparable injury upon complainant, which he appeals to a court of equity to protect him from. In such a case courts of equity issue mandatory writs before the case is heard on its merits." *Toledo, etc. R. Co. v. Pennsylvania Co.*, 54 Fed. 730, 19 L. R. A. 387. (2) Therefore, where the complainant presents a case showing or tending to show that affirmative action by the defendant, of a temporary character, is necessary to preserve the status of the parties, then a mandatory injunction may be granted. But if there be neither proof nor allegation to that effect, and the act sought to be enforced is not continuous in its character, but solely the one sought to be decreed by final judgment, then the issue of a preliminary mandatory injunction is without authority. *Bachman v. Harrington*. 184 N. Y. 458, 77 N. E. 657, 659.

[b] **Improper Issuance.**—It is improper to grant a preliminary mandatory injunction requiring the removal of trade signs (1) pending a suit to enjoin the use thereof (*Hagen v. Beth*, 118 Cal. 330, 50 Pac. 425), (2) or requiring the removal of a building erected before the commencement of the action, so as not to obstruct a highway. *Gardner v. Stroeveer*, 81 Cal. 148, 22 Pac. 483, 6 L. R. A. 90.

[c] **Act Accomplished Before Suit Filed.**—Though the gas was shut off from complainant's factory before complainant had made an application to restrain the respondent from withdrawing the supply of gas it does not prevent the issuance of a preliminary mandatory injunction, as it restores the status quo existing just prior to the filing of the bill. *Whiteman v. Fayette Fuel Gas Co.*, 139 Pa. 492, 20 Atl. 1062.

[d] **Not Issued Without Hearing.**—"The writ of injunction will issue on the *ex parte* application of the complainant only in its prohibitory form, and in cases where the only purpose to be accomplished is to restrain or prohibit something from being done. But in its mandatory form, when it commands the doing of something, it cannot be issued until a hearing on the merits, or when, a prohibiting writ having issued restraining a party from obstructing the exercise of a right, the obstruction may be commanded to be

to be enjoined have been performed subsequent to the filing of the bill but before service of the restraining order,¹⁹ or where defendant does acts in violation of a prohibitory injunction previously allowed, a mandatory injunction requiring the restoration of the status quo is a proper remedy.²⁰ But where the act commanded to be done is not of a mere temporary character, but is practically a finality, and the sum total of the relief sought by the applicant, it is improper to grant such an injunction, except in the rarest cases where the rights of complainant are clear and undoubted.²¹ Thus an injunction having the effect of transferring the possession of property, the title or possession of which is in dispute, from one person to another will not be allowed,²²

removed, because its continuance effects the very injury he was prohibited from effecting.''" Board of Comrs. v. Iberia & V. R. Co., 117 La. 940, 42 So. 433, 434, *quoting* from Black v. Good Intent, etc. Co., 31 La. Ann. 497.

19. **U. S.**—St. Louis, etc. R. Co. v. Cross, 171 Fed. 480. **Ill.**—New Haven Clock Co. v. Kochsberger, 175 Ill. 383, 51 N. E. 629. **Kan.**—Bonnewell v. Lowe, 80 Kan. 769, 104 Pac. 853. **Ky.**—McHugh v. Louisville Bridge Co., 23 Ky. L. Rep. 1546, 65 S. W. 456. **N. J.**—Woodbridge Twp. v. Middlesex Water Co. (N. J. Eq.), 68 Atl. 464. **Eng.**—Von Joel v. Hornsey, 65 L. J. Ch. 102, L. R. 2 Ch. Div. (1895) 774, 73 L. T. 372, acts performed while evading service of writ.

[a] That a building was completed before the issuance of the writ will not prevent the granting of a mandatory injunction. The state of the new building when complainant first complains is the essential point. Lawrence v. Horton, 59 L. J. Ch. 440, 62 L. T. 749, 38 W. R. 555; Goodson v. Richardson, 43 L. J. Ch. 790, L. R. 9 Ch. 221, 30 L. T. 142, 22 W. R. 337.

20. Board of Comrs. v. Iberia & V. R. Co., 117 La. 940, 42 So. 433; Lovett v. West Virginia, etc. Co., 65 W. Va. 739, 65 S. E. 196, 24 L. R. A. (N. S.) 230.

[a] It is error to refuse a preliminary injunction mandatory in nature to restore the status quo. Fredericks v. Huber, 180 Pa. 572, 37 Atl. 90; Whiteman v. Fayette Fuel Gas Co., 139 Pa. 492, 20 Atl. 1062.

21. **U. S.**—American Lead Pencil Co. v. Schneegass, 178 Fed. 735. **Fla.**—Florida R. Co. v. Taylor, 56 Fla. 788, 47 So. 345. **Ky.**—Weaver v. Toney,

107 Ky. 419, 54 S. W. 732, 50 L. R. A. 105. **Mich.**—Ladd v. Flynn, 90 Mich. 181, 51 N. W. 203, 204. **N. J.**—Grand Castle v. Bridgeton Castle (N. J. Eq.), 40 Atl. 849. **N. Y.**—Bachman v. Harrington, 184 N. Y. 458, 77 N. E. 657, 659; Van Veghten v. Howland, 12 Abb. Pr. (N. S.) 461; Beck v. New York, etc. R. Co., 74 App. Div. 626, 77 N. Y. Supp. 357; Keeseville v. Keeseville Elec. Co., 59 App. Div. 381, 69 N. Y. Supp. 249. **Pa.**—Tussey v. Clark, 45 Pa. Super. 433. **Tex.**—Ort v. Bowden (Tex. Civ. App.), 148 S. W. 1145.

[a] The courts move with caution in granting any injunction, (1) and especially in granting those of a mandatory character; as a rule they grant the last only to prevent extreme or very serious damage (Dunn v. Youmans, 224 Ill. 34, 79 N. E. 321), (2) or as expressed by the New York court: "The court will seldom grant a mandatory injunction pendente lite unless the plaintiff's right is so clear that the denial of the right must be either captious or unconscionable." West Side El. Co. v. Consolidated, etc., Co., 87 App. Div. 550, 84 N. Y. Supp. 1052; Schneider v. Miller, 132 App. Div. 852, 117 N. Y. Supp. 287 (rarely if ever issued).

22. **U. S.**—Lacassagne v. Chapuis, 144 U. S. 119, 124, 12 Sup. Ct. 659, 36 L. ed. 368; Spring Valley Water Co. v. San Francisco, 165 Fed. 667, 710. **Ark.**—*Ex parte* Conway, 4 Ark. 302. **Cal.**—Flood v. Goldstein Co., 158 Cal. 247, 110 Pac. 916 (restoration of leased premises); San Antonio W. Co. v. Bodenhamer, 133 Cal. 248, 65 Pac. 471. **Conn.**—Roy v. Moore, 85 Conn. 159, 82 Atl. 233. **Del.**—Gray v. Newark, 9 Del. Ch. 171, 79 Atl. 735, 739; Tebo v. Hazel, 74 Atl. 841. **Ga.**—Rudolph Wur-

unless defendant's possession is a mere interruption of complainant's prior possession.²³ A preliminary mandatory injunction, however, should never issue, except in the rarest of extreme necessity and hardship and where the right thereto is clearly established, and it appears that irreparable injury will flow from its refusal.²⁴

Itzer Co. v. Jackson, 134 Ga. 333, 67 S. E. 879; *Beacham v. Wrightsville*, etc. R. Co., 125 Ga. 362, 54 S. E. 157. **Ia.**—*Hall v. Henninger*, 145 Iowa 230, 121 N. W. 6, 139 Am. St. Rep. 412; *Minneapolis, etc. R. v. Chicago*, etc. R. Co., 116 Iowa 681, 88 N. W. 1082. **Mich.**—*Toledo, etc. R. Co. v. Detroit*, etc. R. Co., 61 Mich. 9, 11, 27 N. W. 715; *Arnold v. Bright*, 41 Mich. 207, 2 N. W. 16. **Neb.**—*State v. Graves*, 66 Neb. 17, 92 N. W. 144; *Calvert v. State*, 34 Neb. 616, 52 N. W. 687. **N. Y.** *Schneider v. Miller*, 132 App. Div. 852, 117 N. Y. Supp. 287. **N. D.**—*Dickson v. Dows*, 11 N. D. 404, 92 N. W. 797. **Okla.**—*Brown v. Donnelly*, 19 Okla. 296, 91 Pac. 859. **Ore.**—*Gobbi v. Dileo*, 58 Ore. 14, 111 Pac. 49, 113 Pac. 57, 34 L. R. A. (N. S.) 951. **Pa.**—*Fredericks v. Huber*, 180 Pa. 572, 37 Atl. 90; *Farmers R. Co. v. Reno*, etc. R. Co., 53 Pa. 224. **S. C.**—*Atlantic, etc. Co. v. E. P. Burton L. Co.*, 89 S. C. 143, 71 S. E. 820; *Evans v. Mayes*, 81 S. C. 188, 62 S. E. 207; *Pelzer v. Hughes*, 27 S. C. 408, 415, 3 S. E. 781. **S. D.**—*Catholicon, etc. Co. v. Ferguson*, 7 S. D. 503, 64 N. W. 539. **Tex.**—*Holbein v. De La Garza* (Tex. Civ. App.), 126 S. W. 42. **W. Va.** *Bettman v. Harness*, 42 W. Va. 433, 26 S. E. 271, 36 L. R. A. 366.

[a] **Reason of Rule.**—"It is not the form but the effect of the order which must be regarded. If it take or permit the taking from a defendant anything he has, it would anticipate and fore-judge the merits of the controversy, and transcend, as we have seen, the purposes of a preliminary injunction." *Spring Valley Water Co. v. San Francisco*, 165 Fed. 667, 710. See *Southern Pac. R. Co. v. Oakland*, 58 Fed. 50, 54; *Calvert v. State*, 34 Neb. 616, 52 N. W. 687, 692.

[b] This doctrine has been departed from in its strictness in some states, but still the doctrine remains that it is to be resorted to "only in a strong mischievous case of pressing necessity." *Holbein v. De La Garza* (Tex. Civ. App.), 126 S. W. 42.

[c] In *Tawas & B. C. R. Co. v. Ioseo Circuit Judge*, 44 Mich. 479, 7 N. W. 65, it is said "that any decree or order divesting possession or rights on a preliminary inquiry is illegal and void, so that no one need respect or obey it." See also *State v. Graves*, 66 Neb. 17, 92 N. W. 144.

[d] A preliminary injunction ordering the sheriff to return distrained articles is therefore improper. *Evans v. Mayes*, 81 S. C. 188, 62 S. E. 207.

[e] The possession of real property cannot be changed to the adverse party by an injunction pending litigation of title. *Forman v. Healey*, 11 N. D. 563, 93 N. W. 866.

[f] "Possession is prima facie evidence of rightful title, because it is one of the elements of title, is sacred, and no court can in any form of proceedings take it from a man without a hearing, without overthrowing the maxim that no man shall be condemned in person or deprived of property without a day in court and due process." *Bettman v. Harness*, 42 W. Va. 433, 26 S. E. 271, 273, 36 L. R. A. 566.

23. **Ark.**—*Ex parte Conway*, 4 Ark. 302, 344. **La.**—*Petit v. Cormier*, 1 McGloin 370, forcibly ejected prior to institution of suit. **Tex.**—*Jeff Chaison, etc. Co. v. McFaddin, etc. Co.*, 56 Tex. Civ. App. 611, 121 S. W. 716.

24. **Cal.**—*Hagen v. Beth*, 118 Cal. 330, 50 Pac. 425; *Gardner v. Stroeve*, 81 Cal. 148, 22 Pac. 483, 6 L. R. A. 90; *Johnson v. Superior Court*, 65 Cal. 567, 4 Pac. 575. **Conn.**—*Bigelow v. Hartford Bridge Co.*, 14 Conn. 565, 36 Am. Dec. 502. **Del.**—*Tebo v. Hazel*, 74 Atl. 841. **Fla.**—*Ocala v. Anderson*, 58 Fla. 415, 50 So. 572; *Florida East C. R. Co. v. Taylor*, 56 Fla. 788, 47 So. 345 (would not compel construction of half mile of railroad and operation of train over same). **Ill.**—*Dunn v. Youmans*, 224 Ill. 34, 79 N. E. 321. **Ind.** *Brauns v. Glesige*, 130 Ind. 167, 29 N. E. 1061. **Kan.**—*Atchison, etc. R. Co. v. Billings*, 77 Kan. 119, 93 Pac. 590. **Ky.**—*Mason v. Byrley*, 26 Ky. L. Rep. 487, 84 S. W. 767; *Hager v. New South*

E. COMMON AND SPECIAL INJUNCTIONS.—In England, and at an early date in this country, a distinction was made between a common and a special injunction.²⁵ The common injunction issued as of course upon default of the defendant, either in appearing or answering the bill.²⁶ It issued in aid of, or as secondary to another equity,²⁷

Brg. Co., 28 Ky. L. Rep. 895, 90 S. W. 608. **Minn.**—Central T. Co. v. Moran, 56 Minn. 188, 57 N. W. 471, 29 L. R. A. 212. **N. H.**—Bassett v. Salisbury M. Co., 47 N. H. 426. **N. J.**—Lehigh Valley R. Co. v. New York, etc. Co., 76 N. J. Eq. 504, 74 Atl. 970; Savage v. Port Reading R. Co., 73 N. J. Eq. 308, 67 Atl. 436; Jacquelin v. Erie R. Co., 69 N. J. Eq. 432, 61 Atl. 18; Bailey v. Schnitzins, 45 N. J. Eq. 178, 13 Atl. 247, 16 Atl. 680; Delaware, etc. R. Co. v. Central Stockyard Co., 43 N. J. Eq. 605, 12 Atl. 374, 13 Atl. 615; Hodge v. Giese, 43 N. J. Eq. 342, 11 Atl. 484. **N. Y.**—Gray v. Manhattan, etc. Co., 128 N. Y. 499, 28 N. E. 498; West Side Elec. Co. v. Consolidated Tel., etc. Co., 87 App. Div. 550, 84 N. Y. Supp. 1052; Jameson v. Hartford Fire Ins. Co., 14 App. Div. 380, 44 N. Y. Supp. 15. **Pa.**—Baltimore Base Ball Co. v. Hayden, 14 Pa. Dist. 529; Taylor v. Sauer, 40 Pa. Super. 229. **S. C.**—Evans v. Mayes, 81 S. C. 188, 62 S. E. 207, officer not required to return property where sale enjoined. **Tenn.**—Post v. Southern R. Co., 103 Tenn. 184, 52 S. W. 301, 55 L. R. A. 481. **Tex.**—Jeff Chaison T. Co. v. McFaddin, etc. Co., 56 Tex. Civ. App. 611, 121 S. W. 716, 719; Simon v. Nance (Tex. Civ. App.), 142 S. W. 661. **Va.**—Virginian R. Co. v. Echols, 83 S. E. 1082; Carpenter v. Gold, 88 Va. 551, 14 S. E. 329. **Wash.**—Lanham v. Menatchee Canal Co., 48 Wash. 337, 93 Pac. 522. **W. Va.**—Powhatan Coal & C. Co. v. Ritz, 60 W. Va. 395, 56 S. E. 257. **Eng.**—Beadel v. Perry, L. R. 3 Eq. 465.

[a] A mandatory injunction is an extreme remedy and should only be applied when legal rights are unlawfully invaded, or legal duties are wilfully or wantonly neglected. McCabe v. Watt, 224 Pa. 253, 73 Atl. 453, 24 L. R. A. (N. S.) 274.

[b] "It is for the court in the exercise of a sound discretion to determine in each case whether a mandatory injunction shall issue. It will not be issued when it appears that it will

operate inequitably or oppressively, nor when it appears that there has been unreasonable delay by the party seeking it in the enforcement of his rights, nor when the injury complained of is not serious or substantial and may be readily compensated in damages, while to restore things as they were before the acts complained of would subject the other party to great inconvenience and loss." Levi v. Worcester Consol. St. Ry. Co., 193 Mass. 116, 78 N. E. 853.

[c] It should rarely issue before a hearing on the merits, unless to enforce a prohibitory injunction previously allowed. Board of Comrs. v. Iberia & V. R. Co., 117 La. 940, 42 So. 433; New Iberia Rice Milling Co. v. Romero, 105 La. 439, 29 So. 876; State v. Judge, 41 La. Ann. 516, 6 So. 512.

25. **N. J.**—Buckley v. Corse, 1 N. J. Eq. 504, 507. **N. C.**—Armstrong v. Kinsell, 164 N. C. 125, 80 S. E. 235; Cobb v. Clegg, 137 N. C. 153, 49 S. E. 80, 82. **S. C.**—Ellis v. Commander, 1 Strobb. Eq. 188.

[a] The special injunction was where the injunction itself was the relief sought, while the common injunction was an ancillary proceeding. Armstrong v. Kinsell, 164 N. C. 125, 80 S. E. 235.

26. **U. S.**—Woodworth v. Rogers, 3 Woodb. & M. 135, 30 Fed. Cas. No. 18,018. **Ala.**—Bibb v. Shackelford, 38 Ala. 611. **Del.**—Marvel v. Ortlip, 3 Del. Ch. 1, 18. **N. J.**—Buckley v. Corse, 1 N. J. Eq. 504, 507. **N. Y.**—Selden v. Vermilya, 4 Sandf. Ch. 573. **N. C.**—Heilig v. Stokes, 63 N. C. 612. **Tenn.**—Chadwell v. Jordan, 2 Cooper's Ch. 635; Hendrick v. Dallum, 1 Overt. 427. **Eng.**—James v. Downes, 18 Ves. Jr. 522, 34 Eng. Reprint 415; Nelthorpe v. Law, 13 Ves. Jr. 323, 33 Eng. Reprint 315.

27. Armstrong v. Kinsell, 164 N. C. 125, 80 S. E. 235; Cobb v. Clegg, 137 N. C. 153, 49 S. E. 80; Jarman v. Saunders, 64 N. C. 367, 369; Heilig v. Stokes, 63 N. C. 612, 615; Purnell v. Daniel, 43 N. C. 9.

as in the case of an injunction to restrain proceedings at law, in order to protect and enforce an equity which could not be pleaded.

A special injunction, on the other hand, was such as was granted only upon special application to the court.²⁸ It issued for the prevention of irreparable injury, when the preventive aid of the court of equity was the ultimate and only relief sought, and was the primary equity involved in the suit.²⁹

This distinction is no longer of much importance, as all injunctions are granted only upon special application to the court.³⁰ Indeed under the statutes providing for the joinder of legal and equitable demands in the same count, and in the same forms of action, it is difficult to conceive how a case for the exercise of a common injunction can ever arise.³¹

F. MANDAMUS AND MANDATORY INJUNCTIONS DISTINGUISHED.³² Where the established distinctions between equity and common law jurisdiction are observed, injunction and mandamus are not correlative remedies, in the sense of being applicable to the same subject-matter, the choice of the writ to be resorted to in a particular case to depend upon whether there is an excess of action to be restrained

[a] Its effect upon a pending suit at law was determined by the progress of that suit at the date of its issuance. If the injunction issued before declaration, it stayed everything; if afterward, it stayed execution only. *Chadwell v. Jordan*, 2 Cooper's Ch. (Tenn.) 635, 636; *Garlick v. Pearson*, 10 Ves. Jr. 450, 32 Eng. Reprint 919.

28. N. J.—*Buckley v. Corse*, 1 N. J. Eq. 504, 507. S. C.—*Aldrich v. Kirkland*, 6 Rich. L. 334. Tenn.—*Patterson v. Gordon*, 3 Cooper's Ch. 18, 21; *Chadwell v. Jordan*, 2 Cooper's Ch. 635.

[a] A special injunction was founded, not on an equity existing in the controversy at law between the parties, but on something collateral to it; as for example, the necessity of protecting property in dispute pending the litigation. *Jarman v. Saunders*, 64 N. C. 367.

29. *Cobb v. Clegg*, 137 N. C. 153, 49 S. E. 80. And see *Armstrong v. Kinsell*, 164 N. C. 125, 80 S. E. 235.

30. *Buckley v. Corse*, 1 N. J. Eq. 504, 507; *Selden v. Vermilya*, 4 Sandf. Ch. (N. Y.) 573.

[a] Under the North Carolina code practice, the difference between special and common injunctions has been abolished. They are all ancillary to the relief sought in the action, and cannot issue except when there is an action pending in court, in which jurisdiction has been obtained in one of

the modes recognized by the statute. *Armstrong v. Kinsell*, 164 N. C. 125, 80 S. E. 235.

[b] Tennessee.—The common injunction no longer exists, every injunction being special. *Patterson v. Gordon*, 3 Cooper's Ch. (Tenn.) 18.

[c] United States Courts.—Since the injunction is not issued without notice to the opposite party, it follows that all injunctions are special, rather than common, or a matter of course. *Perry v. Parker*, 1 Woodb. & M. 280, 19 Fed. Cas. No. 11,010.

[d] England.—The common injunction is abolished in England by 15 and 16 Vict., ch. 86 and the 45th order of the 7th of August, 1852. See also *Anderson v. Noble*, 1 Drew. 143, 61 Eng. Reprint 406.

31. *Jarman v. Saunders*, 64 N. C. 367.

32. For a definition of mandamus, see the title "Mandamus."

For definition of mandatory injunction, see *supra*, I, D.

[a] "An injunction is essentially a preventive remedy, mandamus a remedial one; the former is usually employed to prevent future injury, the latter to redress past grievances. The functions of an injunction are to restrain motion and to enforce inaction; those of a mandamus to set in motion and to compel action. In this sense an injunction may be regarded as a

or a defect to be supplied.³³ The two writs properly pertain to entirely different jurisdictions and to different classes of proceedings, injunction being the proper writ only in cases of equitable cognizance, and mandamus being a common-law writ, and applicable only in cases coming within the appropriate jurisdiction of courts of common law.³⁴ But by virtue of code or constitutional provisions this distinction may become unimportant.³⁵

G. INJUNCTIONS AND STAY OF PROCEEDINGS DISTINGUISHED. — A stay of proceedings is not the same as an injunction by order, where the writ of injunction has been abolished, though it restrains judicial proceedings.³⁶

H. INJUNCTIONS AND WRITS OF PROHIBITION DISTINGUISHED.³⁷ The remedy by writ of prohibition has been likened to the equitable remedy by injunction against proceedings at law.³⁸ There is a material difference between them, however.³⁹

conservative remedy, mandamus an active one; the former preserves matters in statu quo, while the very object of the latter is to change the status of affairs and to substitute action for inactivity. The one is therefore a positive or remedial process, the other a negative or preventive one." *Ware v. Welch* (Tex. Civ. App.), 149 S. W. 263. And see *Callaghan v. McGown* (Tex. Civ. App.), 90 S. W. 319, quoting *High on Extraordinary Legal Remedies* (3d ed.), §6.

33. *Fletcher v. Tuttle*, 151 Ill. 41, 37 N. E. 683, 42 Am. St. Rep. 220, 25 L. R. A. 143.

34. *Fletcher v. Tuttle*, 151 Ill. 41, 37 N. E. 683, 42 Am. St. Rep. 220, 25 L. R. A. 143.

35. See *State v. Cunningham*, 83 Wis. 90, 53 N. W. 35, 35 Am. St. Rep. 27, 17 L. R. A. 145, explained in *Fletcher v. Tuttle*, 151 Ill. 41, 37 N. E. 683, 42 Am. St. Rep. 220, 25 L. R. A. 143.

36. An injunction by order, which is a substitute for the judicial writ, operates upon the conduct of the parties and their attorneys, in respect to matters outside of those occurring in the ordinary progress of the action. A stay of proceedings operates in relation to something within the usual course of judicial proceedings, and which the court, by its authority over the parties and their attorneys, can regulate and control without resort to the extraordinary writ of injunction. *Rossiter v. Aetna Life Ins. Co.*, 96 Wis. 466, 71 N. W. 898. See

also *Avery v. Superior Court*, 57 Cal. 247.

As to distinction between a restraining order and a temporary injunction, see *supra*, I, C.

37. See generally the title "Prohibition."

38. *State ex rel. Terminal R. Assn. v. Tracy*, 237 Mo. 109, 140 S. W. 888, 37 L. R. A. (N. S.) 448.

39. "The object in each case is the restraining of legal proceedings, but, as has been said: 'This vital difference is, however, to be observed between them: an injunction against proceedings at law is directed only to the parties litigant, without in any manner interfering with the court, while a prohibition is directed to the court itself, commanding it to cease from the exercise of a jurisdiction to which it has no legal claim.' (*High's Extraordinary Legal Remedies* [3d ed.], sec. 763.) There is this further similarity between the two remedies thus compared, . . . namely, that as the right to the remedy by injunction implies a wrong threatened by the parties litigant against whom the relief is sought, so the right to the writ of prohibition implies that a wrong is about to be committed, not by the parties litigant, as in the case of injunction, but by the person or court assuming the exercise of judicial power and against whom the writ is asked." *State ex rel. Terminal R. Assn. v. Tracy*, 237 Mo. 109, 117, 140 S. W. 888, 37 L. R. A. (N. S.) 448.

II. JURISDICTION AND VENUE.—A. JURISDICTION.⁴⁰—1. **Incident of Chancery Only.**—The authority to allow an injunction is an incident of chancery jurisdiction and can only be exercised by courts with general chancery powers,⁴¹ or given such jurisdiction by virtue of legislative enactment.⁴² Neither a master in chancery,⁴³ nor a commissioner authorized by statute to make an order requiring a judgment debtor to appear before him and answer has power to issue a restraining order.⁴⁴ The fact that a court has both common-law and chancery jurisdiction in no way changes or obliterates its equitable jurisdiction in the absence of express legislative restriction.⁴⁵

2. **Of Particular Courts.**—a. *In General.*—What courts have original jurisdiction to issue the writ of injunction is regulated by the constitution and statutes of the various states to which reference must be had.⁴⁶ That a court has jurisdiction to issue a temporary

40. See generally the title "Jurisdiction."

41. Ark.—*Randolph v. Abbott*, 84 Ark. 341, 105 S. W. 576 (county court could not grant injunction); *Ex parte Kennedy*, 11 Ark. 598 (can only be issued by judicial officer and not by master in chancery). Ill.—*Friedman v. Podolski*, 185 Ill. 587, 590, 57 N. E. 818, county court having no chancery jurisdiction cannot grant an injunction. Ia.—*Cummings v. Des Moines, etc. R. Co.*, 36 Iowa 173. Miss.—*American Colonization Soc. v. Wade*, 8 Smed. & M. 610 (probate court cannot issue injunction); *Scott v. Searles*, 5 Smed. & M. 246. Mo.—*Schubach v. McDonald*, 179 Mo. 163, 78 S. W. 1020, 101 Am. St. Rep. 452, 65 L. R. A. 136.

[a] **Oklahoma.**—**Probate Court.**—The statute giving the probate courts jurisdiction to issue such injunctions, etc., as may be necessary to causes pending therein does not give the probate court jurisdiction of an action for an injunction alone. *Wetz v. Elliott*, 4 Okla. 618, 51 Pac. 657.

[b] **In New York** a court of equity has no inherent absolute power to grant interlocutory injunctions, but that authority must be found in the Code of Civil Procedure. *Bachman v. Harrington*, 184 N. Y. 458, 77 N. E. 657. See also *People v. Van Buren*, 136 N. Y. 252, 32 N. E. 775, 20 L. R. A. 446; *Jackson v. Bunnell*, 113 N. Y. 216, 21 N. E. 79.

42. See *infra*, III, A, 2, a.

43. *Ex parte Kennedy*, 11 Ark. 598; *Glass v. Ripley County*, 16 Ind. 113.

44. *Blabon v. Gilchrist*, 67 Wis. 38,

29 N. W. 220, cannot restrain party from disposing of property.

45. *Bailey v. Stevens*, 11 Utah 175, 39 Pac. 828.

[a] In *State ex rel. Hahler v. Grimes*, 96 Neb. 719, 148 N. W. 942, the court said: "The district court has both common-law and equity jurisdiction, and, in the absence of any statutory restriction, has jurisdiction and power to award either a restraining order, a temporary writ, or a permanent writ of injunction in a proper case involving its equity jurisdiction."

[b] In *Woodruff v. Fisher*, 17 Barb. (N. Y.) 224, 232, it is said: "This suit is an equitable one, and although legal and equitable actions are, to a degree at least, blended as to form, principles remain the same; and this court will not interfere by injunction where our former court of chancery would not, unless expressly authorized to do so by statute."

46. See the following cases: Ark.—*Randolph v. Abbott*, 84 Ark. 341, 105 S. W. 576 (county court cannot grant an injunction in any case); *Ex parte Jones*, 2 Ark. 93. Ga.—Code, §247; *Sharman v. Town Council*, 67 Ga. 246 (superior court); *Cubbedge v. Adams*, 42 Ga. 124. Ind.—*Rev. St.*, 1870, p. 25; *Martin v. Marks*, 154 Ind. 549, 57 N. E. 249 (superior court of Tippecanoe county may grant mandatory injunction). Ia.—*Gregory v. Howell & Co.*, 118 Iowa 26, 91 N. W. 778. N. Y.—*People v. Windholz*, 68 App. Div. 552, 74 N. Y. Supp. 241, under agricultural act supreme court alone can grant injunction to restrain further violation thereof, and not the county court.

injunction carries with it the right to make it perpetual.⁴⁷ But the

Pa.—*Hoffman v. Pittsburg*, 227 Pa. 36, 78 Atl. 26 (Const. 1873, art. 3, §3, gives the supreme court original jurisdiction in injunction suits where corporation is defendant); *Com. v. Andrews*, 211 Pa. 110, 60 Atl. 554 (under Act May 29, 1901, § 9 Pub. Laws 331, the court of quarter sessions may grant injunction to enjoin party from selling oleomargarine without a license); *Wheeler v. Philadelphia*, 77 Pa. 338 (this includes municipal corporations); *In re Rood*, 8 Del. Co. Ct. 158 (common pleas and not court of quarter sessions has jurisdiction to restrain grade crossings). **S. C.**—*Trustees of University v. Trustees of Academy*, 85 S. C. 546, 67 S. E. 951; *Northwestern R. Co. v. Colclough*, 84 S. C. 37, 65 S. E. 950; *Gilmer v. Hunnicutt*, 57 S. C. 166, 35 S. E. 521; *Salinas v. Aultman & Co.*, 49 S. C. 325, 27 S. E. 385. **Tex.**—*Stein v. Frieberg, Klein & Co.*, 64 Tex. 271; *Burns v. Burns* (Tex. Civ. App.), 126 S. W. 333; *Payne v. Loving* (Tex. Civ. App.), 69 S. W. 92 (county court may grant an injunction); *Allen v. Parker County*, 23 Tex. Civ. App. 536, 57 S. W. 703. **Va.**—*Baker v. Briggs*, 99 Va. 360, 38 S. E. 277, circuit court. **Can.**—*Bradley v. Barber*, 30 Ont. 443.

[a] A statute conferring original jurisdiction upon the supreme court to grant injunctions where a corporation is a defendant does not give such court exclusive jurisdiction to the exclusion of the court having general chancery jurisdiction. *McGeorge v. Hancock Steel & I. Co.*, 11 Phila. (Pa.) 602.

[b] **New York Surrogate's Court.** Special surrogates of certain counties have jurisdiction to grant injunctions, under the laws of 1849, ch. 306, notwithstanding the Code of Civil Procedure gives jurisdiction to grant injunctions in such cases to county judges. *Aldinger v. Pugh*, 122 N. Y. 403, 30 N. E. 745, affirming 10 N. Y. Supp. 684.

[c] **In Texas**, the state constitution of 1876 gives the district courts jurisdiction to issue injunctions irrespective of the amount involved. *Stein v. Frieberg, Klein & Co.*, 64 Tex. 271; *Anderson County v. Kennedy*, 58 Tex. 616; *Poe v. Ferguson* (Tex. Civ. App.), 168 S. W. 459; *Callaghan v. Tobin*, 40 Tex. Civ. App. 441, 90 S. W. 328.

[d] Though the state constitution gives the county court jurisdiction of all proceedings where the amount involved, exclusive of interest, is more than \$200 and not more than \$500, this does not preclude the district court to which exclusive jurisdiction to issue injunctions has been given, of a cause to restrain the use of a trade-mark and for \$500 damages, as the damages are merely incidental to the main relief. *Cleaver v. Duke* (Tex. Civ. App.), 58 S. W. 145.

[e] A justice's court cannot issue an injunction. *Poe v. Ferguson* (Tex. Civ. App.), 168 S. W. 459; *Foust v. Warren* (Tex. Civ. App.), 72 S. W. 404.

[f] **Colorado.—Combinations in Restraint of Trade.**—The district court as well as the supreme court has jurisdiction at the suit of the attorney-general on behalf of the people of an action to enjoin illegal combinations in restraint of trade. *Denver Jobbers' Assn. v. People*, 21 Colo. App. 326, 122 Pac. 404.

[g] "The test of jurisdiction to entertain a bill for injunction is not whether good cause for granting the injunction is set forth in the bill, but whether the court or its organ, the judge, could grant it for any cause. If the tribunal applied to can grant the injunction for any cause, then the question about cause is not a question of jurisdiction, but of the proper exercise of jurisdiction. An injunction granted without jurisdiction is void, but one granted by a competent tribunal for insufficient cause, though erroneous, is valid and binding until vacated or set aside." *Wilson v. Sullivan*, 81 Ga. 238, 245, 7 S. E. 274. See also *State ex rel. Minden-Edison Light & P. Co. v. Dungan*, 89 Neb. 738, 132 N. W. 305.

[h] **Raising Jurisdictional Question.**—The question as to the court's jurisdiction of the cause is fully raised by an answer denying that plaintiff is entitled to the relief or any part thereof sought, and praying the same advantage of the answer as if defendant had pleaded or demurred. *Titus v. Chipewa Circuit Judge*, 168 Mich. 507, 134 N. W. 487.

47. *Stein v. Frieberg, Klein & Co.*, 64 Tex. 271.

fact that jurisdiction to issue writs of mandamus and habeas corpus is given to specified courts does not imply exclude jurisdiction to issue writs of injunction, general chancery power having also been given them.⁴⁸

The United States courts may maintain a bill to restrain the prosecution of a suit pending before it, irrespective of the citizenship of the parties, as the proceeding is regarded not as an original suit, but as ancillary and dependent, and supplementary merely to the original suit out of which it has arisen.⁴⁹

Jurisdiction Given to Judges.—Jurisdiction is sometimes conferred upon the judges of the appellate and other courts, and in such case it is held that the court sitting en banc, or when sitting as a court, has no such jurisdiction.⁵⁰

A special judge commissioned to hold a special term can only issue a restraining order returnable before himself in a case which he would have jurisdiction to hear and determine.⁵¹ If returnable at a subsequent term, he should make it returnable before the regular judge.⁵²

b. *Appellate Courts.*—The constitutions of the various states generally have given the appellate courts jurisdiction to issue the writ of injunction in aid of their appellate jurisdiction,⁵³ though, without

48. *Brown v. Donnelly*, 19 Okla. 296, 91 Pac. 859.

[a] "The writs of mandamus and habeas corpus are, by reason of their peculiar character, usually named specifically in constitutions and organic law, such as the organic act of this territory, while injunctions are not necessarily named specifically, because this class of actions fall strictly within chancery jurisdiction." *Brown v. Donnelly*, 19 Okla. 296, 91 Pac. 859.

49. *Krippendorf v. Hyde*, 110 U. S. 276, 281, 4 Sup. Ct. 27, 28 L. ed. 145; *Jones v. Andrews*, 10 Wall. (U. S.) 327, 19 L. ed. 935; *Freeman v. Howe*, 24 How. (U. S.) 450, 16 L. ed. 749; *Bradshaw v. Miners' Bank*, 81 Fed. 902, 26 C. C. A. 673.

50. III.—*Hall v. O'Brien*, 5 Ill. 410. Ia.—*Reed v. Murphy*, 2 Greene 568. Va.—*Fredenheim v. Rohr*, 87 Va. 764, 13 S. E. 193; *Mayo v. Haines*, 2 Munf. 423.

[a] By statute in some states on refusal of an injunction by the trial court or judge thereof, complainant may make application upon the original papers with the order of refusal, to a judge of the appellate court who may grant an injunction. *Fredenheim v. Rohr*, 87 Va. 764, 13 S. E. 193, Code, 1887, §3436, now W. Va. Code, §4010.

[b] Such statute confers no original

jurisdiction upon the judges of the appellate court except in the one case where an injunction has been refused in the trial court, and where an injunction has been granted and then dissolved on the merits, this does not give the appellate court or any judge thereof jurisdiction to grant an injunction. *Fredenheim v. Rohr*, 87 Va. 768, 13 S. E. 193.

[c] **Officer Competent To Act in Two Characters.**—Where an injunction has been allowed by an officer competent to act in either of two characters, and where it does not appear clearly in which character he did act, it will be presumed he acted in the higher office of judge of the court, instead of that of injunction master. *Frost v. Myrick*, 1 Barb. (N. Y.) 362; *Melick v. Drake*, 6 Paige (N. Y.) 470.

51. **North Carolina.—Authority of Special Judge.**—A special judge commissioned for a special term cannot issue a restraining order returnable before himself in a case in which defendant is not called on to answer for several months later, as there is no cause for trial. *Royal v. Thornton*, 150 N. C. 293, 63 S. E. 1040.

52. *Royal v. Thornton*, 150 N. C. 293, 63 S. E. 1040.

53. **Ind.**—*Baltimore, etc. R. Co. v. Wabash R. Co.*, 28 Ind. App. 185, 62 N. E. 520; *Lewis v. Eillion*, 4 Ind.

any express grant, the appellate court, as incidental to its appellate jurisdiction, and necessary to its full exercise, has jurisdiction to grant an injunction in aid thereof.⁵⁴ But they cannot grant injunctions in cases pending and undetermined in the inferior courts.⁵⁵

Original Jurisdiction.—As a general rule the appellate courts have no original jurisdiction to issue injunctions but are confined to the issuance thereof in aid of their appellate jurisdiction.⁵⁶ But original jurisdiction

App. 105, 29 N. E. 443. **Ia.**—*Manning v. Poling*, 114 Iowa 20, 83 N. W. 895. *affirmed*, 114 Iowa 20, 86 N. W. 30. **Mich.**—*Patek v. Patek*, 166 Mich. 443, 131 N. W. 1103; *Detroit, etc. Co. v. Frazer*, 98 Mich. 141, 56 N. W. 1109. **Mont.**—*Finlen v. Heinze*, 27 Mont. 107, 69 Pac. 829, *rehearing denied*, 27 Mont. 107, 70 Pac. 517. **S. C.**—*Salinas v. Aultman & Co.*, 49 S. C. 325, 27 S. E. 385. **Tex.**—*Gibbons v. Ross* (Tex. Civ. App.), 167 S. W. 17; *Boynton v. Brown* (Tex. Civ. App.), 163 S. W. 599; *Houston, etc. R. Co. v. Hornberger* (Tex.), 157 S. W. 744, answering certified questions in (Tex. Civ. App.), 141 S. W. 311, which it approves; *Hubbart v. Willis State Bank*, 55 Tex. Civ. App. 504, 119 S. W. 711. **Wash.** *Van Sielen v. Muir*, 44 Wash. 361, 87 Pac. 498.

[a] In **Colorado** the trial court is authorized by statute to grant an injunction preserving the status quo pending the appeal or writ of error. *Ajax Gold Min. Co. v. Hilkey*, 30 Colo. 115, 69 Pac. 523.

54. *Doughty v. Somerville, etc. R. Co.*, 7 N. J. Eq. 629, 51 Am. Dec. 267; *Cooper v. Mineral Point*, 34 Wis. 181. See also *Madison, etc. Co. v. Watertown, etc. Co.*, 5 Wis. 173, 184.

[a] Under a constitutional provision conferring upon an appellate court the power to issue writs necessary and proper to the complete exercise of its appellate and revisory jurisdiction, such court may issue a restraining order, pending the proceedings in error from an order refusing to grant an injunction pendente lite. *Weaver v. Richardson* (Wyo.), 132 Pac. 1148.

[b] Since the appellate court may stay proceedings pending the appeal, the appellate court upon dissolution of an injunction may grant another pending the appeal. *Doughty v. Somerville, etc. R. Co.*, 7 N. J. Eq. 629, 51 Am. Dec. 267; *Wagner v. R. Co.*, 38 Ohio St. 32; *Yeoman v. Lasley*, 36 Ohio St. 416.

[c] **Granting Injunction Pending Appeal as Original Grant.**—"It is, in effect, the granting of a new injunction. It is said that this is an original exercise of judicial power; and unquestionably it is so. It is thereupon objected that this is a mere appellate tribunal, and cannot exercise such power. The consequence does not follow. It may not exercise original power in acquiring jurisdiction over the cause. But that jurisdiction once regularly obtained, this court may exercise original jurisdiction over the parties, especially when the proceeding is in rem, and the object of the order to maintain unchanged, as far as practicable, the status or condition of the subject-matter of the controversy during the pendency of the suit. It is on the same principle upon which a court of common law, in an action of ejectment or dower will make an order upon the party in possession, restraining the commission of waste. And a court of equity, prior to the hearing or argument, will, upon the same principle, grant a temporary injunction until the case can be heard. It is an inherent power in all superior tribunals, essential to the attainment of the object of litigation and the ends of justice." *Doughty v. Somerville, etc. R. Co.*, 7 N. J. Eq. 629, 51 Am. Dec. 267. See also *Yeoman v. Lasley*, 36 Ohio St. 416.

55. *Cooper v. Mineral Point*, 34 Wis. 181.

56. **Ark.**—*Jones v. Little Rock*, 25 Ark. 284; *Carnall v. Crawford County*, 11 Ark. 604, 617. **Cal.**—*Rose v. Mesmer*, 131 Cal. 631, 63 Pac. 1010. **Ga.** *Cubbedge v. Adams*, 42 Ga. 124, supreme court. **Ill.**—*Bryant v. People*, 71 Ill. 32; *Campbell v. Campbell*, 22 Ill. 644. **Ind.**—*Baltimore, etc. R. Co. v. Wabash R. Co.*, 28 Ind. App. 185, 62 N. E. 520, court of appeals. **Ia.**—*Reed v. Murphy*, 2 Greene 568. **Kan.**—*State v. Anheuser-Busch Brew. Assn.*, 76 Kan. 184, 90 Pac. 777; *State v. Inner Belt R. Co.*,

is conferred upon them by statute or constitutional provision in some states,⁵⁷ though some of such provisions have been construed as authorizing the issuance of an injunction as an original writ only in cases involving the civil rights of the sovereign power, its prerogatives, and the liberties of its citizens.⁵⁸ But the prerogative writ must be secured

74 Kan. 413, 87 Pac. 696. **La.**—Rous-
sel *v.* Railways Realty Co., 133 La. 153,
62 So. 608. **Mich.**—Patek *v.* Patek,
166 Mich. 443, 131 N. W. 1103; Grand
Rapids, etc. R. Co. *v.* Stevens, 143
Mich. 646, 107 N. W. 436 (supreme
court); Traverse City, etc. R. Co. *v.*
Seymour, 81 Mich. 378, 45 N. W. 826.
Mo.—State *v.* Dreyer, 229 Mo. 201, 129
S. W. 904; State *v.* Wilson, 5 Mo. 285;
Lane *v.* Charless, 5 Mo. 285 (supreme
court). **Mont.**—State *v.* Helena W. Co.,
43 Mont. 169, 115 Pac. 200, supreme
court. **Ohio.**—State *v.* Board of Deputy
State Suprs., 70 Ohio St. 341, 71 N. E.
717; Pittsburgh, etc. R. Co. *v.* Hurd, 17
Ohio St. 144. **Okla.**—State *v.* Kenner,
21 Okla. 817, 97 Pac. 258, where re-
lief prayed for is purely injunctive.
Ore.—Kellaher *v.* Portland, 57 Ore. 575,
110 Pac. 492, 112 Pac. 1076; Livesley
v. Krebbs County Hop Co., 97 Pac. 718.
Pa.—DeWalt *v.* Bartley, 146 Pa. 525,
23 Atl. 448, original jurisdiction is
excluded by §3, art. 5, Const., except
in cases where a corporation is a de-
fendant. **Tenn.**—Kerr *v.* White, 7 Baxt.
394, supreme court. **Tex.**—Tipton *v.*
Railway Postal Clerks' Inv. Assn.
(Tex. Civ. App.), 170 S. W. 113; Gib-
bons *v.* Ross (Tex. Civ. App.), 167 S.
W. 17; Boynton *v.* Brown (Tex. Civ.
App.), 163 S. W. 599; Houston, etc.
R. Co. *v.* Hornberger (Tex. Civ. App.),
141 S. W. 311 (courts of civil appeals),
approved in (Tex.), 157 S. W. 744;
Ellis *v.* Harrison, 24 Tex. Civ. App.
13, 56 S. W. 592, 57 S. W. 984. **Wis.**
In re Hartung, 98 Wis. 140, 73 N. W.
988. **Wyo.**—Smith *v.* Healy, 12 Wyo.
218, 75 Pac. 430, statute conferring
original jurisdiction on supreme court
held impliedly repealed by constitu-
tional provision giving the supreme
court appellate jurisdiction only.

[a] In Aid of Quo Warranto.

Though the supreme court has no
original jurisdiction to grant an injunc-
tion it may, in an original action of
quo warranto, grant an ancillary in-
junction. State *v.* Board of Deputy
State Suprs., 70 Ohio St. 341, 71 N. E.
717.

57. Smith *v.* Ellis, 29 Me. 422, in
all cases of equity jurisdiction when
necessary to prevent injustice.

[a] **Nebraska.**—Under the statute
giving original jurisdiction to the su-
preme court in "civil cases in which
the state shall be a party" the su-
preme court is not confined to cases
in which it has a mere pecuniary in-
terest, but may extend to all cases
in which the state through its proper
officers, seeks the restraint of public
wrong. State *v.* Wells, Fargo & Co.,
80 Neb. 838, 115 N. W. 625; State *v.*
Pacific Exp. Co., 80 Neb. 823, 115 N.
W. 619, 18 L. R. A. (N. S.) 664.

[b] **In Pennsylvania** the appellate
court has original jurisdiction to issue
an injunction only where a corporation
is a defendant. DeWalt *v.* Bartley,
146 Pa. 525, 23 Atl. 448.

58. **Ark.**—State *v.* Ashley, 1 Ark.
279, 309, cited and discussed in *People*
ex rel. Miller *v.* Tool, 86 Pac. 224, 229.
Colo.—People *v.* District Court, 37 Colo.
443, 86 Pac. 87, 92 Pac. 958, 13 L. R.
A. (N. S.) 768; Wheeler *v.* Northern
Colo. I. Co., 9 Colo. 248, 11 Pac. 103.
Mont.—State *v.* Moran, 24 Mont. 433,
63 Pac. 390, restraining a state officer
from interfering with civil rights of
citizens. **N. J.**—McCarter *v.* Vineland,
etc. Co., 72 N. J. Eq. 767, 65 Atl. 1041.
N. D.—State *v.* Miller, 21 N. D. 324,
131 N. W. 282; Anderson *v.* Gordon, 9
N. D. 480, 83 N. W. 993, 52 L. R. A.
134; State *v.* Archibald, 5 N. D. 359,
66 N. W. 234 (quasi prerogative or
original writ in supreme court). **Wis.**
State *v.* Bancroft, 148 Wis. 124, 134
N. W. 330, 38 L. R. A. (N. S.) 526;
Attorney-General *v.* Chicago, etc. R.
Co., 35 Wis. 425.

[a] "The Supreme Court of Arkan-
sas, in State *v.* Ashley, 1 Ark. 309, in
considering a constitutional provision
conferring upon the supreme court
original jurisdiction, and which bears
a striking resemblance to our own, an-
nounced that it was apparently the in-
tention of the constitutional conven-
tion 'to leave with the inferior tri-
bunals the first, or original, cognizance

as such writs are secured by an information filed by the law officer of the state, or with his authority, upon leave granted, and in the name of the state.⁵⁹

3. In Case of Absence or Disability of Judge.—Statutes in many states provide for the issuance of an injunction, in suits pending in other courts, in case of the absence or disability of the judge having jurisdiction, by another judge,⁶⁰ or by some other officer,⁶¹ though such jurisdiction should only be exercised where the delay in reaching the

of cases and controversies between private parties, as well as all controversies in which the state might be a party or otherwise interested in which the sovereignty, or sovereign rights, powers, and franchises of the state are not involved; but in cases involving the civil rights of the sovereign power of a state, affecting vitally its character and the proper administration of the government itself, in which the whole people and every individual member of the community has a direct, immediate, and most sacred interest, when the exercise of a public right, or a public franchise is the subject-matter of controversy, the convention appears to have entertained a different view, and to have deemed it a proper subject to be investigated and determined in the first instance, before the highest judicial tribunal in the state.' *People ex rel. Miller v. Tool* (Colo.), 86 Pac. 224, 229.

59. *Anderson v. Gordon*, 9 N. D. 480, 83 N. W. 993, 52 L. R. A. 134; *State v. Nelson County*, 1 N. D. 88, 45 N. W. 33, 26 Am. St. Rep. 609, 8 L. R. A. 283. See also *McCarter v. Vineland, etc. Co.*, 72 N. J. Eq. 767, 65 Atl. 1041.

[a] **Form of Information by Attorney General.**—See *State v. Miller*, 21 N. D. 324, 131 N. W. 282.

60. **Ark.**—*Kirby's Dig.*, §1294; *Randolph v. Abbott*, 84 Ark. 341, 105 S. W. 576 (county judge may issue where circuit judge absent); *Moody v. Lowrimore*, 74 Ark. 421, 86 S. W. 400 (after commencement of action only). **Colo.** *McLean v. Farmers', etc. Co.*, 44 Colo. 184, 98 Pac. 16. **Ga.**—*Sharman v. Town Council*, 67 Ga. 246. **Kan.**—*State v. Werner*, 80 Kan. 222, 101 Pac. 1004, probate judge may grant injunction in absence of district judge. **Ky.**—*Renshaw v. Cook*, 33 Ky. L. Rep. 860, 111 S. W. 377 (Civ. Code Proc., §273); *Com. v. Combs*, 120 Ky. 368, 86 S. W.

697. **Neb.**—*State v. Greene*, 48 Neb. 327, 67 N. W. 162 (§252, Code); *Ellis v. Karl*, 7 Neb. 381.

[a] **Restraining Orders.**—Authority to grant temporary injunctions includes the authority to allow restraining orders. The greater embraces the less. *State v. Greene*, 48 Neb. 327, 67 N. W. 162.

[b] A statute allowing the circuit judge to grant injunctions when the chancellor is absent from the county "after the action has been commenced, but not before" does not authorize the circuit judge to grant an injunction where an injunction is the only relief sought. *Moody v. Lowrimore*, 74 Ark. 421, 86 S. W. 400.

[c] **Supporting Affidavit.**—Where the application to another judge is required to be supported by an affidavit of certain things, an affidavit not in strict compliance with such requirement is insufficient to give such other judge authority to issue the injunction. *Lee v. Broocks*, 54 Tex. Civ. App. 220, 113 S. W. 164.

[d] **In Vacation.**—But statutes providing that another judge may preside in the court having exclusive original jurisdiction of injunction suits when the regular judge is disqualified, does not give the judge of such other court jurisdiction to grant or refuse injunctions in vacation, no order being taken in term time for the determination of the cause in vacation. *Northwestern Mut. L. Ins. Co. v. Wilcoxon*, 64 Ga. 556.

61. **In Kentucky** (1) by Civ. Code Prac. 273, the circuit judge, clerk of court, or the county judge where the circuit judge is absent from the county. *Com. v. Combs*, 120 Ky. 368, 86 S. W. 697. (2) But the clerk has no jurisdiction to grant a mandatory injunction, in any event. *Com. v. Combs*, 120 Ky. 368, 86 S. W. 697, 700.

proper judge would work irreparable injury.⁶² And when authorized on certain contingencies only, the grounds should appear.⁶³ The writ, however, should be returnable to the court having original jurisdiction.⁶⁴

4. To Enjoin Actions in Other States.—Since an injunction operates in personam, it is well settled that a court having acquired jurisdiction over the subject-matter and the parties, may restrain parties within its jurisdiction from prosecuting a subsequent suit in the courts of another state between the same parties, seeking substantially the same relief arising out of the subject-matter,⁶⁵ though the subject of controversy is in another jurisdiction or in another

62. *McLean v. Farmers', etc. Co.*, 44 Colo. 184, 98 Pac. 16.

63. *Norris v. Pollard*, 75 Ga. 358; *Collins v. Hudson*, 69 Ga. 684; *Sharman v. Town Council*, 67 Ga. 246.

64. *Cox v. Railway Co.*, 55 Ark. 454, 18 S. W. 630.

65. **U. S.**—*Cole v. Cunningham*, 133 U. S. 107, 10 Sup. Ct. 269, 33 L. ed. 538; *Phelps v. McDonald*, 99 U. S. 298, 25 L. ed. 473; *French v. Hay*, 22 Wall. 250, 22 L. ed. 857; *Bigelow v. Calumet, etc. Co.*, 155 Fed. 869, 879; *Gage v. Riverside Trust Co.*, 86 Fed. 984; *Brown v. Silver Mt. S. Min. Co.*, 55 Fed. 7; *Marshall v. Turnbull*, 32 Fed. 124.

Ark.—*Pickett v. Ferguson*, 45 Ark. 177, 55 Am. Rep. 545. **Cal.**—*Spreckels v. Hawaiian, etc. Co.*, 117 Cal. 377, 49 Pac. 353. **Colo.**—*O'Haire v. Burns*, 45 Colo. 432, 101 Pac. 755, 132 Am. St. Rep. 191, 25 L. R. A. (N. S.) 267.

Ga.—*Engel v. Scheuerman*, 40 Ga. 206, 211, 2 Am. Rep. 573. See also *Harwell v. Sharp*, 85 Ga. 124, 11 S. E. 561, 21 Am. St. Rep. 149, 8 L. R. A. 514. **Ill.**—*Royal League v. Kavanagh*, 233 Ill. 175, 84 N. E. 178; *Dunbar v. American Tel., etc. Co.*, 224 Ill. 9, 79 N. E. 423, 115 Am. St. Rep. 132, 8 Am. & Eng. Ann. Cas. 57; *Harris v. Pullman*, 84 Ill. 20, 25 Am. Rep. 416.

Ind.—*Sandage v. Studabaker Bros Mfg. Co.*, 142 Ind. 148, 41 N. E. 380, 51 Am. St. Rep. 165, 34 L. R. A. 363. **Ia.**—*Reed v. Hollingsworth*, 135 N. W. 37; *In re Williams' Estate*, 130 Iowa 553, 107 N. W. 608; *Hager v. Adams*, 70 Iowa 746, 30 N. W. 36. **Kan.**—*Mason v. Harlow*, 84 Kan. 277, 114 Pac. 218; *Gordon v. Munn*, 81 Kan. 537, 106 Pac. 286, 25 L. R. A. (N. S.) 917. **Md.**—*Miller v. Gittings*, 85 Md. 601, 37 Atl. 372, 60 Am. St. Rep. 352, 37 L. R. A. 654; *Keyser*

v. Rice, 47 Md. 203, 28 Am. Rep. 448.

Mass.—*Old Dominion, etc. Co. v. Bigelow*, 203 Mass. 159, 89 N. E. 193, 40 L. R. A. (N. S.) 314; *Cunningham v. Butler*, 142 Mass. 47, 6 N. E. 782, 56 Am. Rep. 657, s. c., sub nom. *Cole v. Cunningham*, 133 U. S. 107, 10 Sup. Ct. 269, 33 L. ed. 538. **Minn.**—*Hawkins v. Ireland*, 64 Minn. 339, 67 N. W. 73, 58 Am. St. Rep. 534. **Mo.**—*Kelly v. Siefert*, 71 Mo. App. 143. **N. J.**—*Von Bernuth v. Von Bernuth*, 76 N. J. Eq. 177; 73 Atl. 1049, 139 Am. St. Rep. 752; *Kempson v. Kempson*, 58 N. J. Eq. 94, 43 Atl. 97. **N. Y.**—*Belasco Co. v. Klaw*, 98 App. Div. 74, 90 N. Y. Supp. 593; *Locomobile Co. v. American Bridge Co.*, 80 App. Div. 44, 80 N. Y. Supp. 288, affirmed, 131 App. Div. 837, 116 N. Y. Supp. 404; *Webster v. Columbian Nat. Life*, 62 Misc. 345, 115 N. Y. Supp. 892; *Vail v. Knapp*, 49 Barb. 299. **Ohio.**—*Snook v. Snetzer*, 25 Ohio St. 516. **Pa.**—*Schmaltz v. York Mfg. Co.*, 204 Pa. 1, 53 Atl. 552, 93 Am. St. Rep. 782, 59 L. R. A. 907. **Tex.**—*Royal Fraternal Union v. Lunday*, 51 Tex. Civ. App. 637, 113 S. W. 185, acts of foreign corporation in foreign state cannot be enjoined. **Vt.**—*Vermont, etc. R. Co. v. Vermont, etc. R. Co.*, 46 Vt. 792. **Wash.**—*Rader v. Stubblefield*, 43 Wash. 334, 86 Pac. 560.

[a] **Basis of Doctrine.**—“The courts do not, in such cases, pretend to direct or control the foreign court but the decree acts solely upon the party. The jurisdiction rests on the authority vested in courts of equity over persons within the limits of their jurisdiction and amenable to process, to stay acts contrary to equity and good conscience. The state has power to compel its own citizens to respects its laws even beyond its own territorial limits,

state, and real estate in such other state is incidentally involved.⁶⁶ But equity will not take jurisdiction when full and complete relief cannot be granted and enforced, except by the exercise of authority over property which lies within another state.⁶⁷

A general appearance by a non-resident gives jurisdiction over him so as to enable the court to grant an injunction, though the subject-matter is in another state.⁶⁸

5. To Enjoin Proceedings in Courts of Concurrent Jurisdiction. Where a court has taken jurisdiction of a cause, a court of concurrent jurisdiction within the state has no jurisdiction to restrain the proceedings therein, the jurisdiction of the first court prevails.⁶⁹ Thus, when the jurisdiction of law and equity are concurrent, a court of

and the power of the courts is undoubted to restrain one citizen from prosecuting in the courts of a foreign state an action against another which will result in a fraud or gross wrong or oppression." *Royal League v. Kavanagh*, 233 Ill. 175, 84 N. E. 178, 181.

[b] "There is a clear distinction as to the power and authority of a court of equity, in this state, to restrain by injunction the *proceedings of a court* in another state, and the power and authority of such court, to restrain, by injunction, the *personal action of a citizen of this state*. In the one case, a court of equity, in this state, has no jurisdiction, in the other, it has jurisdiction to restrain, by injunction the *personal action* of the defendant himself from enforcing an *unconscientious* demand in another state, whether that demand is reduced to judgment or not, upon a proper case being made." *Engel v. Scheuerman*, 40 Ga. 206, 211, 2 Am. Rep. 573.

[c] **Injunction Does Not Issue to Court.**—The injunction issues only to the parties before the court and not to the court. *Central Nat. Bank v. Stevens*, 169 U. S. 422, 463, 18 Sup. Ct. 403, 42 L. ed. 807; *Peck v. Jenness*, 7 How. (U. S.) 612, 12 L. ed. 841.

[d] **Existence of Other Remedies.** This right is not to be defeated because the party complaining has other legal defenses availing in the foreign jurisdiction. *Sandage v. Studabaker Bros. Mfg. Co.*, 142 Ind. 148, 41 N. E. 380, 51 Am. St. Rep. 165, 34 L. R. A. 363.

[e] "No general rule can be laid down as to when and when not the court ought to exercise this power, and enjoin a party from prosecuting a suit

in a foreign jurisdiction. Each case must be ruled by its own facts. If they show that it is necessary and equitable to exercise the power in the orderly administration of justice, the court should enjoin the party, otherwise not." *Hawkins v. Ireland*, 64 Minn. 339, 67 N. W. 73, 58 Am. St. Rep. 534.

[f] "Courts will not enjoin a suit in another state merely on the ground of the convenience of parties, but will do so when the ends of justice require it. *Bank of Bellow Falls v. R. & B. R. Co. et al.*, 28 Vt. 470." *Mason v. Harlow*, 84 Kan. 277, 114 Pac. 218.

[g] **Pending Actions.**—A statute prohibiting an injunction "to stay a judicial proceeding pending at the commencement of the action in which the injunction is demanded," is applicable to suits pending in foreign jurisdiction. *Spreekels v. Hawaiian, etc. Co.*, 117 Cal. 377, 49 Pac. 353.

66. *Ia.*—*Reed v. Hollingsworth*, 157 Iowa 94, 135 N. W. 37, 43. *Kan.*—*Chicago, etc. R. Co. v. Wynkoop*, 73 Kan. 520, 85 Pac. 595, enjoining closing of undergrade crossing. *Minn.*—*Hawkins v. Ireland*, 64 Minn. 339, 67 N. W. 73, 58 Am. St. Rep. 534. *Tenn.*—*Western Union Tel. Co. v. Western, etc. R. Co.*, 8 Baxt. 54, specific performance.

67. *Hawley v. State Bank*, 134 Ill. App. 96; *Western Union Tel. Co. v. Western, etc. R. Co.*, 8 Baxt. (Tenn.) 54.

68. *Hawley v. State Bank*, 134 Ill. App. 96.

69. *Cal.*—*Wright v. Superior Court*, 139 Cal. 469, 73 Pac. 145 (cannot restrain suit pending in another county except to prevent a multiplicity of suits. Civ. Code, §§3366, 3423); *Spreekels v. Hawaiian Com., etc. Co.*,

equity will not interfere by injunction with a matter of which a court of law has already acquired cognizance, unless the court in which the action or proceeding is pending is unable, by reason of its jurisdiction, to afford the party the relief he is entitled to.⁷⁰

6. Conflicting Jurisdiction Between State and Federal Courts. By act of congress the United States courts are prohibited from issuing injunctions to stay proceedings in the state courts, except as authorized by the laws relating to proceedings in bankruptcy;⁷¹ but where the

117 Cal. 377, 49 Pac. 353; *Hockstacker v. Levy*, 11 Cal. 76; *Uhlfelder v. Levy*, 9 Cal. 607; *Chipman v. Hibbard*, 8 Cal. 268. **Fla.**—*Ray v. Williams Phos. Co.*, 59 Fla. 598, 52 So. 589. **Ky.**—*Nair v. Kent H. Co.*, 27 Ky. L. Rep. 551, 86 S. W. 676. **N. J.**—*Sweeney v. Williams*, 36 N. J. Eq. 627. **N. Y.**—*Schuehle v. Reiman*, 86 N. Y. 270; *Crane v. Bunnell*, 10 Paige 333; *Mitchell v. Oakley*, 7 Paige 68. **Tenn.**—*Parkes v. Gilbert*, 1 Baxt. 97; *McKoin v. Cooley*, 3 Humph. 559; *McLin v. Marshall*, 1 Heisk. 678. **Tex.**—*Harrison v. Littlefield* (Tex. Civ. App.), 124 S. W. 212; *New York Chem. Co. v. Spell Bros.*, 56 Tex. Civ. App. 315, 120 S. W. 579 (district court cannot enjoin county court acting within its jurisdiction); *Gulf, etc. R. Co. v. Cleburne Ice, etc. Co.*, 37 Tex. Civ. App. 334, 83 S. W. 1100.

[a] But one chancery court may enjoin the prosecution of separate suits in other chancery courts and draw all the litigation into the one case so that it may be conducted as an insolvent proceeding. "The objection that one chancery court cannot enjoin separate suits in another, does not apply to proceedings of this character. The jurisdiction being once conceded, the right to enforce it must follow. The proceedings in the present case were first instituted, and were instituted in behalf of all other creditors, while the proceedings sought to be enjoined are not of that character, but simply separate attachment bills." *Smith v. St. Louis, etc. R. Co.*, 6 Lea (Tenn.) 564.

70. Cal.—*Uhlfelder v. Levy*, 9 Cal. 607; *Anthony v. Dunlap*, 8 Cal. 26. **Ga.**—Civ. Code, §4915; *Conwell v. Neal*, 115 Ga. 421, 41 S. E. 629; *Gentle v. Atlas, etc. Assn.*, 105 Ga. 406, 31 S. E. 544; *Northeastern R. Co. v. Barrett*, 65 Ga. 601. **Ill.**—*Ross v. Buchanan*, 13 Ill. 55; *Mason v. Piggott*, 11 Ill. 85. **N. J.**—*Sweeney v. Williams*, 36 N. J.

Eq. 627. **N. Y.**—*Crane v. Bunnell*, 10 Paige 333. **Tenn.**—See also *Cornelius v. Morrow*, 12 Heisk. 630; *Chadwell v. Jordan*, 2 Coop. Ch. 635. **W. Va.**—*Grafton, etc. R. Co. v. Buckhannon, etc. R. Co.*, 56 W. Va. 458, 49 S. E. 532.

71. U. S.—Rev. St., §720, Comp. St., 1901, p. 581; *Hunt v. New York Cotton Exch.*, 205 U. S. 322, 338, 27 Sup. Ct. 529, 51 L. ed. 821; *Mutual Reserve, etc. Assn. v. Phelps*, 190 U. S. 147, 159, 23 Sup. Ct. 707, 47 L. ed. 987; *Laing v. Rigney*, 160 U. S. 531, 16 Sup. Ct. 366, 40 L. ed. 525; *Moran v. Sturgess*, 154 U. S. 256, 268, 14 Sup. Ct. 1019, 38 L. ed. 981; *Nelson v. Camp*, 191 Fed. 712, 112 C. C. A. 302; *Rochester German Ins. Co. v. Schmidt*, 175 Fed. 720, 99 C. C. A. 296; *Massie v. Buck*, 128 Fed. 27, 62 C. C. A. 535; *American Shipbuilding Co. v. Whitney*, 190 Fed. 109; *Central Vt. R. Co. v. Redmond*, 189 Fed. 683; *Dodds v. Palmer, etc. Co.*, 188 Fed. 447; *Berman v. Smith*, 171 Fed. 735. **Ga.**—*Bryan v. Hickson*, 40 Ga. 405; *Strozier v. Howes*, 30 Ga. 578. **N. H.**—*Kittredge v. Emerson*, 15 N. H. 227. **W. Va.**—*White v. Holt*, 20 W. Va. 792.

[a] Meaning of "Proceedings."

(1) In *United States v. Collins*, 4 Blatchf. 142, 25 Fed. Cas. No. 14,834, it is held that the term "proceedings" in the act includes all steps taken in a suit from its inception to and including final process. It includes a sale and the judgment thereon. See *Pickett v. Filer & Stowell Co.*, 40 Fed. 313; *Ruggles v. Simonton*, 3 Biss. 325, 20 Fed. Cas. No. 12,129. (2) It is applicable to writs and executions and to every step taken in the cause; it indicates the progressive course of the business from its commencement to its termination. Justice Marshall in *Wayman v. Southard*, 10 Wheat. (U. S.) 1, 6 L. ed. 253.

[b] Enjoining the taking of depositions in the state court is a proceed-

United States courts first obtain jurisdiction,⁷² or where a cause has been removed from the state to the federal court, or where proceedings in the state court are obviously intended to avoid the effect of the removal statutes, and to defeat the federal court's jurisdiction,⁷³ the federal court may restrain proceedings in the state court. And the act of congress does not prevent the federal courts from enjoining state officers under a void state law,⁷⁴ or the re-litigation of the constitutionality of a state statute declared to be unconstitutional by the federal court,⁷⁵ or suits interfering with the possession of property in the hands of a receiver appointed by the federal courts.⁷⁶ On the

ing within the above statute which cannot be enjoined by the federal court. *American Shipbuilding Co. v. Whitney*, 190 Fed. 109.

[c] **Bankruptcy.**—(1) A federal court may restrain an action in a state court to recover some of the proceeds of a bankrupt estate from the trustee in bankruptcy (*Berman v. Smith*, 171 Fed. 735), (2) or may restrain lienholders from prosecuting actions in the state court to foreclose their liens, though such injunction should not extend to the court or judge. *In re Dana*, 167 Fed. 529, 93 C. C. A. 238.

72. *Madisonville T. Co. v. St. Bernard M. Co.*, 196 U. S. 239, 245, 25 Sup. Ct. 251, 49 L. ed. 462; *Watts v. Camors*, 115 U. S. 353, 6 Sup. Ct. 91, 29 L. ed. 406; *French v. Hay*, 22 Wall. (U. S.) 250, 22 L. ed. 857; *Potter v. Selwyn & Co.*, 170 Fed. 223; *Missouri Pac. Co. v. Jones*, 170 Fed. 124; *Camden Int. R. Co. v. Catlettsburg*, 129 Fed. 421; *Union Life Ins. Co. v. Riggs*, 123 Fed. 312; *Stewart v. Wisconsin Cent. R. Co.*, 117 Fed. 782.

[a] **When Statute Not Controlling.** This statute is not controlling and has no application in cases where the injunctive process is invoked to protect the federal court's own jurisdiction. The federal court may restrain all proceedings in a state court which would have the effect of defeating or impairing its jurisdiction, its jurisdiction having first attached. The writ of injunction may be used to prevent parties from interfering by the use of the process of state courts with property in possession of the federal court. *Nelson v. Camp*, 191 Fed. 712, 112 C. C. A. 302.

[b] In *Oliver v. Parlin, etc. Co.*, 105 Fed. 272, 45 C. C. A. 200, the court said: "An examination of the cases

. . . will show that in every well considered case, when an injunction restraining already instituted proceedings in a state court has been issued by a United States court it was either based on a decree or judgment of the United States court which it was necessary and proper to enforce; or, if issued prior to judgment or decree, it was directed against a party who, after jurisdiction over him and the cause was fully vested, had resorted to proceedings in the state court necessarily conflicting with, if not ousting, the jurisdiction of the United States courts."

73. *Kern v. Huidekoper*, 103 U. S. 494, 26 L. ed. 497; *French v. Hay*, 22 Wall. (U. S.) 231, 22 L. ed. 799; *Western Union Tel. Co. v. Cooper*, 182 Fed. 710; *Donovan v. Wells, etc. Co.*, 169 Fed. 363, 94 C. C. A. 609, 22 L. R. A. (N. S.) 1250; *Atlantic Coast Line R. Co. v. Bailey*, 151 Fed. 891; *Home Ins. Co. v. Virginia-Carolina Chem. Co.*, 109 Fed. 681, *affirmed*, 113 Fed. 1, 51 C. C. A. 21; *Coeur d'Alene R., etc. Co. v. Spalding*, 93 Fed. 280, 35 C. C. A. 295.

74. *Haskell v. Cowham*, 187 Fed. 403, 109 C. C. A. 235, enjoining state officers from interfering under state law with piping of natural gas from state.

[a] **Searches and Seizures for Liquors in Interstate Commerce.**—Such act does not prevent the federal court from enjoining a search and seizure warrant for liquors still in the carrier's hands in interstate commerce and before delivery to the consignee. *Danciger v. Stone*, 187 Fed. 853.

75. *Missouri Pac. R. Co. v. Jones*, 170 Fed. 124.

76. *Gay v. Hudson R., etc. Co.*, 182 Fed. 279.

other hand, because in their sphere of action United States courts are wholly independent of the state courts, a state court will not enjoin proceedings in the United States courts,⁷⁷ unless to protect its own jurisdiction previously acquired.⁷⁸

7. As Dependent Upon Amount in Controversy.—Constitutional provisions limiting the jurisdiction of certain courts to specified amounts are applicable to injunction proceedings.⁷⁹ Statutes in many jurisdictions make the jurisdiction of particular courts to grant an injunction dependent upon the amount in controversy.⁸⁰ Some courts, however, have original jurisdiction to issue an injunction irrespective

77. U. S.—*Central Nat. Bank v. Stevens*, 169 U. S. 432, 460, 18 Sup. Ct. 403, 42 L. ed. 807; *Shields v. Coleman*, 157 U. S. 168, 15 Sup. Ct. 570, 39 L. ed. 660; *Moran v. Sturges*, 154 U. S. 256, 14 Sup. Ct. 1019, 38 L. ed. 981; *Riggs v. Johnson Co.*, 6 Wall. 166, 195, 18 L. ed. 768; *Frank v. Leopold, etc. Co.*, 169 Fed. 922. **Ala.**—*Opelika v. Daniel*, 59 Ala. 211. **Cal.**—*Code Civ. Proc.*, §526; *Phelan v. Smith*, 8 Cal. 520. **Ga.**—*Bryan v. Hickson*, 40 Ga. 405; *Strozier v. Howes*, 30 Ga. 578 (enjoining execution from United States courts). **Ill.**—*Logan v. Lucas*, 59 Ill. 237. **Miss.**—See also *Griffith v. Vicksburg W. Wks. Co.*, 88 Miss. 371, 40 So. 1011. **N. J.**—*Smith v. Reed*, 74 N. J. Eq. 776, 70 Atl. 961. **N. Y.**—*Montana Ore P. Co. v. Butte, etc. M. Co.*, 44 App. Div. 136, 60 N. Y. Supp. 684, 94 N. Y. St. 684; *Johnstown Min. Co. v. Morse*, 44 Misc. 504, 90 N. Y. Supp. 107. **Tenn.**—*Lockwood & Co. v. Nye*, 2 Swan 515, 521, 58 Am. Dec. 73. **Va.**—*Dorr's Admr. v. Rohr*, 82 Va. 359, 3 Am. St. Rep. 106. **W. Va.**—*Henderson v. Henrie*, 61 W. Va. 183, 188, 56 S. E. 369.

[a] The rule obviously applies as well after judgment or decree as at any anterior stage of the proceedings; for execution is called the life of the law, and the jurisdiction of a court is not exhausted until its judgment is satisfied. *Dorr's Admr. v. Rohr*, 82 Va. 359, 3 Am. St. Rep. 106.

[b] A state court has jurisdiction to protect a landowner by the issuance of an injunction from having his lands overflowed, though a suit to condemn such land is in the federal court. *Ryan v. Weiser Val., etc. Co.*, 20 Idaho 288, 118 Pac. 769.

78. Ga.—*Bryan v. Hickson*, 40 Ga. 405. **N. J.**—*Home Ins. Co. v. Howell*,

24 N. J. Eq. 238. **Wis.**—*Akerly v. Vilas*, 15 Wis. 401.

79. Staley v. Derden, 57 Tex. Civ. App. 142, 121 S. W. 1136.

80. Ill.—*Starr & Curt. Ann. St.* (1896), ch. 69, par. 6; *York v. Kile*, 67 Ill. 233 (justices court judgment for less than \$20 exclusive of costs cannot be enjoined). **Md.**—*Kenneweg v. Allegany County Comrs.*, 102 Md. 119, 62 Atl. 249, equity court has no jurisdiction to restrain collection of tax for less than \$20. **Tex.**—*Poe v. Ferguson* (Tex. Civ. App.), 168 S. W. 459 (jurisdiction of county court so depends in Texas); *Tomlin v. Clay* (Tex. Civ. App.), 167 S. W. 204; *Eppler v. Hilley* (Tex. Civ. App.), 166 S. W. 87; *Arnold v. McNinch*, 56 Tex. Civ. App. 553, 121 S. W. 904 (county court cannot enjoin enforcement of justice's judgment for less than \$100).

[a] Amount in controversy as determining jurisdiction generally, see the title "Jurisdiction."

[b] **Kentucky.—Void Judgment.**—Under Civ. Code Pr., §284, a suit does not lie to enjoin a justice's judgment or a county court's judgment where the amount in dispute is less than \$25. Suit will not lie to enjoin judgment for \$5 on the ground that it is void. *Barnes v. Barnett* (Ky.), 118 S. W. 997.

[c] **In the Federal Courts.**—*Larabee v. Dolley*, 175 Fed. 365; *Helena v. Helena W. Co.*, 173 Fed. 18, 97 C. C. A. 320 (total amount of taxes not first annual assessment is criterion); *Turner v. Jackson L. Co.*, 159 Fed. 923, 87 C. C. A. 103; *North American Smelt., etc. Co. v. Godfrey*, 158 Fed. 225, 89 C. C. A. 139; *Evenson v. Spaulding*, 150 Fed. 517, 82 C. C. A. 263, 9 L. R. A. (N. S.) 904; *American Cold Storage Co. v. Chicago*, 151 Fed. 120; *Glucose Ref. Co. v. Chicago*, 138 Fed. 209.

of the amount which may be in controversy in the suit.⁸¹

What Determines Amount in Controversy.—In a suit for an injunction, the amount in dispute is the value of the object to be gained by the bill, or in other words, the value of the right to be protected.⁸²

81. *Stein v. Frieberg, Klein & Co.*, 64 Tex. 271; *Anderson County v. Kennedy*, 58 Tex. 616; *Poe v. Ferguson* (Tex. Civ. App.), 168 S. W. 459; *Callaghan v. Tobin*, 40 Tex. Civ. App. 441, 90 S. W. 328 (district court has jurisdiction under the constitution, irrespective of the amount in controversy, to issue injunctions where court of equity may issue).

82. *Douglass County v. Stone*, 191 U. S. 557, 24 Sup. Ct. 843, 48 L. ed. 301, *affirming* 110 Fed. 812; *Holt v. Indiana Mfg. Co.*, 176 U. S. 68, 20 Sup. Ct. 272, 44 L. ed. 374; *Fishbaek v. Western Union Tel. Co.*, 161 U. S. 96, 16 Sup. Ct. 506, 40 L. ed. 630; *Helena v. Helena W. Co.*, 173 Fed. 18, 97 C. C. A. 320; *Texas, etc. R. Co. v. Kuteman*, 54 Fed. 547, 4 C. C. A. 503; *Larabee v. Dolley*, 175 Fed. 365; *Southern Pac. Co. v. Bartine*, 170 Fed. 725. See also *Board of Trade v. Cella Com. Co.*, 145 Fed. 28, 76 C. C. A. 28; *Delaware, etc. R. Co. v. Frank*, 110 Fed. 689; *Humes v. Ft. Smith*, 93 Fed. 857; *Nashville R. Co. v. McConnell*, 82 Fed. 65.

[a] **Value of Right Criterion.**—In a suit to enjoin a threatened or continued commission of certain acts, the amount or value involved is the value of the right which the complainant seeks to protect from invasion, or the object to be gained by the bill. It is not the sum he might recover in an action at law for the damages already sustained, nor is he required to wait until it reaches the jurisdictional amount. *Board of Trade v. Cella Com. Co.*, 145 Fed. 28, 76 C. C. A. 28.

[b] **Value of subject-matter sought to be protected is criterion.** *Staley & Barnsdale v. Derden*, 57 Tex. Civ. App. 142, 121 S. W. 1136.

[c] **Stockholder Enjoining Acceptance of Bank Guaranty Act.**—The value in controversy in a suit by a minority stockholder to restrain a bank from accepting a state bank guaranty law by which over \$2000 per year was to be paid to the state, is the value of the bank sought to be protected and not the burden which will be by the

law laid on his shares. *Larabee v. Dolley*, 175 Fed. 365, 378.

[d] **To restrain a conspiracy to interfere with complainant's business, the value of the business is the criterion.** *Rocky Mt. B. T. Co. v. Montana Fed. of Labor*, 156 Fed. 809.

[e] **Restraining Ticket Scalping.** The jurisdictional averment in the bill is to be tested, not by the mere immediate pecuniary damage resulting from the acts complained of, but by the value of the business sought to be protected and the right of property which the complainant sought to have recognized and enforced. *Bitterman v. Louisville, etc. R. Co.*, 207 U. S. 205, 28 Sup. Ct. 91, 52 L. ed. 171, *affirming* 144 Fed. 34, 75 C. C. A. 192.

[f] **Restraining Collection of Taxes.** Where it is sought to restrain the sale of lands for illegal taxes because such sale would be a cloud on the title, the taxes determine the amount involved and not the value of the property. *Turner v. Jackson L. Co.*, 159 Fed. 923, 87 C. C. A. 103.

[g] **Where several property owners join in a proceeding to restrain the collection of assessments against their separate property, the amount in controversy as to an appeal to the United States supreme court is determined by the amount of each separate assessment, the object being to relieve each separate owner from the amount for which he was personally, or his property, liable, and such distinct or separate interests cannot be united for the purpose of making up the amount necessary to give the supreme court jurisdiction.** *Ogden City v. Armstrong*, 168 U. S. 224, 18 Sup. Ct. 98, 42 L. ed. 444, *affirming* 12 Utah 476, 43 Pac. 119; *Russell v. Stansell*, 105 U. S. 303, 26 L. ed. 989.

[h] **Issuance of Bonds.**—Where a taxpayer brings an action to restrain the issuance of bonds because in excess of its constitutional limit, the right to issue the bonds and not the amount of tax which the taxpayer would have to pay is the matter in dispute. *Ottumwa v. City Water Supply*

B. VENUE.—1. In General.—In the absence of specific provision relative to the venue of injunction suits, the usual rules as to equity suits apply;⁸³ but the venue is governed by statute in some states.⁸⁴ Such suits are generally required to be instituted in the county where the defendant against whom the injunction is prayed, resides or has his domicile.⁸⁵

Co., 119 Fed. 315, 56 C. C. A. 219, 59 L. R. A. 604.

83. *Railroad Comr. v. Palmer Hdw. Co.*, 124 Ga. 633, 53 S. E. 193. See generally the title "**Venue.**"

84. See generally the statutes.

[a] **Michigan.**—Under §434, Comp. Laws, if there is no property involved, and the subject-matter is not local, and defendant is a non-resident and complainant a resident, the action must be brought in the county of complainant's residence. A court of equity of a county other than complainant's residence has no jurisdiction to enjoin a non-resident from taking depositions. No property being involved and the subject-matter not being local. *Titus v. Chippewa Circuit Judge*, 168 Mich. 507, 134 N. W. 487.

[b] **A suit to restrain the application of a sewerage fund** to any purpose until plaintiff's claim for the construction of a sewerage system is adjudicated, is a local action, under a statute making actions involving the right to the possession or title of specific personal property local. *North Yakima v. Superior Court*, 4 Wash. 655, 30 Pac. 1053.

85. **Ala.**—*Street v. Selig*, 88 Ala. 533, 7 So. 236. **Ga.**—Civ. Code, §587; *Stone v. King-Hodgson Co.*, 140 Ga. 487, 79 S. E. 122; *Wall v. Mercer*, 119 Ga. 346, 46 S. E. 420 (though title to land is involved); *Meeks v. Roan*, 117 Ga. 865, 45 S. E. 252; *Vizard v. Moody*, 115 Ga. 491, 41 S. E. 997; *Clayton v. Stetson*, 101 Ga. 634, 28 S. E. 983. **Ia.** *Everett v. Pottawattamie County Suprs.*, 93 Iowa 721, 61 N. W. 1062, enjoining township trustees and supervisors from establishment of highway is a personal, not a local action. **Pa.** *Clad v. Paist*, 181 Pa. 148, 37 Atl. 194. **Tenn.**—*Childress v. Perkins*, Cooke 87. **Tex.**—*International, etc. R. Co. v. Anderson County* (Tex. Civ. App.), 150 S. W. 239. **W. Va.**—*Toledo, etc. Lumb. Co. v. Thomas*, 33 W. Va. 566, 11 S. E. 37, 25 Am. St. Rep. 925.

[a] **A petition praying for other**

relief besides the restraining of an action at law and brought in another county than where the defendants resided, is demurrable for want of jurisdiction where the statute provides that injunction suits other than those to restrain actions at law must be brought where defendant resides. *Crawley v. Barge*, 132 Ga. 96, 63 S. E. 819. See also *Stone v. King-Hodgson Co.*, 140 Ga. 487, 79 S. E. 122.

[b] **Advertising and preparing land for sale under a power** in a deed of trust is not a pending proceeding so as to give the court where the land is situated jurisdiction to enjoin the sale, where the grantee resides in another county. And the fact that the trustee in the deed of trust resides in the county where the land is situated and the sale is to take place, does not give jurisdiction, the trustee having no title or interest therein. *Meeks v. Roan*, 117 Ga. 865, 45 S. E. 252.

[c] **Restraining Railroad Commissioners.**—An action to restrain railroad commissioners from enforcing unfair railroad rates must be brought where one or more of the railroad commissioners resides. *Railroad Com. v. Palmer Hdw. Co.*, 124 Ga. 633, 53 S. E. 193.

[d] **A suit to enjoin a railroad company** from establishing and enforcing unreasonable railroad rates in violation of interstate commerce act may be brought in any district where defendant has its domicile. *Union Pac. R. Co. v. Oregon, etc. Assn.*, 165 Fed. 13, 91 C. C. A. 51; *Northern Pac. R. Co. v. Pacific Coast L. M. Assn.*, 165 Fed. 1, 91 C. C. A. 39; *Macon Groc. Co. v. Atlantic Coast Line R. Co.*, 163 Fed. 736. See also *International, etc. R. Co. v. Anderson County* (Tex. Civ. App.), 150 S. W. 239.

[e] **Railroad tickets are not "property"** in the sense of a provision requiring a suit in reference to "property" to be brought where the property is located, but such suit is in personam and transitory in character and must be brought where defendant has its

Issuance by Judge While Outside His District.—Unless authorized by statute an injunction cannot be issued by a judge while out of his district,⁸⁶ but statutes in some states permit a judge to grant injunctions in any part of the state.⁸⁷ But a statute providing for the hearing of an injunction proceeding in the county of defendant's residence does not prevent the judge from granting an ex parte injunction when in another county of his circuit.⁸⁸

2. Suits To Stay Proceedings on Judgments or Suits at Law. Statutes in many states require that suits to restrain proceedings at law must be brought in the county where such proceedings are pending or the judgment rendered,⁸⁹ though such a statute does not pre-

domicil. *Kirby v. Union Pac. R. Co.*, 51 Colo. 509, 119 Pac. 1042.

[f] **Several Parties Defendant.** Where a suit for injunction and damages against a corporation and its agent is instituted in the county of the agent's residence, and jurisdiction as to the agent is relied upon as forming a basis for jurisdiction of the corporation, and it appears from the allegations of the petition that they are insufficient to constitute a cause of action against the agent, the court is without jurisdiction as to the corporation. *McClellan & Co. v. American Tie, etc. Co.*, 135 Ga. 370, 69 S. E. 486.

[g] **Notes in Escrow.**—Where part of the relief sought is to enjoin the delivery or disposal of certain notes of the plaintiff given in part payment of the property, such an action may properly be brought in the county where such notes are held in escrow, and a summons may be sent to another county for service upon the defendant against whom the other relief is sought. *Bushee v. Keller*, 96 Neb. 736, 148 N. W. 902.

[h] **In Virginia** such suit must be instituted in the county where the act or proceeding is to be done, or is doing, or apprehended. Code, §3436; *Norfolk, etc. R. Co. v. Postal Tel. C. Co.*, 88 Va. 932, 14 S. E. 690 (chancery court of Richmond cannot enjoin acts done in another county); *Norfolk, etc. R. Co. v. Postal Tel. C. Co.*, 88 Va. 932, 14 S. E. 689.

86. *Bedwell v. Ross*, 12 Okla. 507, 73 Pac. 267. See also *Ellis v. Karl*, 7 Neb. 381, 386. See generally the title "Courts," and *supra*, III, A. 3.

87. **In New York**, an ex parte injunction may be granted by the judge

in any part of the state. Code Civ. Proc., §772. But injunctions upon notice can only be made in the judicial district where the action was triable or in the county adjoining. Code, §769; *Rhodes v. Wheeler*, 48 App. Div. 410, 63 N. Y. Supp. 184.

[a] **In Tennessee**, a chancellor may issue an injunction to other counties. *Wells v. Collins*, 11 Lea (Tenn.) 213.

88. *Burchard v. Boyce*, 21 Ga. 6.

89. **Colo.**—*Smith v. Morrill*, 12 Colo. App. 233, 243, 55 Pac. 824. **Ill.**—*Garetson v. Appleton Mfg. Co.*, 61, 113 App. 443. **Ind. Ter.**—*Hampton v. Mays*, 4 Ind. Ter. 503, 69 S. W. 1115, though defendant appears and pleads. **Ia.** *Brunk v. Moulton Bank*, 121 Iowa 14, 95 N. W. 238 (statute applicable to enjoin for matters arising after rendition of judgment); *Oberholtzer v. Hazen*, 101 Iowa 340, 70 N. W. 207; *Phelan v. Johnson*, 80 Iowa 727, 46 N. W. 68; *Baker v. Ryan*, 67 Iowa 708, 25 N. W. 890. **Ky.**—*Willis v. Tomes*, 141 Ky. 431, 132 S. W. 1043; *Arnett v. Cardwell*, 135 Ky. 14, 121 S. W. 964; *Evans v. Cook*, 33 Ky. L. Rep. 788, 111 S. W. 326 (§258, Code Civ. Proc.); *Mason-Gooch, etc. Co. v. Mechanics' Lien, etc. Co.*, 118 Ky. 707, 82 S. W. 290 (Civ. Code, §285); *Chesapeake & O., etc. R. Co. v. Reasor*, 84 Ky. 369, 1 S. W. 599. **Mo.**—*Davison v. Hough*, 165 Mo. 561, 65 S. W. 731, Rev. St., 1899, §3661. **Pa.**—*Lehigh, etc. R. Co. v. Hanhauser*, 222 Pa. 248, 70 Atl. 1089. **Tenn.**—*Douglass v. Joyner*, 1 Baxt. 32, or where execution is levied. **Tex.** *Sayles' Ann. Civ. St.*, 1897, art. 2996; *Leachman v. Capps*, 89 Tex. 690, 36 S. W. 250; *Seligson & Co. v. Collins*, 64 Tex. 314; *Parsons v. McKinney* (Tex. Civ. App.), 133 S. W. 1084; *Turner v. Patterson*, 54 Tex. Civ. App. 581, 118

clude another court from enjoining the enforcement of a void judgment,⁹⁰ or the taking out of execution on a judgment by one who is not the owner of the judgment.⁹¹ And where the injunctive relief

S. W. 565 (Rev. St., 1895, art. 1194, subd. 17); *Lee v. Broocks*, 54 Tex. Civ. App. 220, 118 S. W. 164 (art. 2996, Rev. St.); *Broocks v. Lee*, 50 Tex. Civ. App. 604, 110 S. W. 756 (Rev. St., art. 2996); *Aultman, Miller & Co. v. Higbee*, 32 Tex. Civ. App. 502, 74 S. W. 955. Va.—Code, §3436.

[a] In Alabama it must be brought where the plaintiff in the judgment resides. *Butler v. Butler*, 11 Ala. 668.

[b] In Georgia, to the constitutional requirement that "equity cases shall be tried in the county where a defendant resides against whom substantial relief is prayed" there is an exception "in cases of injunction to stay pending proceedings, when the petition may be filed in the county where the proceedings are pending; provided no relief is prayed as to matters not included in such litigation." *Stone v. King-Hodgson Co.*, 140 Ga. 487, 79 S. E. 122; *Crawley v. Barge*, 132 Ga. 96, 63 S. E. 819; *Macon Nav. Co. v. Stallings*, 110 Ga. 352, 35 S. E. 647; *Clark v. Beall*, 39 Ga. 533. See also *Ellis v. Stewart*, 123 Ga. 242, 51 S. E. 321. "This exception is upheld only on the theory of waiver; that is, that where a party institutes a proceeding in a court of a county other than that of his residence, against a person residing in such county, he submits himself, to the extent of such suit, to the equity jurisdiction of the court where in the suit is brought." *Stone v. King-Hodgson Co.*, 140 Ga. 487, 79 S. E. 122; *Crawley v. Barge*, 132 Ga. 96, 63 S. E. 819.

[c] "Where the general constitutional jurisdiction is in one county, and the right to proceed in another depends upon waiver of, or submission to, jurisdiction in the latter county by the plaintiff in the proceeding sought to be enjoined, and upon the particular kind of equitable petition which may be filed to enjoin the proceeding of the original plaintiff, an equitable petition which does not substantially comply with the statute cannot be upheld. If in its general scope it does not conform to the statute, it is subject to demurrer for want of jurisdiction." *Crawley v. Barge*, 132 Ga. 96,

63 S. E. 819. See also *Stone v. King-Hodgson Co.*, 140 Ga. 487, 79 S. E. 122.

[d] **Enjoining Levy of Execution.** The venue of an equitable petition to enjoin the levy of an execution until a pending motion to set aside the judgment on which it was issued can be heard and determined, and complaining of no misconduct of the levying officer is in the county of the judgment creditor's residence, if a resident of the state. *Malsby v. Studstill*, 127 Ga. 726, 56 S. E. 988.

[e] **Texas.—Execution.**—Such statute applies "only when the suit is to restrain the execution of a judgment because of some infirmity in the judgment or the writ, or of some equity which has arisen since the rendition of the judgment which should prevent its enforcement, and does not apply when the purpose of the injunction is only to prevent the sale of exempt property, and in such case the suit can be brought in any court of the county in which any of the defendants reside or in which the property, if real estate, is situated, having jurisdiction of the subject-matter of the suit." *Parsons v. McKinney* (Tex. Civ. App.), 133 S. W. 1084, writ of error refused by supreme court.

90. **Void Judgment.**—*Willis v. Tomes*, 141 Ky. 431, 132 S. W. 1043; *Noordlinger v. Huff*, 31 Wash. 360, 72 Pac. 73.

[a] **Federal Courts.**—Where the judgment rendered in one federal district is void, its enforcement may be enjoined by a federal court in another district. *Kirk v. United States*, 124 Fed. 324.

[b] **Kansas.**—An action to enjoin the enforcement of a void judgment may be instituted in any county in which an attempt to enforce it is made, though the judgment was rendered in another county. *Chambers Bros. & Co. v. King, etc. Co.*, 16 Kan. 270.

91. *Kruegel v. Rawlins* (Tex. Civ. App.), 121 S. W. 216.

[a] Such statute does not apply where the party seeking the injunction was not a party to the judgment. *Rob-*

is merely incidental to the main object of the bill, the suit need not be instituted in the county where such suit is pending, its venue being determined by the main object of the bill.⁹²

Waiver.—But if the suit is commenced in another county than that where the statute provides it should be tried, it is not a jurisdictional defect, but is waived by failure to object and ask for a change of venue.⁹³

3. Title or Possession of Land Involved.—If title to or possession of land is involved the suit must be brought in the county where the land is situated.⁹⁴

inson v. Carlton, 123 Ky. 419, 96 S. W. 542, *disapproving* dicta in *Mallory v. Dauber's Exr.*, 83 Ky. 239; *Bean v. Everett*, 21 Ky. L. Rep. 1790, 56 S. W. 403.

92. Ga.—*Crawley v. Barge*, 132 Ga. 96, 63 S. E. 819; *Macon Nav. Co. v. Stallings*, 119 Ga. 352, 35 S. E. 647; *Carswell v. Macon Mfg. Co.*, 38 Ga. 403.

93. Ill.—*Hayes v. O'Brien*, 149 Ill. 403, 37 N. E. 73, 23 L. R. A. 555; *Worthy v. Day*, 143 Ill. App. 274. **Mo.**—*Davidson v. Hough*, 165 Mo. 561, 65 S. W. 731. **Va.**—*Muller v. Bayly*, 21 Gratt. 521.

94. Ohio *Colorado Min., etc. Co. v. Wiley*, 18 Colo. App. 311, 71 Pac. 1001; *Smith v. Morrell*, 12 Colo. App. 233, 55 Pac. 824. *Compare* *Crawley v. Barge*, 132 Ga. 96, 63 S. E. 819. See generally the title "**Venue.**"

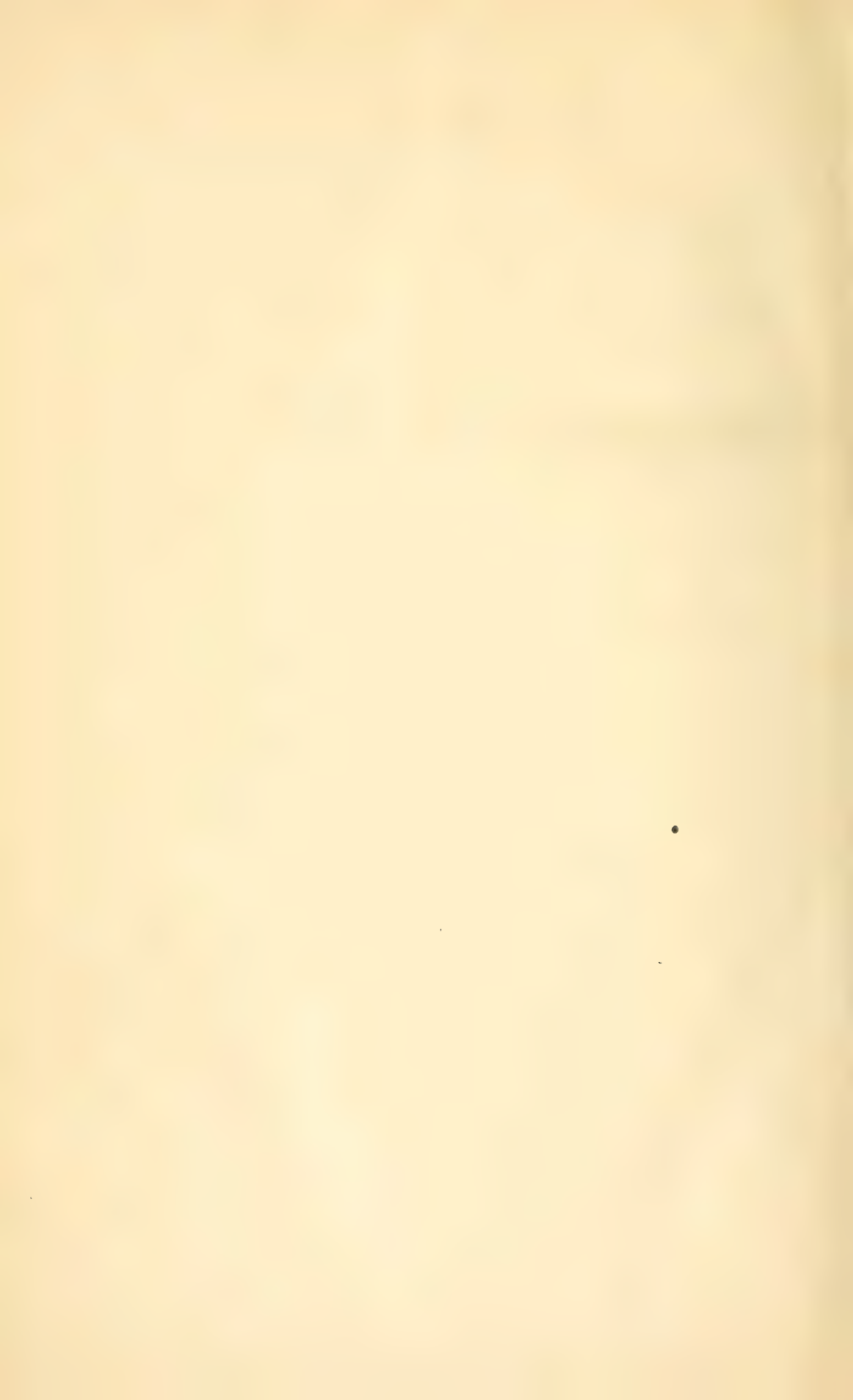
91. Ark.—*Cox v. Railway Co.*, 55 Ark. 454, 18 S. W. 639, restraining removal of earth is an action for injury to real property. **Cal.**—*Code Civ. Proc.*, §392; *Miller v. Madera, etc. Co.*, 155 Cal. 59, 99 Pac. 507, 22 L. R. A. (N. S.) 391; *Drinkhouse v. Spring Val. Waterworks*, 80 Cal. 308, 22 Pac. 252 (resisting flooding of land by construction of dam is action for injuries to real property). **Ind.**—*Armstrong v. Evans*, 138 Ind. 285, 37 N. E. 792 (restraining maker of notes given another as part of purchase price from praying same does not involve the title); *Becknell v. Becknell*, 110 Ind. 42, 10 N. E. 414 (restraining disposition of notes and mortgage taken on transfer of property does not involve

title of land). **Mo.**—*State v. Goodrich*, 238 Mo. 720, 142 S. W. 300, Rev. St., 1909, §1753. **N. Y.**—*Leland v. Hathorn*, 42 N. Y. 547; *Leland v. Hathorne*, 9 Abb. Pr. (N. S.) 97. **Tex.**—*O'Connor v. Shannon* (Tex. Civ. App.), 30 S. W. 1096, enjoining interference with quarrying stone and for damages for breach of contract does not involve the recovery of lands.

[a] **In Georgia** (1) it must always be brought in the county of defendant's residence though title (*Clayton v. Stetson*, 101 Ga. 634, 28 S. E. 983), (2) or possession of land is involved. *Vizard v. Moody*, 115 Ga. 491, 41 S. E. 997.

[b] **A bill to restrain trespasses upon realty** (1) by cutting standing timber (*Powell v. Cheshire*, 70 Ga. 357, 48 Am. Rep. 572), (2) or a suit to restrain interference with the complainant's right to cut and remove standing timber (real estate) does not involve title or possession of real estate so as to require the suit to be brought where the land is situated. *State v. Goodrich*, 238 Mo. 720, 142 S. W. 300.

[c] **Where a suit is brought to restrain the diversion of water** constituting an injury to real estate, notwithstanding the statute provides that suits to recover for injuries to real estate shall be tried in the county where the land is situated, this does not prevent such suit being commenced in another county, and such county may try the suit if application is not made for a transfer. *Miller v. Madera, etc. Co.*, 155 Cal. 59, 99 Pac. 507, 22 L. R. A. (N. S.) 391.



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